No. 20003-SA-02658

COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

QUITMAN COUNTY, MISSISSIPPI,

Plaintiff-Appellant,

vs.

STATE OF MISSISSIPPI, Haley Barbour,
in his official capacity as GOVERNOR, and James Hood,
in his official capacity as ATTORNEY GENERAL,

Defendants-Appellees.

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On Appeal From The Circuit Court Of The Eleventh Judicial District
In And For Quitman County, Mississippi

BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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as GOVERNOR, and JIM HOOD, in his
official capacity as ATTORNEY GENERAL — DEFENDANTS-APPELLEES.

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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 representations are made in order that the Justices of the Supreme Court may evaluate possible disqualification or recusal.

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- Quitman County Supervisor Brooks Earnest
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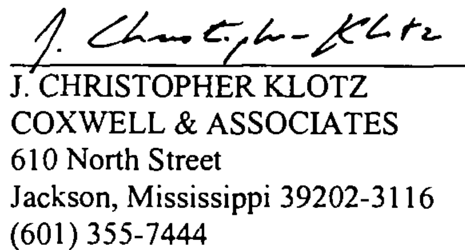

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"In all criminal prosecutions the accused shall have a right to be heard by himself or counsel or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the office was committed . . ."

Art. 3§ 26 of the Mississippi Constitution.

* * * *

"The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

* * * *

"The Gideon case held that this applied to state action also . . . . In accordance with these mandatory decisions we hold that there must be an intelligent and competent waiver of counsel by the defense."

Conn v. State, 170 So. 2d 20, 21 (Miss. 1964).

* * * *

Q.: **So if it *was* $10,000, you wouldn't support [money for indigent defense]?**
A.: **That's right.**
Q.: **And if it was $500, you wouldn't support it?**
A.: **I just wouldn't support it. Yeah. [ ] I'm not going to support anything that costs any money. Nothing.**
Q.: **No matter how much it is?**
A.: **That's right.**

PX 51B at 45-46. Deposition Testimony of Charles Capps, Appropriations Committee Chairman, Mississippi House of Representative, introduced in Quitman v. State.

"We don't have any money for that right now. We have other priorities."

Senate Appropriations Committee Chairman Jack Gordon, D-Okolona, Clarion-Ledger (January 20, 2004).

INTRODUCTION AND SUMMARY

The "ultimate obligation" of the State to provide effective indigent defense was recognized by the U.S. Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and the Mississippi Supreme Court as early as *Conn v. State*, 170 So.2d 20, 21 (Miss. 1964), when it quoted *Gideon* for the proposition that the fundamental and essential right to counsel for indigent defendants is an "obligation of the States."[1] And in 2001, as a result of this case, this Court fully elucidated the inevitable link between the obligation of state-provided indigent defense to the adequate implementation *and funding* of that system of indigent defense. In so doing, this Court gave life to the complaint of Quitman County, and indeed of all poor Mississippi counties, that decades of gross underfunding of that State obligation and noble constitutional right had rendered it a mere idealistic platitude.

This Court reaffirmed in *Quitman v. State*, 807 So. 2d 401 (Miss. 2001) – as it has since 1964 – that it is the obligation and duty of the State of Mississippi to provide all indigent defendants within its state with an "effective" defense. If it does not, the courts must step in, as this Court did in *Hosford v. State*, 525 So. 2d 789 (Miss. 1988), where it held that where the Legislature "fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional duty and the Judicial branch has the authority to see that the courts do not atrophy."

This Court's prior decision in *Quitman* is a model of clarity in its analysis of the tools of an effective indigent defense, and in its discussion of the circumstances under which the machinery of

---

[1] *See also Triplett v. State*, 666 So.2d 1356, 1357 (Miss. 1995) (same); *Vielee v. State*, 653 So.2d 920, 922 (Miss. 1995) ("our decisions make clear that inadequate assistance does not satisfy the right to counsel made applicable to the State.").

justice can become so broken and underresourced that the very integrity of the justice system has been undermined, and the independence of the judicial branch threatened. In 2003, Quitman presented its case for prospective declaratory and injunctive relief under Article 3, Section 26 of the Mississippi Constitution to the Circuit Court, Judge Ann Lamar presiding. As set forth below, the evidence of Quitman's "constitutional dilemma" in providing adequate indigent defense RE 3 (Tr. Ct. Op. ¶ 83) was overwhelming. But Quitman did not prevail, and so is again before this Court today. Quitman respectfully presents its case to this Court, and requests that the Court order that a statewide, state-funded indigent defense system be implemented forthwith.

STATEMENT OF ISSUES

Quitman County raises the following issues on appeal:

1. Did the Circuit Court err in applying the standard for evaluating effective assistance of counsel claims by individual post-conviction defendants as set forth in *Howard v. State*, 853 So. 2d 781, 796 (Miss. 2003) to Quitman County's claim for prospective injunctive relief against systemic constitutional violations, rather than applying the test set forth by this Court in *State v. Quitman County*, 807 So. 2d 401 (Miss. 2001) for this case, *i.e.*, whether the county-based indigent defense system fails to provide the tools of an adequate defense?

2. Did the Circuit Court err by assuming it was Quitman County's burden to prove it cut funding for schools, hospitals and local law enforcement to pay for indigent defense and therefore ignoring the unrebutted evidence that Quitman County cannot afford a constitutionally adequate indigent defense system, the burden established by this Court's prior decision in this action?

3. Did the Circuit Court commit prejudicial error by (a) excluding expert testimony offered by Quitman County on the ultimate issues of fact set forth in *State v. Quitman County* and (b) permitting Circuit Judges who preside over Quitman County criminal dispositions to testify and opine that the public defenders were "effective advocates" or were "effectively representing their indigent clients" in violation of *State v. Quitman County* and the Circuit Court's own evidentiary rulings and despite the Circuit Judges' acknowledged lack of basis for such opinions?

4. Did the Circuit Court err by ignoring credible and unrebutted expert and lay witness testimony, authoritative standards, governmental studies and other documentary evidence, and admissions by defendants' own witnesses supporting Quitman County's claims?

5. Did the Circuit Court err by following the dissent in *State v. Quitman County* rather than the governing precedent and determining that Quitman County had failed to show that the "county-based system has resulted in the inability of the judiciary to

operate in an independent and effective manner" against the overwhelming weight of the evidence?

STATEMENT OF THE CASE

Quitman filed this lawsuit in December 1999 contending that the State of Mississippi had "improperly and unfairly shifted the state's obligation to provide and pay for representation of indigent defendants to the counties of Mississippi," and in so doing, had violated its duty under Article 3, Section 26 of the Mississippi Constitution and other provisions of state law to provide indigent defendants with the "effective assistance of counsel." Rec. 9.[2] After the State's Motion to Dismiss was denied, the Mississippi Supreme Court affirmed on interlocutory appeal and remanded the case for trial.

This Court's 2001 opinion set forth the standards that would govern the trial. *State v. Quitman County*, 807 So. 2d 401 (Miss. 2001), *reh'g denied* (2002), and ruled that Quitman had a right to a statewide public defender system if it proved its allegations, including "the County's inability to fund an effective system, and the failure of the existing system to provide indigent defendants in Quitman County with the tools of an adequate defense." 807 So. 2d at 408 (emphasis added).[3]

---

[2] Record excerpts are cited as "RE___." Other citations to the reporter's transcript are given as "Tr. __," exhibits introduced into evidence by plaintiff or defendants are cited as "PX __" or "DX __," respectively, and other portions of the record on appeal are cited as "Rec. __."

[3] The ultimate constitutional question the Supreme Court recognized in *Quitman* is whether "the county-based system has *resulted*" in unconstitutionality that requires the Court to "interfere in this traditionally legislative function and order the Legislature to establish a statewide, state-funded system of indigent defense." 807 So. 2d at 410. The Court elucidated facts that if established would entitle Quitman to statewide relief, including:

(1) the State's refusal to provide funds;
(2) that funding is inadequate;
(3) that the lack of resources results in inadequate representation;
(4) the lack of statewide oversight;
(5) the impact on county government services;
(6) the disproportionate burden on smaller counties with significant crime problems; and
(7) the chronic underfunding that adversely affects the administration of justice.

Footnote continued on next page

This Court also directed the trial court to determine:

> "whether, assuming the State has failed in its duty to provide effective indigent defense, the county-based system has resulted in the inability of the judiciary to operate in an independent and effective manner to the extent that this Court must, of necessity, interfere in this traditionally legislative function and order the Legislature to establish a statewide, state-funded system of indigent defense."

Id. at 410 (emphasis added). Such remedy is required "where the Legislature fails to act" and so "fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively" so that the courts "have the authority and duty to intervene." *Id.* at 409.

At trial, Quitman presented detailed testimony from three qualified experts, Stephen Bright, Steven Farese, and Thomas Fortner, RE 16 (Tr. 333), RE 17 (Tr. 624), RE 18 (750), supported by extensive evidence. *See* pp. 9-22 below. Defendants proffered *no* expert testimony. Quitman introduced extensive authoritative evidence concerning the tools of an effective defense and governmental studies and other evidence demonstrating Mississippi's county-based system wide failure to provide those tools. *See* pp. 9-14 below. Defendants offered virtually no evidence in rebuttal. Quitman also directed the court to numerous supporting admissions by defendants' own witnesses, undercutting defendants' largely rhetorical arguments. *See* pp. 40-41 below. This evidence was ignored by the Circuit Court. *See* pp. 25-41 below.

Footnote continued from previous page

Id. at 408-09. As with other systemic constitutional cases, Quitman's burden of proof at trial was by a preponderance of the evidence, although strict scrutiny applies to the analysis of the particular tools. *See* n. 72 below; *see, e.g. DOE v. District of Columbia*, 701 F.2d 948, 954 (D.C. Cir. 1983) (in class action by D.C. prisoners, court held that prisoners must prove constitutional inadequacy of prison system by preponderance of the evidence); *Ruiz v. Johnson*, 154 F. Supp. 2d 975 (S.D. Tex. 2001) (holding that Texas inmates established systemic constitutional violations of their rights by preponderance of the evidence and were thus entitled to relief); *Goss v. Bd. of Educ.*, 270 F. Supp. 903 (E.D. Tenn. 1967) (holding that plaintiffs had failed to establish by preponderance of the evidence that school desegregation plan violated the constitution).

The Circuit Court's opinion expressed various "conclusions" and in list format described the supporting evidence, but avoided rendering specific or general findings of fact, weighing the evidence, making credibility determinations, or addressing the uncontroverted expert opinions. Remarkably, the Court expressed *no* "conclusions" about the issues the Supreme Court said were to be tried, for example, whether the county-based system provides "the tools of an adequate defense." 807 So. 2d at 408. Indeed, the opinion is silent on the issues framed by this Court, but pursues entirely different inquiries, such as whether the county proved a lawyer to be "incompetent" RE 3 (Tr. Ct. Op. ¶ 76) or whether any particular defendant demonstrably was prejudiced RE 3 (*id.* ¶¶ 72, 77), under the *Howard v. State*, 853 So. 2d 781, and *Strickland v. Washington*, 466 U.S. 668 (1984) analysis this Court rejected previously for prospective cases. The Circuit Court also relied on self-serving testimony of the public defenders as to their own "competen[ce]," equally self-serving testimony from the District Attorney that his adversaries are "competent," and the opinion of the local Circuit Judges (in some "lay-witness" capacity) to the same effect. RE 3 (Tr. Ct. ¶¶ 43-48, 79). And without *any* basis in this Court's opinion, the Circuit Court actually opined that despite unchallenged massive deficits, it was the *county's* burden to prove it already had cut funding for schools, hospitals and local law enforcement to pay for indigent defense, RE 3 (Tr. Ct. Op. ¶ 70), rather than proving an inability to *afford* a constitutionally adequate system (807 So. 2d at 408) as Quitman demonstrated it could not do. *See* pp. 29-30 below.

Finally, displaying a "personal" opinion, the Circuit Court lauded this Court's 2001 dissenting opinion that indigent defense is a legislative matter, called the creation of two capital defense offices in 2000 a "major step," and expressed the hope that left to its own devices the Legislature eventually would correct any remaining shortcomings, despite no record evidence the State would do so and substantial evidence to the contrary. RE 3 (Tr. Ct. Op. ¶¶ 82-84). Notably,

defendants failed to produce a single witness to testify that a statewide system is likely to be implemented by the Legislature without judicial intervention.

STATEMENT OF FACTS

Quitman County

Like the vast majority of counties in Mississippi, Quitman utilizes the services of part-time defenders who simultaneously maintain unlimited, unregulated private practices, of potentially substantial financial value. Butch Scipper, the Chancery Clerk and County Administrator, and Brooks Earnest, a member of the Board of Supervisors, testified that Quitman cannot afford to pay any more than it currently does for indigent defense.[4] RE 3 (Tr. Ct. Op. ¶ 7). Their testimony was undisputed and supported by all other record evidence.

Quitman's economic prospects remain extremely bleak. Tr. 831. With a declining population of just over 10,000, PX 20, Quitman has high percentages of residents younger than 18 or older than 65, *id.*, a skewed age distribution that results in a disproportionate demand for government services with few taxpayers and a high rate of homestead property tax exemptions. Tr. 137-39, 146-47. Quitman has a per capita income of less than $11,000, a mere two-thirds of the state average. Tr. 139-43, PX 20.[5] In recent years Quitman County also has seen falling agriculture prices, rising costs and natural disasters such as floods leading to further setbacks in the retail and service sectors. Tr. 135-36. Manufacturing has fared no better, with plants closed or in bankruptcy. Tr. 143-45.

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[4] Mr. Scipper has worked tirelessly with judges, bar representatives, prosecutors, county officials and legislators to reform indigent defense in the only way it can truly be reformed, by implementing a statewide system. Tr. 106, 179, 286-87. The Quitman Board of Supervisors fully supports those efforts of Mr. Scipper and others to reform indigent defense. Tr. 835-36, 839-40.

[5] Almost 43% of the residents are eligible for Medicaid, an indicator of poverty; only two counties have higher percentages. PX 21. However, 44 counties have rates of Medicaid-eligible residents above 25%, indicating that poverty is widespread throughout Mississippi counties. *Id.*

Quitman County's governmental prospects are equally bleak. Tr. 831. The county cannot raise taxes to pay for existing or new programs. Tr. 147-51. Its residents face the highest tax rates among the residents of the adjacent counties with which Quitman competes (PX 25); yet even with its high tax rates, it has by far the smallest tax base among the adjacent counties. PX 26. People have moved out because of high taxes and registered their cars in counties with far lower tax rates. Raising taxes any more would accelerate that downward spiral. Tr. 149-52. Indeed, Quitman already has an accumulated deficit of more than $2 million in operating losses and operating debt (approximately $2,000 per taxpayer) (Tr. 152-53, 159-61, PX 22-24) that precludes the county from starting new programs or expanding existing ones. Tr. 153.

The deficit has accumulated over more than a decade and has several causes. Tr. 153-56, 158. The high-profile Simon and Carr capital murder cases wiped out the county's surplus and forced it to borrow money and raise taxes. Tr. 107-09. Subsequently, the deficit grew to cover the unplanned costs of responding to natural disasters and unfunded state and federal mandates. These mandates required the county, among other things, to contract for costly garbage service, obtain liability insurance that doubled in cost last year, and hire additional employees such as trained emergency dispatchers and trained jailers at higher salaries and benefits.[6] Quitman cannot change its priorities by cutting expenditures to start new programs or expand existing ones such as indigent

---

[6] Defendants' suggestion that the deficit largely was due to garbage service costs and economic development bonds on which industries defaulted was repeated by the Circuit Court. RE 3 (Tr. Ct. Op. ¶ 8). But Quitman had to contract for solid waste pickup because of a federal ban on landfills and the State required that it cosign the economic development obligations. Tr. 155, 156. Regardless, the county has a very large deficit that prevents it from paying more indigent defense or for other vital programs. The factors that have fueled the deficit are outside the county's control and new disasters and mandates could occur at any time and impose additional unbudgeted costs, evidenced at trial when the state Office of Post-Conviction Counsel moved to compel Quitman to pay attorneys' fees and costs of Anthony Carr's post-conviction proceedings. PX 47. Such costs could further drive the county deeper into the red. Tr. 154, 181, 281.

defense, since services are already below a bare bones. Tr. 145-46.[7] In short, Quitman has little flexibility in its spending decisions, 80-85% of its expenditures are mandated by the state and federal governments, Tr. 163, and much of the rest is effectively mandated by state and federal requirements that the county match contributions in order to participate in their programs. Tr. 163-65, 171-72.[8]

Indigent Defense in Mississippi

Undisputed testimony and evidence established that the defense system that fails to provide the tools of an adequate defense in Quitman exists throughout Mississippi. Mr. Farese characterized the system as "broken," "made to fail," and in some respects "should shock our legal conscience." RE 17 (Tr. 647-48, 697). He concluded that a statewide indigent defense system with resources comparable to the prosecution is necessary "to balance the system" and restore a properly functioning adversarial system where "[j]ustice is the final product." RE 17 (Tr. 648-49).[9] Mr. Bright testified

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7 For example, the county's contract ambulance service does not even have IV capability but is the *only* ambulance service in a rural area with a large elderly population. Tr. 145, 164, 165. The local hospital provides only basic care, but the county cut its contribution for indigent care by $30,000 to reduce its deficit. Tr. 145, 162, 166. The poor persons' health clinic is open only four days a week because the county had to cut its appropriation by $12,000 for deficit reduction. Tr. 162, 165. Modest $15,000 dues to the North Delta Planning and Development District provide, among other things, more than 3,000 Meals on Wheels per month for the poor, sick and elderly. Tr. 169-70.

8 For example, the county's $33,250 contribution to the public library is a condition of a state grant which, with the county's contribution, comprises about 90% of the library's revenue. Tr. 166-67. Mr. Scipper and Mr. Earnest described the devastating consequences to Quitman children and the elderly, if the library were forced to close, deprive them of access to newspapers, magazines, books and computers. Tr. 167, 834-35. Similarly, the county contributes $11,000 to supplement state and federal grants in order to keep the Soil Conservation Service office in Marks open to provide services of vital importance in an agricultural county prone to floods and other natural disasters. Tr. 168, 831-32. Likewise, the county pays $39,000 pursuant to an agreement with Mississippi State University to keep the local Extension Service office open, to give Quitman residents access to nutrition programs for school children and their families, money management advice for poor people who often labor under burdensome debt, and Extension Service programs for farmers and homeowners. Tr. 168-69, 832-34.

9 As set forth below at 31-33, Mr. Farese specifically was precluded from opining on, as this Court set forth as the very heart of this case, whether this imbalance went to the very "integrity" of the system. RE 17 (Tr. 699).

that the system provides "superficial processing" of the poor and "*no*" criminal defense representation in the true meaning of the words, RE 18 (Tr. 760-61), and that the implementation of a statewide system – like Florida, Colorado, North Carolina, and Georgia -- is necessary to resolve the problems inherent in the county-based system. RE 18 (Tr. 827-28). Mr. Fortner concluded that the current county-based system is "unfair" and "inadequate," and that a full-time, district wide public defender office is needed to deliver indigent defense services in a constitutionally adequate manner in Mississippi. RE 16 (Tr. 363, 399-400). Mr. Fortner testified that the establishment of a full-time public defender office would require state action *and* state funding.[10] RE 16 (Tr. 363-64). This expert testimony was *undisputed.*

The expert witnesses, authoritative standards and public defenders themselves identified tools of an effective criminal defense, including (1) client communication, (2) factual investigation, (3) informed plea negotiation, (4) motion practice, (5) expert consultation, (6) independent forensic analysis, (7) competent trial counsel, (8) sentencing advocacy, and (9) adequate appellate advocacy. RE 16 (Tr. 338-39), RE 17 (616-17, 644-45), RE 18 (746, 769-72). The Mississippi county-based system does not provide these necessary tools. *See* pp. 15-22 below.

Undisputed expert testimony established that these systemic flaws are inherent in a part-time system and cannot be cured by appointing different lawyers or prohibiting particular practices such as guilty pleas on the day of arraignment, RE 16 (Tr. 357, 359), because the incentives created by a part-time system allowing for private practices invariably lead attorneys to minimize the amount of time

[10] A full-time public defender office would need an adequate salary; investigative support; secretarial and other support; office space; access to legal resources; a computer system; professional supervision and consulting attorneys; and funds for conflicts of interest. RE 17 (Tr. 648-49). The resources required are far beyond the means of Quitman County and other poor rural countries. RE 16 (349-50, 336, 359-60) RE 17 (Tr. 658, 661-62).

spent representing indigent clients in favor of their paying clients. RE 17 (Tr. 647-48), RE 16 (353), RE 18 (805-806).[11]

The record evidence of statewide inadequacy was overwhelming and virtually undisputed, since the state offered absolutely *no* expert testimony or evidence. Of particular significance, the Spangenberg Group, a well-known consulting organization specializing in indigent defense, conducted a comprehensive study of indigent defense commissioned by the Mississippi Bar Association that was introduced into evidence. RE 16 (Tr. 319). The Public Defense Commission relied upon the Spangenberg study and incorporated the study's reports into its final Implementation Plan. RE 15 (Tr. 110, 112-13). The key findings included that:

- Funding for indigent defense is totally inadequate (amounting to $3.24 per capita in 1998, the lowest in the nation);

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[11] Mr. Fortner succinctly summed up the core economic disincentives:

> The system is itself responsible for a lot of that type activity. The way the system is set up . . . encourages spending the least amount of time possible on a case. It encourages pleading guilty on arraignment day. I mean it encourages disposing of these cases as quickly as possible so that you can, in Quitman County's case, go to the other counties you serve and do the same thing there and still have time to engage in your private practice, whatever that private practice may be. Because my experience has been that that's – private practice takes precedence over part time public defender practice. It just does.
>
> * * * *
>
> My opinion is that the part-time system . . . encourages [lawyers] to dispose of [cases] quickly, without proper investigation, without looking into all the various motions that might be filed, to make the best deal you can as fast as you can and take care of the case and be done with it. That's what it encourages.

RE 16 (Tr. 346, 353-54). Mr. Fortner concluded the following:

> Q. What are the chances that a system in a county that uses the part time method will operate in an adequate manner?
>
> A. I don't think there's any chance of that. It's the same chance Quitman County has had, I guess. And there hasn't been a chance for it to happen here.

RE 16 (Tr. 358-59).

- The lack of adequate resources for indigent defense services results in poor quality services and representation; and

- There is no statewide oversight of indigent defense, which leads to a hodgepodge, county-by-county approach to providing defense services.

RE 15 at MS 03868-03869, 03966.[12]

These shortcomings also were identified by the statutorily created Mississippi Public Defenders Task Force in its September 2000 report, introduced into evidence but ignored by the court, that concluded that "indigent defense remained a vexing problem for the counties" and that state funding is needed. RE 8, Introduction and Narrative at 5; RE 16 (Tr. 320). Notably, the report included responses by Senior Circuit Judges to a survey describing inadequate representation they observed in their districts. RE 8, Attachment C; Tr. 126-27.[13]

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[12] Like the testifying experts, the Spangenberg study found that the tools of an adequate defense were not being provided throughout Mississippi:

> Resources are not sufficient to provide adequate representation even in felony cases, particularly in those counties using the contract public defender system. Every aspect of defense representation is compromised. Specifically there is very little early representation provided, investigation conducted, attorney/client contact, or use of experts. There is a low trial rate in felony and misdemeanor cases. The requirement for contract defenders and assigned counsel to handle their own appeals, often with no additional compensation, creates a disincentive for taking cases to trial. Case preparation is often late, and frequently preliminary hearings are waived and defendants are held in jail three to six months without counsel until arraignment in circuit court. The overall situation has lead to an insufficient number of qualified attorneys willing to take court appointments in indigent cases or to seek contract public defender positions.

RE 15 at MS 03868-69.

[13] For example, the Senior Circuit Judge for the 21st District reported:

> Public Defenders are presently not on a level ground with prosecutors. They have no access to investigators and other staff assistance. Because they are part-time, many defendants are not afforded adequate counsel because of part-time defenders not putting sufficient time into their criminal docket. Public defenders attorneys should be full-time and funded and staffed just as prosecutors.

RE 8, Attachment C at 6. Similarly, the Senior Circuit Justice to the 10th District reported: "Low pay for public defenders, too few attorneys interested in position of P.D.; case load much too high." RE 8, Attachment C at 4.

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In addition to these authoritative reports, Thomas Fortner, the chief public defender for Hinds County, and Andre DeGruy, a veteran public defender and current head of the Office of Capital Defense Counsel, testified that they had observed public defenders fail to provide the necessary tools of an adequate defense in numerous counties in Mississippi.[14] Mr. Farese also observed throughout the Delta counties "instances of things that I felt could result in ineffective assistance of counsel." RE 16 (Tr. 693). And Mr. DeGruy testified that public defenders throughout Mississippi do not use investigators, do no investigation, do not use expert witnesses, do not file relevant motions using the facts and the current law, and are not prepared to engage in effective sentencing advocacy or plea negotiations. RE 4 (Tr. 587-90).[15]

Finally, Defendants' own witnesses confirmed that the current system fails to provide the tools of an adequate defense throughout Mississippi. Thus, District Attorney Laurence Mellen testified that arraignment day guilty pleas occur in other counties as well as Quitman. RE 7 (Tr. 1018). Assistant Attorney General Sonny White, Mississippi's own Rule 30(b)(6) designee,

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When asked whether they would favor moving from the current county system to a district-wide full time public defender office with equivalent resources. Twelve of the sixteen Senior Circuit Judges favored such a reform. RE 8, Attachment C at 5; (Tr. 321-22).

Finally, the Study Commission on the Mississippi Judicial System reported in 2001 that "the present system of relying on appointments or part-time public defenders is woefully inadequate and burdensome on the counties," RE 9 at 31, that "[p]art-time public defender systems lead to part-time justice," and that the State should "fund and staff an adequate indigent defense system at levels equivalent to district attorneys' offices." *Id.* at 27, 31.

[14] Specifically, Mr. Fortner testified that, based on his observations, many public defenders do not file pretrial motions, use experts or follow other suggestions he and the lawyers in his office make, and simply cannot do the extremely time-consuming work necessary to represent their indigent clients effectively and also maintain their private practices. RE 16 (Tr. 353).

[15] Moreover, the public defenders in Mississippi have no supervision or sounding board and "the majority of them are on their own." RE 4 (Tr. 591-92).

admitted that ABA Standards that investigative and expert services are necessary to effective criminal representation are "a nice goal" but "it's not reality." PX 50B at 246. Witnesses and evidence also demonstrated that this inadequate representation is exacerbated by the vast disparity between the resources provided by the State to the prosecution and the minimal resources available to public defenders. RE 16 (Tr. 359-60). District Attorneys are full time and their offices are funded by State appropriations that have increased in each of the last three years. They also have discretion to use bad check proceeds to cover their office expenses. Tr. 962-63, 965-68, RE 12, PX 19; RE 7 (Tr. 1031-32).[16]

In discharging their duties, the District Attorneys are aided by multiple full time assistant district attorneys, staff investigators, secretarial support, and often a victim assistance coordinator and a bad check fund administrator. RE 7 (Tr. 1022-23, PX 34, PX 38 at 3, PX 50B at 172-173, 175). District Attorneys use the investigative resources of local police departments, sheriffs' departments, the Gaming Commission, the Bureau of Narcotics, the Highway Patrol and the Crime Lab. RE 7 (Tr. 1003, 1009, 1023-24), PX 50B at 185, 189-190, 192. Public defenders would need a court order. RE 7 (Tr. 1025-26).[17]

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[16] Judge Larry Lewis, a defense witness, testified that prosecutions could not be done adequately if Mississippi went back to the old part-time District Attorney system that the Legislature abolished years ago. Tr. 927. Multiple offices represent the State in criminal matters – the District Attorneys prosecute felonies in Circuit Court, county prosecutors handle matters in Justice Court, and the Attorney General's office is responsible for appeals. RE 7 (Tr. 1028-29), PX 36, PX 37 at 5-6, PX 50B at 52, 78-81, 84-86, 126. In contrast, the public defenders are required to represent their clients at all three levels, in Justice Court, in Circuit Court and on appeal. Mr. Tisdell's testimony demonstrated the vastly disparate resources he had as a prosecutor than when he switched to defense work. Tr. 456-63.

[17] The Attorney General's office provides training sessions and materials for District Attorneys and county prosecutors and their staffs, but it provides no training or materials for lawyers employed by counties to represent indigent defendants. PX 50B at 55-58, 72, 76-78, 105-106, 108-110, PX 37 at 15, PX 45.

Indigent Defense in Quitman County

Two part-time contract defenders, David Tisdell and Allan Shackelford, are responsible for all indigent cases in the Circuit Courts of Quitman, Coahoma and Tunica Counties, all appeals in those cases, and for Justice Court indigent representations in Quitman and Tunica.[18] Neither lawyer resides in Quitman and their caseload required them to spend a lot of time driving between the several counties they serve. Tr. 453-54. Quitman pays each public defender $1,350 per month plus benefits. Their compensation does not vary depending on how many cases they have or how complex their cases are.[19] Tr. 442-43. The public defenders must pay for office space, secretarial and other support help, computers and any other expenses out of this monthly stipend. (Tr. 448-50; RE 6 (Tr. 337). Nevertheless, the public defenders like the financial aspects of the part-time system because it allows them to pursue "anything that could be income" – Mr. Tisdell believes the current system is "wonderful" because it allows him to supplement his income with a private practice.[20] Tr. 437-38, 853. Mr. Shackelford too, likes the system because it leaves him plenty of time for fishing and other extracurricular activities.[21] Tr. 499. Mr. Pearson handled indigent cases and private matters, "[a]nything they had money to pay me for." Tr. 549.

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18 A third defender, Thomas Pearson, testified he had been fired as a public defender but still takes private cases.

19 Mr. Shackelford's and Mr. Tisdell's Circuit Court caseloads average 164 and 169 felony cases, respectively. PX 48. These caseloads exceed the maximum of 150 felony cases recommended by the National Advisory Committee on Criminal Justice Standards and Goals, RE 15 at MS 03843, even without including Justice Court matters, appeals and private cases. Defendants proffered evidence of the average number of indigent defendants represented by public defenders in Quitman County Circuit Court, figures repeated by the Circuit Court. RE 3 (Tr. Ct. Op. ¶ 13). These numbers are not meaningful because they exclude the Quitman County Justice Court and appellate matters and their private practice. RE 18 (Tr. 758).

20 When testifying as to why he had become a public defender, Mr. Tisdell explained: "Now and of course, going into private practice to work as a public defender, I looked at it as a blessing. . . . So, again, it was a business decision that fit and satisfied my needs." Tr. 853.

21 During his testimony Mr. Shackelford stated for the record that he spends his spare time "[f]ishing, bird hunting, girl watching, whatever dirty old men do." Tr. 499.

The Senior Circuit Judge has the sole authority to hire and fire the public defenders. Tr. 174-76, 178. Mr. Farese testified that this situation should "shock our legal consciences" because the public defenders are not independent of the judiciary. RE 17 (Tr. 697). There is a clear potential for a public defender to be inhibited from zealously representing a client because of concern that filing motions or taking aggressive steps will annoy the judge who controls his livelihood. RE 17 (Tr. 698-99). Indeed, Mr. Pearson admitted that he did not ask for an investigator or file motions because he was concerned how the Senior Circuit Judge would react. (Tr. 648, Tr. 563-64).

As is the case throughout Mississippi, the county-based system fails to provide indigent defendants in Quitman with the tools of an adequate defense. Tr. 338-39, 752-53. *See* pp. 9-14 above. Rev. Carl Brown testified that attorney-client communication is entirely lacking as public defenders are first appointed to represent defendants in Circuit Court at arraignment, and often plead out that day RE 5 (TR 703-04); Rev. Brown described that the scene in the courtroom as "chaotic" and said many of the defendants do not even recognize the lawyers appointed to represent them. RE 5 (Tr. 703-04.)[22] District Attorney Laurence Mellen and Judge Larry Lewis, defense witnesses, admitted that they have seen the public defenders frequently meet with their new clients in groups in the courtroom, sometimes within earshot of the prosecution and the judge. RE 7 (Tr. 1008) ("they meet their client for the first time in the courtroom in front of me"), Tr. 1017-18.[23] Individual,

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[22] Rev. Brown is a community leader who regularly attends court sessions and was moved to establish a "court ministry" and "jail ministry" because of concerns of members of the community about attention given indigent defendants by the public defenders. RE 5 (Tr. 700-02, 708.) The Circuit Court's opinion does not even mention Rev. Brown or his testimony, a plainly credible and unbiased witness, with absolutely no reason to shade his testimony.

[23] During testimony Mr. Pearson admitted: "After arraignments were over and I had the appointments as to what cases I was representing, So I would meet usually in the jury room here. I would ask all persons whom I had been asked to represent, please come in the room. I would announce to the people at that time that I was wanting to meet with people who might be interested in plea bargaining, and the only people that could plea bargain would be people who admitted their guilt of the crime. And anybody who did not admit their guilt should go back out in the courtroom, and I'll

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confidential, attorney-client consultations plainly are impossible in such circumstances, even though guilty pleas immediately are entered on behalf of many of these defendants. Tr. 628-30. *See* below.[24] Defendants fare no better in the Quitman jail; Deputy Sheriff Sims testified that he has seen prisoners sit in jail 4 to 5 months without any contact with a lawyer. Mr. Tisdell testified he has a "phobia" of jails. Tr. 476, 533, 534-35. Tr. 542.[25]

Testimony at trial confirmed that the independent investigation of the facts is essential to making an informed decision whether to recommend a guilty plea or trial, and engage in meaningful plea negotiations and sentencing advocacy. Nevertheless, State witnesses suggested that it was sufficient for defendants to rely on the prosecution's file.[26] RE 7 (Tr. 1003-04); 856-58; 515 But as Mr. Fortner explained, the law enforcement reports in the prosecution's file are synopses which may be inaccurate or incomplete and some cases are biased or slanted. RE 16 (Tr. 343-44). The only way

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meet with you individually later. And those persons who indicated they wanted to find out what the plea bargain was, we would stay in there, and we would discuss." (Tr. 559-560)

[24] Public defenders are appointed to represent defendants in Justice Court, but the appointment terminates with the Justice Court session and a different lawyer may represent the same defendant later in Circuit Court. RE 16 (Tr. 342-43) Mr. Tisdell found this practice "troubling." Tr. 475. The defenders do not communicate with defendants between the time of Justice Court and arraignment in Circuit Court because *no attorney-client representation is in existence.* Tr. 508.

[25] Mr. Bright cited the case of Larry Nance, who was held in jail for 8 months without a visit from a lawyer. RE 18 (Tr. 767, 806.) The defenders maintain a similar hands-off attitude toward their clients after conviction or a guilty plea. Mr. Pearson admitted that clients frequently wrote to him to complain about lack of communication and that he told one "that I wasn't the one that jumped up on that counter and shot that lady in the head and killed and robbed her and that I didn't sign on to be his pen pal." Tr. 565. Mr. Shackelford charged poor clients $1 per page for copying their transcript and refused to provide a transcript without payment up front to a client who had complained to the Mississippi Bar Association. PX 15; Tr. 525.

[26] Mr. Shackelford noted in his testimony: "If there seems to be a question in their mind as to whether they want to plead guilty or not -- I go get the district attorney, even without -- we have a gentleman's agreement that -- they trust us any way -- that they will allow us -- they will just give us their file..." (Tr. 515).

for defense counsel to assess that information is to talk to the witnesses directly. Moreover, independent investigation may impact a plea negotiation or trial in a manner favorable to the client. RE 17 (Tr. 346).[27] The experts agreed that it is necessary to have investigators available to assist in every case, RE 16 (Tr. 349-50), RE 17 (Tr. 648), RE 18 (TR 752-54), since investigators are "streetwise" and can find witnesses lawyers cannot find. TR. 349. Investigators must be present to take a witness statement in the event it becomes necessary to impeach the witness at trial. RE 16 (Tr. 350.) Quitman does not have a single investigator, and the public defenders *have never asked the Quitman court* for funding to employ an investigator in a non-capital case. RE 3 (Tr. Ct. Op. ¶ 29; RE 10 PX 4 RE 10 449, 558.[28]

Although each of the experts testified that motion practice is important to a more favorable plea resolution[29] certain cases "beg" for motions, Tr. 351. The undisputed evidence established that there is virtually no substantive motion practice in Quitman County indigent defense cases. RE 16

[27] Mr. Fortner testified that in monetary cases, discussions by defense counsel with the victims frequently will result in the victims signing affidavits urging restitution or other alternatives to jail time. RE 16 (Tr. 345.) Mr. Mellen testified that he will change a plea offer if defense counsel brings him mitigating information, and Mr. Tisdell testified that cases that appear simple often turn out to be more complicated upon investigation. Tr. 857. However, independent investigation is lacking. The defenders do not investigate cases prior to arraignment in Circuit Court, and in many cases there is no investigation because the client immediately pleads guilty at arraignment, but if the case proceeds, rather than find witnesses themselves, the defenders ask the Sheriff's Department to find witnesses and bring them in, a practice Mr. Bright characterized as "bizarre." RE 18 (Tr. 755.)

[28] Mr. Pearson testified that he was once told by the court that it was his job to investigate his public defender cases and if he could not, the court would replace him with a lawyer who could. Tr. 564. Mr. Shackelford admitted that he had refused to accept an investigator offered by the court in a capital case and said he would not accept one in the future. Tr. 517.

[29] Mr. Fortner explained that motions cause the prosecutor to realistically evaluate the "worth" of the case. RE 16 (Tr. 352.) Moreover, motion practice goes hand in hand with investigation of the case and helps counsel prepare for trial and plea negotiation. RE 16 (Tr. 352.) Similarly, Mr. Bright testified that the fact very little motion practice occurs in Quitman County (including no significant bond motion practice) is a further indication of Quitman's superficial processing of defendants. RE 18 (Tr. 760-61).

(Tr. 350-52)[30] Public defenders filed no substantive motions (*i.e.*, motions other than for substitution of counsel or a one-page form discovery request) in 83% of their cases during 1998-2000. RE 3 (Tr. Ct. Op. ¶ 30; RE 14). The percentage of cases in which no substantive motions were filed increased to almost 85% during 2001-March 2003. RE 14; RE 16 (Tr. 350-51). For example, drug possession charges raise suppression issues; Mr. Fortner testified that he moves to suppress in approximately 50% of his drug possession cases. RE 16 (Tr. 351.) Yet Mr. Tisdell admitted that the only motion to suppress he filed in Quitman that the State could identify was for one of his privately retained clients, PX 4 at 126, and he was confused as to what a "Brady motion" was and had to be assisted by the Court. *Brady v. Maryland*, 373 U.S. 83 (1963). Tr. 880-82. Moreover, the lack of motion practice is only part of a larger problem: the Quitman public defenders *routinely waive* important stages of the proceedings, effecting a complete denial of the right to counsel.[31]

Evidence established that because of the absence of client communication, fact investigation and motion practice, indigent defendants in Quitman simply do not receive meaningful plea negotiation services. RE 16 (Tr. 352, 405) The most striking evidence of inadequacy in this regard is the practice of pleading defendants guilty at arraignment, *when they first are appointed an attorney*,

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[30] Public defenders filed no substantive motions (*i.e.*, motions other than for substitution of counsel or a one page form discovery request) in 83% of their cases during 1998-2000. Tr. Ct. Op. ¶ 30; RE 14. The percentage of cases in which no substantive motions were filed increased to almost 85% during 2001-March 2003. PX 49; RE 16 (Tr. 350-51)

[31] Mr. Shackelford routinely waives preliminary hearing if he personally believes there is probable cause. Tr. 506. Mr. Pearson admitted to accepting the facts in the indictments and asking clients in groups whether they were guilty or wanted to plead prior to obtaining advice, waiving their right to counsel at that critical stage of the proceeding. Tr. 559-60. The practices of the public defenders of "get[ting] along" with the District Attorney undoubtedly contribute to this. Mr. Mellen testified that his practice is to withdraw plea offers if a defense attorney makes a motion for psychological or psychiatric examination or any other motion he unilaterally deems "frivolous." RE 7 (Tr. 1011-12, 1021). He testified that he has no problems with the public defenders and "we all get along." RE 7 (Tr. 1004-05, 1021). This demonstrates, as Mr. Farese testified, that the Quitman County judicial process lacks "things of this nature to balance the system balance." RE 17 (Tr. 648).

in some cases to sentences of 5 years and 10 years in prison. RE 7 (Tr. 1018-19); RE 16 (Tr. 349-41)[32] Fully 57% of all guilty pleas during the period February 1995 - March 2003 were entered on the day of arraignment. RE 3 Tr. Ct. Op. ¶ 31; RE 11. This accounts for over 40% of all public defender cases in Quitman Circuit Court during that period. Remarkably, the public defenders do not even look at the prosecution's file before pleading their clients guilty. Mr. Mellen testified that only after the plea agreements are finalized do the public defenders review his file to "legitimize" the plea. RE 7 (Tr. 1018).[33]

The Circuit Court simply ignored evidence that pleading clients guilty on the day of arraignment is not an acceptable practice.[34] RE 16 (Tr. 340). Experts found the number of arraignment day pleas shocking. RE 16 (Tr. 339-34) RE 17 (Tr. 638), RE 18 (Tr. 756-57) Even Mr. Tisdell conceded "this may not be a good idea" (Tr. 855). As Mr. DeGruy testified, and Mr. Mellen confirmed, on the day of arraignment, the District Attorney's case is complete. RE 4 (Tr. 591), RE 7 (Tr. 1024-25). In contrast, the defense attorney is only getting started.[35] RE 4 (Tr. 591)

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[32] As Mr. Fortner testified, the rapport necessary for the client to trust counsel's opinion "doesn't happen in a five minute meeting." RE 16 (Tr. 340). Counsel also needs time to fully investigate the case, talk to witnesses and ensure the client should agree to the plea being offered. RE 16 (Tr. 341).

[33] The breakdown of the adversarial system is apparent in the lack of incentive for the District Attorney to negotiate. Mr. Mellen testified his relationship with Quitman County public defenders was such that: "All of them, we work real well with. When I say that, I may be in a courtroom during arraignment and they'll ask me about it and I may have a confession in it or maybe recommended probation and they'll look at that file in order to legitimize maybe their suggestion to their client." (Tr. 1018) He also testified District Attorney's office offers recommendations based upon the category of case that are largely uniform, regardless of the facts. RE 7 (Tr. 1005-07).

[34] Mr. Shackelford testified that: "if, after talking with the witness – I know there is probably cause then I see no reason to go through all of the – jump through all the hoops, particularly if all of the witnesses are law enforcement." (Tr. 506-07)

[35] According to Mr. Mellen, the District Attorneys and the courts encourage pleas on the day of arraignment because it is administratively easier and "convenient" when everyone is together on one

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Finally, Quitman offers little indigent defense if an arraignment day plea falls through. While there is little occasion for trial advocacy because there are few trials (only 8% of the public defender cases were tried during the period February 1995-March 2003 were actually tried, RE 5), where there were trials, they were scheduled only a few weeks after the public defender was first appointed at arraignment. RE 3 (Tr. Ct. Op. ¶ 33). Thus, any investigation, motion practice, expert consultation and other preparation would have to be started and completed during this brief period.[36] Moreover, the trials are under-resourced in a core Constitutional respect, because indigent defendants have no meaningful access to experts. Neither Mr. Tisdell nor Mr. Pearson has ever requested an expert in a non-capital case. RE 3 (Tr. Ct. Op. ¶ 32); (Tr. 461)[37] Mr. Shackelford – who has served as a public defender since 1990 – only requested the services of an expert once. RE 3 (Tr. Ct. Op. ¶ 32).[38] And

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day. RE 7 (Tr. 1020-21.) Indeed, Mr. Mellen admitted that public defenders often come back from receiving the District Attorney's offer "within a matter of minutes" to accept it. RE 7 (Tr. 1020-21). It is no surprise that 40% of cases are pled on the day of arraignment.

[36] Mr. Farese testified that 3-5 weeks is not sufficient time for the public defenders to adequately prepare to try a case, particularly given their competing caseloads. RE 17 (Tr. 642.) Thus, regardless of the advocacy at trial, the pre-trial broken system precludes effective trial representation.

[37] When questioned further Mr. Tisdell admitted: "I don't know what an "outside expert is." (Tr. 876.)

[38] Mr. Tisdell acknowledged that appropriate independent forensic analyses could become essential to "confront the State's case," but there is no such independent analysis. Deputy Sheriff Sims, who processes all requests for forensic testing to the Crime Lab submitted in Quitman County, testified that no public defender has ever obtained a court order authorizing forensic testing on behalf of an indigent defendant. Tr. 532, 534. The only motions filed for psychiatric examinations seek to have the defendant evaluated at the State mental institution by psychiatrists that would normally testify for the prosecution, a practice that Mr. Bright found disturbing. RE 3 (Tr. Ct. Op. ¶ 32); RE 18 (Tr. 773-74, 775-76) RE 10. No public defender has ever filed a motion to obtain a psychiatric examination conducted by an independent mental health expert. RE 10.

once a defendant is convicted, there is very little appellate advocacy. Only 50% of the convictions in public defender cases were appealed between February 1995 to March 2003. RE 11.[39]

And for those very few cases that reach sentencing, the public defenders do not submit sentencing alternatives, do not submit sentencing reports, and requested only three presentencing investigations during the period February 1995 to March 2003. RE 3 (Tr. Ct. Op. ¶ 35); RE 10.

Legislative Inaction

For almost 15 years, this Court and numerous study commissions have identified serious problems in the county-based indigent defense system and urged the Legislature to replace it with a statewide, state-funded system. *Mease v. State*, 583 So. 2d 1283, 1285 (Miss. 1991); *Wilson v. State*, 574 So. 2d 1338, 1348 (Miss. 1990); Tr. 324-25. PX 1, 2, 3 Those calls have gone unheeded except for some very limited funding in capital cases.[40]

More than a decade ago, in December 1993, the Mississippi Judiciary Advisory Study Committee recommended significant changes in the provision of counsel in criminal cases. The Study Committee agreed on three principles: (1) the creation of a state-funded, statewide public defender system to replace the county-based system; (2) the creation of a State Public Defender position; and (3) the creation of District Defenders' offices in each of the circuit court districts of the state. RE 15 at MS 03878; RE 16 (Tr. 318-20). Five years later, the Public Defender Commission

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[39] Moreover, the quality of appellate advocacy provided was poor. The appellate briefs filed by Mr. Shackelford in the record are perfunctory and riddled with typographical errors. PX 15. Mr. Shackelford admitted that he did not proofread his appellate briefs, blaming lack of time. Tr. 526-27.

[40] Only *after* Quitman County and other counties filed suit did the Legislature create the two capital defense offices and, contrary to the Circuit Court's conclusion, these actions did not relieve counties of the financial burdens of death penalty cases. *See* p. 25 above; Tr. 180-82, 183-84. Moreover, death penalty prosecutions, while the most serious, are only a small percentage of the indigent felony case in Mississippi.

was mandated to "assess the feasibility and cost" of a statewide public defender system. RE 15 at MS 03782-03783-3802, Tr. 109-11.[41]

The 2000 Public Defender Task Force chaired by Justice Waller included judges, legislators and prosecutors and found that "indigent defense remains a vexing problem for the counties." RE 8, Introduction and Narrative at 5; Tr. 123-24, 126. The Task Force unanimously reaffirmed "that reform of the present system is needed" and "the costs of indigent defense should be shifted from the counties to an alternate funding source." RE 8, Sept. 29, 2000 transmittal letter at 1, 2; Tr. 132. It recommended creation of a State Public Defender Office and an Office of Indigent Appeals as the next logical steps to a statewide system. RE 8, Sept. 29, 2000 transmittal letter at 2 and Memorandum of Proposed Legislation at 1. In its report, which considered the experience of Arkansas and other nearby states, the Task Force proposed creative approaches to financing a public defender system from sources other than the State's general revenues.[42] Once again, the Legislature failed to act.[43]

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[41] The Commission Implementation Plan is a roadmap for the creation of effective system of indigent defense in Mississippi, and includes a statewide office, divisions for direct appeals and post-conviction death penalty proceedings, a conflicts division, and district defender offices. RE 15 at MS 04020, 04038-04046, 04070-04071; RE 16 (Tr. 319-25); Tr. 128, RE 15, Tr. 112-14. This statewide system would be phased in over several years at an estimated total cost of approximately $14 million. RE 15 at MS 04073-04074; Tr. 114-16, RE 16 (361-63). Although District Attorneys, the Mississippi Association of Supervisors and the Chancery Clerks Association supported a statewide system, the Legislative Budget Committee declined to provide any funding for indigent defense. RE 15 at MS 04116, 04132; Tr. 118-19, 120-21, 122-23.

[42] Specifically, the Task Force recommended assessments on criminal fines imposed in felony and misdemeanor cases, including traffic offenses, as a funding source. RE 8, Sept. 29, 2000 transmittal letter at 2 and Introduction and Narrative at 5-6; Tr. 130-31.

[43] Yet another study commission, the Study Commission on the Mississippi Judicial System comprising numerous judges, legislators and bar representatives, recommended in 2001 that the State fund and staff an adequate indigent defense system at levels equivalent to district attorneys' offices because the present system is "woefully inadequate and burdensome on the counties." RE 9 at 31. Its recommendations, too, were ignored. Most recently, the Mississippi Judicial Advisory Study Committee reiterated "its support for the implementation and funding of a statewide public defender

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There has been no movement in the four years since the Legislature repealed the Mississippi Statewide Public Defender Act in mid-2000. Tr. 182-84.[44] The State's failure to correct the broken indigent defense system is not about money. Both the Mississippi Public Defender Commission and the Mississippi Public Defender Task Force concluded that a statewide system would achieve overall cost savings compared to the current inadequate hodgepodge. Tr. 116-18. A single organized statewide system would eliminate duplication and inefficiencies inherent in 82 uncoordinated county programs and two State capital defense offices.[45]

The inflexible opposition of key legislators to indigent defense reform was displayed during the deposition of Charlie Capps, the longtime chairman of the House Appropriations Committee. Mr. Capps testified and admitted that he would not support the modest incremental step of creating a Division of Indigent Appeals recommended by the Public Defender Task Force under any circumstances:

> Q.: So if it was $10,000, you wouldn't support it?
> A.: That's right.

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system." *The Annual Report of the Mississippi Judicial Advisory Study Committee*, submitted to the Legislature February 9, 2004, at 3.

[44] Although Defendants' counsel incorrectly indicated at trial that the Public Defender Task Force rejected a statewide, state-funded system, this erroneous statement was relied upon in the trial court's opinion. RE 3 (Tr. Ct. Op. ¶ 23.) In fact, the Task Force's report makes clear that all members favored a statewide system, but they proposed achieving it in incremental steps because overhauling the entire system at once appeared politically infeasible. RE 8, Memorandum of Proposed Legislation at 1; Tr. 131, 134, 287-88. Indeed, Assistant Attorney General Sonny White, who was a member of the Task Force and defendants' Rule 30(b)(6) designee in this action, testified, "I'm totally committed to a – to working out some sort of viable public defender system in the State of Mississippi funded by the state." PX 50B at 248.

[45] The State's contribution would be reduced, of course, in a statewide system funded by both state and county sources because a portion of the total cost would be offset by county funding. As an order of magnitude, counties spent more than $9 million on indigent defense in noncapital felony cases in 1999. RE 8, Introduction and Narrative at 5; Tr. 128.

Q.: And if it was $500, you wouldn't support it?
A.: I just wouldn't support it. Yeah.

* * * *

A.: I'm not going to support anything that costs any money. Nothing.
Q.: No matter how much it is?
A.: That's right.

PX 51B at 46-47.[46] In accord with Mr. Capps, the Legislature has reduced funding for the Office of Capital Defense Counsel and the Office of Capital Post-Conviction Counsel in each of the last three years. Tr. 579-80, 973-74, 1031-32. Simultaneously, the Legislature has increased its appropriations for District Attorneys and other law enforcement agencies. Tr. 962-63, 971-73; RE 12.

In sum, the overwhelming evidence in the record demonstrated that any hope of legislative action without a judicial mandate are simply unfounded.

I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY APPLYING THE WRONG LEGAL STANDARD TO QUITMAN COUNTY'S SYSTEMIC CLAIMS SEEKING PROSPECTIVE RELIEF.

A. The Post-Conviction Standard of *Howard v. State* and *Strickland v. Washington* Does Not Apply in This Case.

The Circuit Court committed reversible error by applying the wrong legal standard to Quitman's claims. *See McClendon v. State*, 539 So. 2d 1375, 1377 (Miss. 1989) ("where, as here, the trial judge has applied an erroneous legal standard, we should not hesitate to reverse"). Although citing this Court's prior decision, the Circuit Court did not use the standard the Supreme Court held governs this case. Instead, it applied the higher, two part test used only for post-conviction challenges by individual criminal defendants under *Howard v. State* and *Strickland v. Washington*. RE 3 (Tr. Ct.

[46] According to a January 20, 2004 article by the *Associated Press and Local Wire* and the *Clarion Ledger*, Senate Appropriations Committee Chairman Jack Gordon, D-Okolona asserted the cost (of funding a public defender system) is the responsibility of the counties, and that: "We don't have any money for that right now. We have other priorities."

Op. ¶ 66) ("The Supreme Court recently stated the standard of review of effective assistance of counsel cases," citing *Howard* and *Strickland*).

The Circuit Court proceeded as if this were an individual post-conviction proceeding and Quitman had to prove on a case-by-case basis that the attorney's performance was deficient and the defendant was prejudiced, *i.e.*, but for these deficiencies, there would have been a different outcome in the trial court. Thus, the Circuit Court repeatedly criticized Quitman's proof for supposed failure to show "incompetence" and prejudice in particular cases that would have warranted reversal of the conviction under *Howard* and *Strickland* for example, by citing the lack of evidence of post-conviction proceedings, that cases had "been overturned," of incompetence, or that the experts had employed the Strickla*nd* test in reviewing any of the cases" or proved any defendant had been "prejudiced" because of a plea entered on arraignment day. RE 3 (Tr. Ct. Op. ¶¶ 72, 76, 77.)

Although many of these criticisms are baseless, since the record evidence of Defender and expert testimony and Table PX 4 of every felony case from March 1995 to 2003 demonstrates objective incompetence and ineffectiveness in the provision of defense services in Quitman, including specific examples and proof of the complete *absence* of attorney services, *United States v. Cronic*, 466 U.S. 648 (1984), the courts did not focus on proving *Strickland* prejudice in individual outcomes because it was not relevant to or required by this Court's opinion. Hence, the Circuit Court fundamentally misconceived Quitman's case. Quitman's complaint is that "the existing county-based system results in an inadequate and unconstitutional system of indigent defense." 807 So. 2d at 405. The county does not seek to overturn particular convictions, but rather seeks a system that meets constitutional guarantees. As this Court recognized, it is "the State's failure to remedy the alleged systemic ineffective assistance of counsel that is the crux of the County's complaint." *Id.* at 408.

Accordingly, the Supreme Court rejected the State's legal challenges and held that Quitman is entitled to the prospective statewide relief it seeks if it established the cost of an effective system of indigent criminal defense, the county's inability to fund such a system, and the failure of the existing system to provide indigent defendants in Quitman with the tools of an adequate defense. *Id.* at 408, 410. The evidence at trial established each of these elements. It was erroneous and unfair for the Circuit Court subsequently to apply a different, higher standard that is inconsistent with the systemic case presented by Quitman pursuant to the Supreme Court's directive.[47]

B. Quitman County Showed That Essential Tools of Defense Are Not Provided Even When Measured Under the Standards of *Strickland*-Based Cases.

In any event, Quitman demonstrated that the county-based system does not provide the tools of an adequate defense even under the post-conviction cases that use the *Strickland* analysis. *Strickland* itself emphasized the importance of attorney-client communication, citing counsel's "duties to consult with the defendant on important decisions and to keep the defendant informed of important developments during the course of the prosecution." 466 U.S. at 688.

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[47] Like the Court in this case, other courts have concluded that prospective challenges to indigent defense systems are not subject to the requirements of *Strickland* and that the proper inquiry is whether the system provides the tools of an adequate defense. *See, e.g., Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988); *State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (creating "rebuttable presumption" that "indigents . . . are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards" to be applied prospectively); *New York County Lawyers' Assoc. v. State*, 745 N.Y.S.2d 376, 384 (N.Y. Sup. Ct. 2002). The distinction between the standards applicable to post-conviction proceedings and to systemic challenges rests on the very different policies applicable in the two kinds of cases. In a post-conviction challenge, courts attempt to balance the individual defendant's interest in challenging his conviction against broader interests in judicial economy and finality. *Strickland*, 466 U.S. at 693-94. The concerns about certainty and finality of past criminal convictions do not arise in systemic cases. In those cases, society's interest in the provision of an effective defense to all citizens is paramount. *See Lucky v. Harris*, 860 F.2d at 1017; *New York County Lawyers Association v. State*, 745 N.Y.S. 2d at 384. Accordingly, courts look to whether the system provides the essential tools of an effective defense across the broad run of cases; the performance of a particular lawyer or the result in any one case is not decisive.

Post-conviction cases following *Strickland* have identified other tools that the county-based system does not provide as fundamental to effective assistance of counsel.[48] For example, this Court declared that meaningful discussions regarding the realities of a case are the "cornerstones of effective assistance of counsel." *State v. Tokman*, 564 So. 2d 1339, 1343 (Miss. 1990) (citing *Gaines v. Hopper*, 575 F.2d 1147, 1150 (5th Cir. 1978)). Similarly, this Court has recognized that independent investigation is an essential component of a basic defense. *Triplett v. State*, 666 So.2d 1356, 1361 (Miss. 1995); *Tokman*, 564 So. 2d 1339, 1342 (Miss. 1990) ("at a minimum, counsel has a duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case"); *Triplett v. State*, 666 So. 2d 1356, 1361 (Miss. 1995) ("The Defendant is entitled to a basic defense. . . . Basic defense in this case required complete investigation to ascertain every material fact about this case, favorable and unfavorable."). Numerous courts have found that defense counsel's exclusive reliance on the prosecution evidence constitutes ineffective assistance.[49]

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[48] *See, e.g., Wiggins v. Smith*, 539 U.S. 510 (2003) (investigation of mitigation evidence); *Williams v. Taylor*, 529 U.S. 362 (2000) (same); *Bell v. Cone*, 535 U.S. 685 (2002) (failure to call witnesses and waiving of argument in sentencing phase); *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (failure to file notice of appeal); *Smith v. Robbins*, 528 U.S. 259 (2000) (failure to file merits brief without consent); *United States v. Cronic*, 466 U.S. 648 (1984) (multiple factors, including limited time to prepare for trial and witness inaccessibility, inexperience of defender); *Hill v. Lockhart*, 474 U.S. 52 (1985) (guilty plea challenges).

[49] *See, e.g., Bigner v. State*, 822 So.2d 342, 350 (Miss. Ct. App. 2002); *Yabrough v. State*, 529 So.2d 659, 662 (Miss. 1988); *Ferguson v. State*, 507 So.2d 94, 96 (Miss. 1987). Indeed, the Court has recognized that the "failure [] to conduct any investigation at all" is an "identifiable lapse" in the adversarial process. *Tokman*, 564 So.2d at 1342. A preemptive decision to conduct no investigation does not fall within the ambit of sound trial strategy, as the public defenders have yet to obtain the facts on which such a decision could be based. *Silva v. Woodford*, 279 F.3d 825, 847 (9th Cir. 2002); *Walker v. Lockhart*, 807 F.2d 136, 140 (8th Cir. 1986). *Cf. Tokman*, 564 So.2d at 1343 ("A common thread of the fabric of the reviewing courts' deference to tactical considerations is thorough investigation."). Neither the court nor counsel can predict what a prompt and thorough investigation might disclose. *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990).

In making these decisions, courts look to objective criteria promulgated by the American Bar Association and other standard-setting bodies in determining whether essential tools were provided. *See, e.g.*, *Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable"); *Wiggins v. Smith*, 123 S. Ct. 2527, 2536-37 (2003) (counsel failed to go beyond presentence report and social services records in investigating mitigating evidence, as required by ABA standards); *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (counsel did not investigate and present substantial mitigating evidence, as ABA standards prescribe). These standards and their applicability to Quitman were briefed extensively to the Circuit Court. *See, e.g.*, RE 20.

Had the Circuit Court assessed the tools of an adequate defense in light of this Court's prior decisions and standards, it would have been clear that the county-based system in Quitman and counties does not provide the essential tools of defense and therefore violates the constitutional guarantee of effective assistance of counsel.

II. THE CIRCUIT COURT APPLIED THE WRONG LEGAL STANDARD IN CONCLUDING THAT QUITMAN HAD NOT SHOWN FINANCIAL INJURY.

The Circuit Court also misconstrued the applicable legal standard with respect to financial matters. The Supreme Court's opinion made clear that the triable issue was whether Quitman could afford a constitutionally adequate system of indigent defense. 807 So. 2d at 408 (describing Quitman's intent to "show the cost of an effective system of indigent criminal defense" and "the County's inability to fund such a system"). Quitman met this burden, and established that it cannot afford to pay any more than it does now for indigent defense. *See* pp. 7-9 above. The unanimous expert testimony was that a statewide, state-funded system is needed to provide the tools of an effective defense. *See* pp. 9-14 above. But even if one were to hypothesize a standalone county

system that provided adequate defense tools, Mr. Farese's opinion was that it would cost $300,000 to $500,000, RE 3 (Tr. Ct. Op. ¶¶ 41-42), 10 to 15 times what Quitman can pay. Tr. 82.

The Circuit Court disregarded this evidence and never reached the issue framed by the this Court but instead addressed a different issue – noting the absence of testimony that "resources to fund schools, hospitals, and local law enforcement were reduced because of indigent defense costs as alleged in the Complaint,"[50] RE 3 (Tr. Ct. Op. ¶ 70) (emphasis in original) and expressing a personal belief that "indigent defense is neither the cause nor the solution to the county's financial difficulties." *Id.* Under this newly devised test, the county could prevail only if it showed indigent defense was the *sole* cause of the county's financial problems and that these problems would disappear if the financial burden of indigent defense were lifted.[51] But there is no hint in that decision that the county must prove that its financial problems are all due to indigent defense or that it would be in excellent financial shape but for indigent defense costs. Obviously, no county ever could meet such a requirement because one can always posit causes of fiscal or economic problems in addition to indigent defense costs.[52]

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[50] As the testimony demonstrated, this statement is untrue. Quitman's financial crisis has forced it to slash the modest amounts it provides the local hospital and Health Department for health care for the poor by $42,000, a 25% cut. Tr. 162. Quitman also has had to fire an employee in the Circuit Clerk's office, freeze hiring in all other departments, cut the Sheriff's budget and put off buying a much needed patrol car. Tr. 162.

[51] Moreover, the Circuit Court apparently believed that Quitman was required to trace each dollar it now spends on indigent defense and show that it was taken from designated funding for schools or hospitals or local law enforcement. This proposition has no support in the Supreme Court's opinion.

[52] By erecting a new financial injury barrier that by definition is impossible to meet, the Circuit Court's decision effectively nullifies the Supreme Court's holding that Quitman has standing to challenge the constitutionality of Mississippi's indigent defense system. Under Mississippi's "liberal" standing requirements, Quitman has standing either if it "has asserted a colorable interest in the subject matter of the litigation or experienced an adverse effect from the conduct of the defendant." 807 So. 2d at 405. The Supreme Court held that Quitman satisfied both prongs of this disjunctive standard, id., and the evidence demonstrated that Quitman has a "colorable interest" in a

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Furthermore, the Circuit Court simply misunderstood Quitman's Pretrial Order contentions: that it would "demonstrate at trial that it is in economic peril and is burdened with substantial and increasing debt . . . and its difficulties in providing the necessary funding even for the most basic human services and obligations of the County." Rec. 73 (emphasis added).[53]

III. THE CIRCUIT COURT ERRED IN TWO KEY EVIDENTIARY RULINGS.

The Circuit Court committed prejudicial error in two critical evidentiary rulings. First, the court erroneously barred Quitman County from introducing expert testimony that the indigent defense system has affected the independence and effectiveness of the courts. Second, the court erred by allowing the local Circuit Judges to offer their opinions on the competence of the public defenders. Each of these errors affected a substantial right of Quitman County.

A. The Circuit Court's Erroneous Ruling Barring Quitman County's Expert Testimony That The Current System Affects The Integrity Of The Judicial System Was Highly Prejudicial.

The Supreme Court identified as a triable issue whether "the county-based system has resulted in the inability of the judiciary to operate in an independent and effective manner." 807 So. 2d at 410. If such an effect is shown, this Court held that it must necessarily intervene and "order the Legislature to establish a statewide, state-funded system of indigent criminal defense." *Id.*

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constitutionally adequate indigent defense system and has "experienced an adverse effect" from defendants' breach of their duties.

[53] Undisputed evidence established that the Simon and Carr cases wiped out the county's surplus and forced it to borrow money and raise taxes, exacerbating the downward spiral of Quitman County's economy and financial position, and that the county labors under a $2 million deficit and so can only provide bare-bones services for its impoverished population. Tr. 107-09. The county has even been forced to cut the modest amounts it provides for indigent care to the local hospital and Health Department by $42,000 (a 25% reduction). Indigent defense is not the sole cause of the county's fiscal problems, but it has contributed substantially to them. Tr. 162, 165. (PX 47).

Plainly, evidence that the integrity of the judicial system has been compromised by the State's failure to provide the essential tools of an effective defense is critical to the outcome of this case.

However, the Circuit Court barred Quitman from introducing expert testimony on this critical issue. Its expert Steven Farese was asked to give an opinion in response to the following question:

> Because of all of the testimony that you have heard in this case and all of the study that you have done, all of the preparation for your testifying today and your . . . 26 years of experience practicing law in Mississippi and indeed around the country, given what you know now about the state of indigent defense in Mississippi, do you have any fears for the integrity of our court system, should the system of indigent defense here in Quitman County continue?

RE 17 (Tr. 698-99.) Defendants' counsel objected on relevancy, and the Circuit Court sustained the objection.[54]

Excluding Mr. Farese's expert opinion on this matter plainly was error. Miss. R. Evid. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." The comment to Rule 401 explains that "[i]f the evidence has any probative value at all,

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[54] RE 17 (Tr. 699.) The sustaining of this objection followed a lengthy colloquy in the testimony of Quitman's first expert witness, Mr. Fortner, between the court and counsel regarding what expert testimony Quitman properly could introduce. RE 16 (Tr. 328-333.) At the conclusion of that colloquy, the court made the following ruling to govern the introduction of Quitman's expert testimony:

> "We could put lawyers on the stand all day that will agree and disagree about what that ultimate question is and we probably could put judges on the witness stand who would agree and disagree all day and it wouldn't surprise me. But our rules and Rule 702 says that if specialized knowledge will assist the trier of facts to understand the evidence, then the witness who is qualified by knowledge or skill or experience or training -- has quite expanded our previous rule -- may testify in the form of an opinion. And I am going to allow this witness to testify as an expert in the field offered of indigent defense and I do think that he has specialized knowledge through his experience and training. And as to the ultimate question or the legal conclusion which must be drawn, that is a question for the Court and I would just as soon you stay away from it."

the rule favors its admission." As was apparent from the context in which the questions were asked, Mr. Farese's expert opinion would have been that the county-based system of indigent defense system has compromised the integrity of the criminal justice system in Mississippi – an ultimate issue in the case under Miss. R. Evid. 704 – and described the ways in which that compromise has occurred.[55] This testimony and the multiple fruits of the testimony would have been probative of key aspects of in an ultimate issue of fact – the determination that the judiciary must intervene and order the establishment of a constitutional indigent defense system.[56]

The exclusion of this expert evidence affected a substantial right of Quitman. Miss. R. Evid. 103(a). Without any citation to the record, the Circuit Court concluded that "the County has not proven that the county-based system has resulted in the inability of the judiciary to operate in an independent and effective manner." RE 3 (Tr. Ct. Op. ¶ 83.) Had it been admitted, Mr. Farese's expert testimony that the system has undermined the integrity of the judicial system would have led to the opposite conclusion.

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[55] Introducing this evidence in the form of an expert opinion was proper because that opinion would have assisted the Circuit Court "to understand the evidence or to determine a fact in issue." Miss. R. Evid. 702. That Mr. Farese's opinion embraced an ultimate issue of fact provides no grounds for exclusion. Miss. R. Evid. 704.

[56] The Mississippi Supreme Court has made clear "[t]here is no invalidity to an expert witness's testimony even if the answer is in effect also a legal conclusion, if what underlies that conclusion is within the witness's specialized area of expertise." *Mississippi Baptist Foundation v. Estate of Matthews*, 791 So.2d 213, 218 (Miss. 2001) (quoting *McBeath v. State*, 739 So.2d 451, 454 (Miss. Ct. App. 1999)). The Supreme Court relied on Miss. R. Evid. 704, which provides opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." The comment to the rule explains that the old "ultimate issue rule" abolished by Rule 704 was "often unnecessarily restrictive and difficult to apply" and "[m]ore often than not the invocation of the rule served to deprive the trier of fact of useful information." Invocation of that superseded rule to exclude Mr. Farese's testimony concerning the ultimate issue framed by the Supreme Court in this case negatively affected a substantial right of plaintiff. Miss. R. Evid. 103(a). It should also be noted that when counsel for the State originally cited to the Court an objection to Mr. Fortner's testimony concerning a purported legal conclusion, it did so on the basis of solely federal cases and Weinstein's Federal Evidence, § 704. *See id.* RE 16 (Tr. 328-333).

B. The Circuit Court's Reliance On Inadmissible Judicial Testimony Was Highly Prejudicial.

Over Quitman's repeated objections, the Circuit Court allowed the three Circuit Judges for the 11th Judicial District to testify and offer opinions that the public defenders are "competent" and "effective advocates, *even after* telling Quitman to "stay away from" expert testimony on ultimate questions of fact. Extraordinarily, the Circuit Court then gave dispositive weight to these conclusory opinions, which had little or no evidentiary foundation in the record. RE 3 (Tr. Ct. Op. ¶¶ 43, 45, 47, 48, 79.) As described below, the judges acknowledged that the only bases for their opinions were their observations in court, agreed that a large part of the most important work of a criminal defense lawyer is done out of court, and said that they had no idea what the public defenders did or did not do outside court.[57]

When defendants announced pretrial that they intended to call sitting Circuit Judges to testify, Quitman moved *in limine* to exclude the anticipated testimony.[58] The Circuit Court acknowledged that Quitman had "legitimate concerns" about the proposed testimony and that its claim goes to "the very heart of our justice system," but nonetheless allowed the Circuit Judges to testify, subject to certain guidelines: that the judges could not be called as expert witnesses that their testimony could not address particular cases, and that they could not offer legal opinions. Tr. 410-12. Nevertheless,

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[57] Judges Albert Smith and Lawrence Lewis testified. The parties stipulated that Circuit Judge Kenneth Thomas's testimony would be the same, except that he would not give testimony as a former county prosecutor. RE 7 (Tr. 1037.)

[58] Plaintiff's *in limine* motion demonstrated that the harm such testimony would do to the integrity of the fact-finding process in this case and to the administration of justice in other pending and future criminal cases in the 11th District greatly outweighs any minimal relevance testimony by judges about their in-court observations could have and accordingly should have been excluded under Miss. R. Evid. 403 and Canons 2(A) and 3(E)(1) of the Code of Judicial Conduct. Rec. 28-35, 64-67; Tr. 2-13, 21-23.

defense counsel sought to elicit opinions and, over objection, the judges were allowed to opine that the public defenders are competent and effective.[59]

The Circuit Court's decision allowing the judges to testify and to offer these opinions was erroneous. First, the opinions allowed by the Circuit Court violated its own guideline that the judges are not expert witnesses and could not give expert opinions. The testimony of a judge in a judicial proceeding that a lawyer is "competent" or "effective" clearly is an expert opinion.[60] Although defendants' counsel sometimes introduced questions with a reference to "perceptions" in an effort to suggest the testimony was lay opinion testimony, this Court has established a "bright line rule" distinguishing lay opinion and expert testimony, where, "in order to express the opinion, the witness must possess some experience or expertise beyond that of the average, randomly selected adult, it is a M.R.E. 702 opinion and not a 701 opinion." *Langston v. Kidder*, 670 So. 2d 1, 3-4 (Miss. 1995). (citation omitted).

Second, even if these opinions were misconstrued as lay testimony, the Circuit Court erred by relying on them to determine what it regarded as the ultimate issue of fact – whether these individual

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[59] For example, the Circuit Court overruled an objection to the question "are they zealot advocates for their clients?" and allowed Judge Smith to opine, "They're competent." RE 6 (Tr. 719.) Similarly, the Circuit Court overruled an objection to the question "are they effective advocates for their clients?" and allowed Judge Lewis to opine that "they are indeed effective" and are "effective" during pleas. Tr. 916-17, 917-18. The Circuit Court relied on these conclusory opinions in denying Quitman's request for declaratory and injunctive relief. RE 3 (Tr. Ct. Op. ¶ 79.)

[60] The judges who testified in this case clearly are not average, randomly selected adults and their opinions were sought because they have knowledge or information "which is not likely to be possessed by a layman." *May v. State*, 524 So. 2d 957, 963 (Miss. 1988). The Circuit Court's failure to recognize this distinction between lay and expert testimony allowed expert opinions to come in through the backdoor in violation of its own ruling and to Quitman's clear prejudice, requiring reversal. *Cotton v. State*, 675 So. 2d 308, 312 (Miss. 1996) ("It is reversible error to allow expert testimony from a witness never qualified or tendered as an expert"); *Mississippi State Highway Commission v. Gilich*, 609 So. 2d 367, 376 (Miss. 1992) (judgment reversed in case where opinions derived from witness' education and experience erroneously admitted under Rule 701).

lawyers are "competent" and "effective, particularly where the Court instructed Quitman that *its voir-dired, qualified experts* could not do the same. And although expert opinion may embrace an ultimate issue to be decided by the trier of fact under M.R. Evid. 704, "a lay witness may not express an opinion on the ultimate issue." *Jackson v. State*, 551 Serted 132, 144 (Miss., 1989). The error in allowing this subjective opinion testimony further compounded the Circuit Court's erroneous rulings prohibiting Steven Farese from giving his expert opinion that the county-based indigent defense system undermines the integrity of the court system, and ordering all of Quitman's experts to "stay away" from ultimate issues. Quitman thus was whipsawed by having improper lay opinion testimony used against it while at the same time being barred from introducing proper expert opinion testimony.[61]

As a result there is simply no evidentiary basis for the Circuit Court's sweeping conclusions. Indeed, although the Circuit Court premised its decision to allow the judges to testify on the assumption they could shed light on how the system in Quitman operates (Tr. 412), Judge Smith testified that he does not know how the system is set up or operates or how the public defenders are paid. RE 6 (Tr. 726.) Since the judges could provide no specific factual testimony whether the system provides the tools of an effective defense, the Circuit Court chose to rely instead on conclusory opinions that the lawyers are "competent" or "effective." This reliance is another manifestation of the Circuit Court's misunderstanding of the legal standard applicable to Quitman's systemic challenge to the county-based system. *See* Point I above. At most, the judges have personal knowledge of what they observe the lawyers doing in their courtroom. But courtroom appearances

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[61] The Circuit Court also erred in allowing the judges' testimony because it is not relevant to the issue as framed by the Supreme Court for trial – whether the county-based system provides *the tools* of an effective defense, because the judges offered *no* opinion about tools of an effective defense.

are only the tip of the iceberg of what a criminal defense lawyer does, and ignore the full panoply of ways in which lawyers represent clients, *e. g.*, communicating with them, developing facts and analyzing legal issues, almost all of which occurs outside the courtroom.[62] Nevertheless, the Circuit Court uncritically accepted the judges' conclusions.[63]

Because Plaintiff's *in limine* motion should have been granted and the testimony excluded pursuant to Miss. R. Evid. 403 and the canons of the Code of Judicial Conduct.[64]

IV. THE CIRCUIT COURT ERRED BY IGNORING CREDIBLE' UNREBUTTED EVIDENCE ESTABLISHING QUITMAN COUNTY'S CLAIMS.

The Circuit Court ignored entire categories of expert and lay witness testimony, authoritative standards, government studies, and defense witness admissions establishing the key facts that this

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[62] Judge Smith agreed that "a very large part" of the work of a criminal defense lawyer in representing a client is done out of court, that a criminal defense lawyer's out of court activities are "very important," and include communicating with the client, communicating with the client's family and friends, identifying and interviewing potential witnesses, and conducting legal research and analysis to prepare for plea negotiations or trial. RE 6 (Tr. 728-37.) He agreed that these activities can be "very time consuming," and that he has no personal knowledge of them. RE 6 (Tr. 728, 737-38.) Similarly, Judge Lewis testified that he has no personal knowledge whether public defenders investigate their cases, attempt to negotiate pleas with the District Attorney or communicate with their clients before entering a guilty plea or going to trial. Tr. 918-19.

[63] The Circuit Court placed considerable weight on a scripted exchange of questions and answers (PX 29) that is supposed to occur before entry of a guilty plea. RE 3 (Tr. Ct. Op. ¶ 78.) Judge Smith testified that he does not use PX 29. RE 3 (Tr. 725.) Judge Lewis testified that he uses a form of plea agreement (PX 28) already filled in, signed by the defendant and filed with the clerk before he ever sees it. Tr. 918. The expert witnesses, Mr. Fortner and Mr. Bright, testified that such form "plea dialogues" do not alleviate concerns about representation in light of the evidence that attorney-client communications, investigation and plea negotiations are lacking. Mr. Fortner's expert opinion is that such "dialogues" provide no evidence the attorney did any work on the case or that there has been meaningful discussion and consultation. RE 16 (Tr. 404-05). Mr. Bright's expert opinion is that the lack of investigation and an independent examination of the facts cannot be cured by the exchange preceding the plea. RE 18 (Tr. 765.) The Circuit Court fails to mention this expert testimony.

[64] Rec. 65-67; *In re Wilkinson*, 678 A. 2d 1257, 1258-59 (Vt. 1996) (allowing judge who presided over criminal trial to testify voluntarily for State as expert in post-conviction proceeding that defense counsel's shortcomings did not affect the outcome of the trial violated "basic principles of fairness and due process" and was reversible error); *Joachim v. Chambers*, 815 S. W. 2d 234, 239-40 & n.1 (Tex. 1991) (court "clearly abused [its] discretion" in allowing judge to testify as expert witness for defendants).

Court held are determinative of Quitman's claims. This Court has long held that it is reversible error for a trial court to ignore uncontradicted evidence.[65]

A. The Circuit Court Committed Reversible Error by Ignoring Pivotal Expert and Lay Witness Testimony.

1. Statewide Failures in Indigent Defense Systems.

Undisputed expert and lay witness testimony established that the county-based system fails to provide the tools of an adequate defense statewide. Many public defenders throughout the state do not file pretrial motions, use experts or invest the time necessary to represent their indigent clients effectively. RE 16 (Tr. 353.) They have no administrative or investigative support and lack oversight. RE 4 (Tr. 592.) Public defenders do not use investigators, have very little contact with their clients, and file irrelevant motions that rely on outdated legal research. RE 4 (Tr. 588-590.)[66] The Circuit Court's opinion does not address the statewide failures to provide the essential tools of an adequate defense.

2. Failure to Provide Adequate Defense Tools in Quitman County.

The Circuit Court ignored testimony that defense tools are not being provided in Quitman:

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[65] *See Lucedale Veneer Co. v. Rogers*, 53 So. 2d 69, 75 (Miss. 1951) ("[E]vidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously discredited, disregarded, or rejected . . ."); *Tarver v. Lindsey*, 137 So. 93, 96 (Miss. 1931) ("Where, as in this case, the testimony of witnesses is undisputed, is reasonable in itself, . . . and the witnesses are unimpeached, then the trier of facts must act on the testimony and cannot reject it, else trials might eventuate in arbitrary results . . ."); *Holmes v. Holmes*, 123 So. 865 (Miss. 1929) (reversing lower court's dismissal where trial court ignored both the undisputed testimony of a clerk with direct personal knowledge of the transaction at issue, as well as a letter written by defendant containing important admissions).

[66] The evidence of statewide deficiencies was not disputed at trial. Indeed, defendants' own witnesses testified to the same effect. For example, District Attorney Mellen testified that arraignment-day guilty pleas are entered in other counties. RE 7 (Tr. 1018.) Assistant Attorney General White admitted that investigative and expert services typically are not provided by the state to indigent criminal defendants in Mississippi. PX 50B at 246.

- Defendants do not recognize the lawyers appointed to represent them at arraignment, and prisoners sit in jail up to 4 to 5 months without any lawyer contact. Tr. 542, RE 5 (703-04), RE 18 (767, 806).

- Client meetings are held in groups in the courtroom within earshot of the prosecutor and the judge. RE 7 (Tr. 1008, 1017-18.)

- Public defenders routinely waive preliminary hearings, accept facts in indictments, and do not ask for investigators or experts. Tr. 444, 506-07, 563.

- There is no opportunity for the investigation or communication necessary to make an informed decision when pleas are entered on arraignment day. RE 4 (Tr. 591.)

- There is a vast disparity between the resources of the State and public defenders. *See* pp. 9-21 above.

None of this evidence is even acknowledged in the Circuit Court's opinion.

B. The Circuit Court Ignored Governmental Studies and Authoritative Standards Used to Assess The Effectiveness of Defense Provided.

1. Governmental Studies Established Statewide Defense Failures.

Governmental studies repeatedly have found the tools of adequate defense are lacking. Thus, the Spangenberg studies found that "funding for indigent defense is totally inadequate," "the lack of adequate resources for indigent defense services results in poor quality services and representation," "there is no statewide oversight of indigent defense, which leads to a hodgepodge, county-by-county approach to providing services" and "[e]very aspect of defense representation is compromised." App. Ex. 1.[67] The Circuit Court's opinion does not refer to these repeated findings of inadequate representation by these highly reputable bodies.

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[67] Similarly, the Mississippi Public Defenders Task Force report concluded that "indigent defense remained a vexing problem for the counties" and compiled deeply troubling reports by several Senior Circuit Judges describing systemic inadequacies they have observed in their districts. RE 8, Attachment C); Tr. 126-27. The subsequent report by the Study Commission on the Mississippi Judicial System likewise found that "the present system of relying on appointments of part-time defenders is woefully inadequate and burdensome on the counties." RE 9 (PX at 31.)

2. Authoritative Standards of Adequate Criminal Defense.

The experts testified that the criteria identified by the American Bar Association and National Legal Aid and Defender Association for criminal defense representation are essential to providing an adequate defense and Quitman's trial presentation and brief extensively reviewed those standards, which provide objective guidance in evaluating whether the tools of defense are provided. *See App.* RE 20. The Circuit Court failed entirely to acknowledge the standards or the expert testimony concerning them. This disregard had important practical effects. For example, the evidence showed that the public defenders have more felony cases than the maximum recommended by national standards. PX 48. Mr. Bright's expert opinion was that public defenders could not handle their large caseloads adequately given the lack of investigative support. RE 18 (Tr. 753-754). The Circuit Court gave no heed to these objective standards and expert evidence, instead relying on the public defenders' subjective impressions.[68]

C. The Circuit Court Ignored Admissions from Defendants' Witnesses.

The Circuit Court ignored key admissions by the State's witnesses, including admissions by District Attorney Mellen showing a breakdown of the advocacy system, including (1) that the District Attorney withdraws plea offers if a defense attorney makes a motion he deems "frivolous; (2) Quitman public defenders do not create problems for the District Attorney and "we all get along"

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[68] The Circuit Court's disregard of these authoritative standards also is reflected in its decisions to repeatedly overrule Quitman's objections to the illusory distinction the State attempted to draw during its cross-examination of Mr. Farese between authoritative standards and so-called "minimum requirements" for defense. The Circuit Court erred by allowing the State to question Mr. Farese about hypothetical minimums, instead of the objective and authoritative standards identified by the experts. This error had an important substantive effect because it required Quitman to change its strategy in order to deal with the supposed and unsubstantiated "minimums." Tr. 621, 650, 653. This too was reversible error, compounded by the other evidentiary errors made by the Court during the trial. *See Jenkins v. State*, 607 So.2d 1171, 1183-84 (Miss. 1992) ("This Court has often ruled that errors in the lower court that do not require reversal standing alone may nonetheless taken cumulatively require reversal.").

RE 7 (Tr. 1004-05, 1011-12, 1021); (3) public defenders do not look at the prosecutor's file before pleading their clients guilty; (4) they often accept pleas "within a matter of minutes"; (5) public defenders look at the file only after the agreements are finalized to "legitimize" the plea RE 7 (Tr. 1005-07, 1018, 1020-21); and (6) District Attorneys and the courts encourage indigent defendants to plead on arraignment day because it is more "convenient." RE 7 (Tr. 1021.)

The Circuit Court also ignored the dramatic admission of Appropriations Chairman Capps in response to questions about the Public Defender Task Force's recommendation to create a Division of Indigent Appeals. Representative Capps unequivocally answered that he would not support the smallest step toward creating such a division -- "I'm not going to support anything that costs nothing. Nothing." PX 51B at 46-47. Had the Circuit Court had considered these admissions and the other evidence described above, it could not have concluded that the county-based system provides the tools of defense or that the Legislature can be counted on to correct the problems plaguing the system. The Circuit Court committed reversible error by ignoring this uncontradicted evidence.

Finally, the Circuit Court's decision goes against the weight of the evidence in this case. This Court should therefore reverse the Circuit Court's judgment as arbitrary, unsubstantiated by the record, and manifestly unjust. *See Tanner v. State*, 764 So.2d 385, 393 (Miss. 2000) (reversal warranted if factual findings are clearly erroneous or against the overwhelming weight of the evidence); *Jackson v. Daley*, 739 So.2d 1031, 1042 (Miss. 1999)(same).

V. THE CIRCUIT COURT IMPROPERLY INVOKED THIS COURT'S PRIOR DISSENT AND PERSONAL OPINION IN FAILING TO ORDER A STATEWIDE INDIGENT DEFENSE SYSTEM IN LIGHT OF THE BREAKDOWN OF THE INTEGRITY OF THE ADVERSARY SYSTEM.

A. The Judicial Obligation to Follow the Law Does Not Permit A Court to Invoke Personal Opinion or Bias in Fashioning A Remedy for Constitutional Violations.

In reaching the conclusion that a statewide system need not be implemented despite Quitman's "constitutional dilemmas" the Circuit Court expressed a personal opinion, invoking this Court's prior *Dissent* in Quitman:

> This Court agrees with the sentiments expressed by three justices in the dissenting opinion in *State v. Quitman County*, 807 So. 2d at 413 (Pittman, C.J., dissenting):
>
> "I agree that it would be wise of the Legislature to create and fund a statewide public defenders' office. However, the Legislature has attempted to solve the problem of indigent defense in other ways. By its actions the Legislature has shown that it is not blind to the plight of Quitman County. It is the Legislature which holds the key to solving these problems, not this Court by impressive and excessive exercise of judicial authority."

RE 3, (Op. at 27, ¶ 84.)

This was plain error. This Court held earlier this month that "[n]o credible person could dispute that having impartial judges is a compelling state interest." *Mississippi Commission on Judicial Performance v. Wilkerson*, -- So. 2d --, 2004 WL 1471110, No. 2002-JP-02105 SCT (Miss. July 1, 2004).[69] Judges act contrary to these policies when they base judicial opinions on material outside the scope of prevailing law. By expressing "agreement" with and directly quoting the Dissent, Judge Lamar injected an unfortunate note of personal opinion into a decision of statewide

[69] Canon 3A of the Mississippi Code of Judicial Conduct requires that judges "be faithful to the law."

significance and constitutional import, *and* contrary to the expressed view of the majority of the *Quitman* Court.[70]

B. *Quitman* and *Hosford* Provide this Court with the Authority to Order A Statewide, State Funded System.

Because Quitman County proved the necessary factual predicates, this Court has the inherent authority to order as a remedy that the State implement a statewide public defender system:

> The question raised by the County's allegations is whether, assuming the State has failed in its duty to provide effective indigent defense, the county-based system has resulted in the inability of the judiciary to operate in an independent and effective manner to the extent that this Court *must*, of *necessity*, interfere in this traditionally legislative function and *order the Legislature to establish a statewide, state-funded system of indigent criminal defense*. Again, taking as true the well-pled allegations of the County's complaint, such systemic constitutional deficiencies would entitle the County to relief.

Quitman, 807 So. 2d at 410 (emphasis added).

It is clear from this decision that Quitman need not first demonstrate that there is no alternative recourse to ordering a statewide system -- rather, such a remedy is proper simply "where the Legislature fails to act" and as a result it "fails to fulfill a constitutional obligation to enable the

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[70] Although judicial "critical or disaproving" of a party's position do not ordinarily support a finding of bias or prejudice, where they "reveal such a high degree of favoritism or antagonism as to make fair judgment impossible," a challenge to impartiality may be appropriate. *Liteky v. United States*, 510 U.S. 540, 555 (1994) (construing federal recusal statute). Reliance on an extrajudicial source in ruling on the merits of this case is one of the primary indicia of partiality; in fact, the United States Supreme Court has deemed reliance on extrajudicial sources in opinions to be sufficiently suspect as to be among the factors in recusal jurisprudence. *Liteky*, 510 U.S. at 554-55 (1994). Reliance on information "'other than what the judge has learned from his participation in the case'" has been determined to be evidence of bias or prejudice meriting recusal. *United States v. MMR Corp.*, 954 F.2d 1040, 1045 (5th Cir. 1992) (quoting *United States. v. Grinnell Corp.*, 384 U.S. 563, 583 (1966)).

judicial branch to operate *independently* and *effectively*" so that the courts "have the authority and duty to intervene." *Id.* at 409 (emphasis added).[71]

Thus, *Hosford v. State*, 525 So. 2d 789 (Miss. 1988), held that the Court is empowered to mandate the expenditure of legislative funds when necessary to preserve the very existence of the judicial branch:

> The same Constitutional requirement for our courts to exist obviously carries with it the duty on the part of the legislative branch to provide sufficient funds and facilities for them to operate independently and effectively. Any holding otherwise would emasculate the constitutional mandate for three separate and co-equal branches of government by reducing courts to supplicants only of the Legislature.

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[71] In reaching its decision, this Court invoked the long line of Mississippi cases recognizing the judiciary's inherent authority to act, and noted that, while the "expenditure of funds" for the purpose of indigent defense is "in most instances" a legislative affair, the Court has had to act on several occasions to remedy the "Legislature's failure to allocate sufficient funds." *Id.* at 409, for example, *Fuller v. State*, 57 So.2d 806, 807 (Miss. 1912), in which the Court said that "[T]he inherent powers of a court are such as result from the very nature of its organization, and are essential to its existence and protection, and to the due administration of justice." *Id.* at 807 (citing *Watson v. Williams*, 36 Miss. 331 (Miss. Err. App. 1850)). *See also In Re Lewis*, 654 So.2d 1379, 1383 (Miss. 1995) (citing *In re Steen*, 134 So.2d 67, 69-70 (Miss. 1931) (quoting same)); *State v. Blenden*, 748 So.2d 77, 86-87 (Miss 1999) (trial courts have inherent authority to impose monetary sanctions on State or political subdivision for violation of discovery orders in criminal cases); *Newell v. State*, 308 So.2d 71, 77-78 (Miss. 1975) (statutory provision which prohibited judge from instructing jury on law except on request by party contravened constitutional mandates of judiciary). Of course, it is well-recognized that Courts have a special duty and role in the protection of fundamental rights. *See, e.g., Miss. Comm'n on Judicial Performance v. Spencer*, 725 So. 2d 171, 183 (Miss. 1998) ("'The judges who sit in our communities are entrusted with the duty to safeguard the fundamental rights of others . . . . There is no place in the judiciary for one who will not take equal pains with each and every litigant . . . to ensure that they are guaranteed [their] fundamental rights.'") (citation omitted); *accord*, *Trop v. Dulles*, 356 U.S. 86, 103, 78 S. Ct. 590, 599 (1958) ("We are oath-bound to defend the Constitution . . . . The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence."). *Gideon v. Wainwright* makes clear that the right to counsel is one such fundamental right, subject to strict judicial scrutiny, because criminal courts are "necessities, not luxuries," wherein "[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." 372 U.S. at 344.

> This discretionary authority of the Legislature is wide indeed, but it does not cover quite all the spectrum. If it fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate, *and the Judicial branch has the authority as well as the duty to see that courts do not atrophy*. No court created by the Constitution is required to accept conditions which prevent it operating independently and effectively. Such court also has the duty under our governmental system to protect its own integrity. It likewise has the inherent authority as part of a separate and co-equal branch to make such orders to insure that independence and integrity.

Id. at 797-98 (emphasis added.).[72]

The evidence in this case conclusively established that due to chronic underfunding by the Legislature, Mississippi courts cannot maintain their "effectiveness" and "independence" under the existing county-based system of indigent defense. The evidence showed that the county-based system is not effective because it is hodge-podge, poorly funded, prone to unconstitutional

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[72] The *Hosford* Court ultimately concluded that if the "Legislative branch fails in its constitutional mandate to furnish the absolute essentials required for the operation of an independent and effective court, then no court affected thereby should fail to act," and characterized their powers in such circumstances as an "absolute duty [] to act" and "act promptly." *Id. Cf. Pruett v. State*, 574 So. 2d 1342, 1352 (Miss. 1990) (Robertson, J., concurring) ("We have reasserted our authority to guarantee adequate funding for the judiciary."); *Mease v. State*, 583 So. 2d at 1285 (calling on legislature to "address problem of indigent representation on a statewide basis rather than thrust the burden on financially-strapped counties"); *Jackson v.* State, 732 So. 2d at 188-89, 191 (1999) (concerning capital cases: "The Legislature has been aware of this acute problem [since 1995] . . . . We can no longer sit idly by."); *Wilson v. State*, 574 So. 2d at 1341 ("Since the state funds the prosecution in these cases, why not the defense?").

Courts around the country agree. For example, the Supreme Court of California determined in *In Re Attorney Discipline System*, 19 Cal. 4th 582 (1998), that though it was "mindful of the Legislature's traditional role in setting dues for members of the State Bar," it would step in to impose a "special regulatory assessment" on attorneys for disciplinary actions in order to "provide protection to the public, the courts, and the legal profession pending further action by our sister branches." There the court took over the legislature role until "such time as the legislature and executive branches authorize funds for an adequately functioning attorney discipline system." *See also*, *State v. Smith*, 394 A.2d 734 (N.H. 1978) (requiring state legislature to fund court-set payment schedule); *People v. Randolph*, 219 N.E. 2d 337 (Ill. 1966) (state, not particularly impoverished county, should pay costs of murder trial.); State Court Assertion of Power to Determine and Demand Its Own Budget, 120 Pa. L. Rev. 1187, 1196 (1972) ("No Government unit can be independent if its level of income is determined by another government unit which might be hostile."); *see also*, Cratsley, *Inherent Powers of the Courts. The National Judicial College* (1980).

representation, and imbalanced. *See supra* at 9-14. For example, Mr. Farese testified that it is inherent in the system that Mississippi's public defenders are overworked and understaffed, and he characterized the system as "designed to fail."[73]

Numerous witnesses also testified that the system is insufficiently independent. Based upon testimony by the public defenders, Mr. Farese testified that the county-based system has resulted in a prosecutorial system in which defense attorneys are afraid to ask judges for money because doing so could affect their very livelihood. He noted that it should "shock our legal conscience" that the courts are so heavily involved in the hiring decisions involving public defenders. Mr. Farese's testimony was amply supported by the Spangenberg and other studies in the record identifying the fundamental failures of the Mississippi county-based system. *Id.*[74] Not surprisingly, given this lack of independence, Mr. Pearson testified that while he would evaluate it himself, he typically saw the District Attorney's recommendation as fair punishment. In short, the evidence was clear and overwhelming at trial that the independence and effectiveness of both Quitman and the entire county-

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[73] Mr. Farese also testified that a statewide system would provide a counterpart to the prosecution, and give balance to a system that is otherwise not balanced. RE 17 (Tr. 648-49). Tom Fortner testified that any person working within a system like Quitman County's would ultimately practice in the same way, that there is no way that the part-time system in Mississippi ever will be adequate, and that a statewide system would solve these problems. RE 16 (Tr. 358-59). *See also, Gideon*, 372 U.S. at 344 (explaining the "obvious truth" that "[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime.").

[74] Steve Bright testified that even the investigative function in Quitman County is not independent, because public defenders engage in the "bizarre" practice of using the sheriff to find witnesses for their cases and interview them at the jail. RE 18 (Tr. 755). Steve Bright explained that the lack of such independence is one of the critical weaknesses in the system, because defense counsel need such independence to ensure that they know their responsibility is to the system and not to simply processing people. *Id.* Mr. Bright described several states that have implemented statewide systems that solved many of these problems, including Florida immediately after *Gideon*, and more recently Colorado, North Carolina, and Georgia. RE 18 (Tr. 827-28).

based system had been so deeply affected as to damage the very integrity of the Mississippi judicial system, 807 So. 2d at 405.[75]

C. The Court Should Order A Remedy Sufficient to Cure Systemic Ineffectiveness -- A Statewide Indigent Defense System -- Forthwith.

In the course of the five years this case has been litigated, the State repeatedly has argued that the Court should take note of the various measures that the State has undertaken in deciding whether it is necessary at this juncture to order statewide relief, invoking the capital and post-conviction funding now available on the defense side, as well as the various studies that have been commissioned by the Legislature, as evidence that the State Legislature is not failing to act, but should be allowed to proceed *at its own* deliberate speed. The time for the *Legislature's* deliberate speed has now passed, and this Court should not "sit idly by." Instead, this Court must conclude that the only proper remedy for Mississippi's unconstitutional conduct is an order which includes the remedy that that a statewide system be implemented forthwith.

In 1990, the Court in *Wilson* acceded to the State's delay rationale on the grounds that "[t]he Legislature is better equipped to handle this matter" because:

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[75] In addition to this Court's inherent authority to order a statewide system forthwith to maintain the integrity of the judicial system, it also has the authority to order a remedy adequate and sufficient to cure any established constitutional violation, and rejected arguments by states that a constitutional violation should be overlooked because the remedy is costly or money is tight. *See, e. g., DeRolph v. State*, 780 N. E. 2d 529, 530, 532 (2002) ("We are not unmindful of the difficulties facing the state, but those difficulties do not trump the Constitution . . . . We realize that the General Assembly cannot spend money it does not have. Nevertheless, we reiterate that the constitutional mandate [requiring the legislature to finance a thorough and efficient system of schools] must be met. The Constitution protects us whether the state is flush or destitute."); *Claremont School District v. Governor*, 794 A. 2d 744, 754-55 (N. H. 2002) (state required to guarantee funding necessary to provide a constitutionally adequate education); *McGowan v. State*, 60 P. 3d 67, 70 (Wash. 2002) (same); *Gates v. Collier*, 501 F.2d 1291, 1320 (5th Cir. 1974) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable powers.") (citation and internal quotation omitted). The Fifth Circuit expressly stated in *Gates*, "[s]hortage of funds is not a justification for continuing to deny citizens their constitutional rights." *Id.* (rejecting Mississippi's argument that shortage of funds barred district court's order requiring State to remedy unconstitutional conditions at Parchman prison facility).

'It can conduct hearings to determine the extent of the need, the amount of funds required, and the numerous factors involved. While the legislature can view the full spectrum of the problem, the courts, which do not have the facilities to adequately study the problem or provide the remedy, can only deal with the problem on a case by case basis.'

(quoting *Bailey*, 236 So. 2d at 423).

But the hearings have occurred, and time has long passed. At the time of *Wilson* and *Pruett*, the State legislature had not yet studied the problem of indigent defense in any systematic way. Fourteen years later, the State still has not actually implemented a statewide system, as numerous Supreme Court Justices have urged and the studies demonstrate is practically and economically feasible. *See supra* at 20-25. Moreover, while every governmental study has found a statewide, state-funded system necessary, the Legislature has failed to implement it, unreasonably and inequitably leaving in place the unconstitutional conditions created by the county-based system.[76] And given the State's clear resistance to meet its constitutional obligations, this Court should order that the remedy be implemented without delay.[77]

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[76] *See Client's Council v. Pierce*, 711 F.2d 1406, 1425-26 (8th Cir. 1983) (after finding that Department of Housing and Urban Development (HUD) unreasonably delayed remedying discriminatory housing practices, court concluded that district court remedy should "direct HUD to issue orders that will require the THA to desegregate all of its housing projects with all deliberate speed"); *Evans v. Ennis*, 281 F.2d 385, 393-94 (3d Cir. 1960) (rejecting twelve year desegregation plan, court stated "[t]rue the defendants must act in good faith to comply with the [constitutional] mandate of the Supreme Court, but they must do more than this. They must proceed to integration with all deliberate speed."); *Morris v. Bd. of Estimate*, 647 F. Supp. 1463, 1479 (E.D.N.Y. 1986) (after concluding that section of city charter violative of Equal Protection Clause, court held that "city defendants are enjoined to undertake curative measures with all deliberate speed"); *Davis v. East Baton Rouge Parish Sch.*, 214 F. Supp. 624, 625-26 (E.D. La. 1963) (ordering state defendants to present plan for reorganization of school district so as to accomplish desegregation with all deliberate speed); *DeRolph v. State*, 677 N.E.2d 733, 747, 778 (Ohio 1997) (Douglas, J. concurring) ("By our decision today we require the General Assembly to act with all deliberate speed to establish a constitutional system of school funding to address the formidable problems facing many of Ohio's school districts."); *Sheff v. O'Neill*, 678 A.2d 1267, 1295 (Conn. 1996) (Berdon, J. concurring) ("The executive and legislative branches of the state government should be given an opportunity to remedy what is [] a terrible wrong [but] the state must act 'with all deliberate speed.'") (citation omitted).

[77] *See, e.g., Brown v. Bd. of Educ.*, 349 U.S. 294, 301, 75 S. Ct. 753, 757 (1955) (ordering that States implement desegregation plans "with all deliberate speed").

After years of litigation, the State of Mississippi has failed to produce a single study, piece of evidence, or shred of testimony that the proposal in evidence of the Public Defender Commission, implementing a statewide public defender system that would cost approximately fourteen million dollars over a period of several years, was economically unreasonable or beyond the state's budgetary abilities. The undisputed evidence from the Circuit Court established that a statewide system is economically feasible, is part of this State's "fundamental obligation" recognized by *Gideon v. Wainwright* and *Conn. v. State*, and indeed would cost little more than the current inequitable and hodge-podge system the counties are now required to fund. And without such funding, it is equally clear that the Courts as the "great levelers" cannot be restored to balance in Mississippi so that "the[ir] integrity . . . is a living, working reality,"[78] and so that the "noble ideal" of the right to counsel for all is finally effected throughout the State. In short, in view of the overwhelming Article III § 26 case made by Quitman County below, and Mississippi's historic legacy of legislative inaction, a statewide system is *the* constitutionally correct and pragmatically proper remedy that this Court should order at this time.

CONCLUSION

Under *State v. Quitman* and *Hosford v. State*, Quitman has demonstrated the fundamental preconditions for the entry of an order declaring the current county-based system unconstitutional, and requiring implementation of a statewide, state-funded indigent defense system. Quitman County respectfully requests that a statewide state-funded indigent defense system be ordered forthwith.

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[78] H. Lee, *To Kill A Mockingbird*, 208 (1960), *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

July 19, 2004

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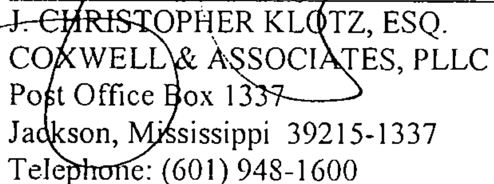
CERTIFICATE OF SERVICE

This is to certify that I have caused Gregory W.K. Voigt, to deliver on this nineteenth day of July, 2004, via hand delivery, a true and correct copy of the foregoing Appellant's Brief and Appellant's Record Excerpts to the following: HAROLD E. PIZZETTA, III, ESQ. Special Assistant Attorney General, Office of Attorney General, Post Office Box 220, Jackson, MS 39205



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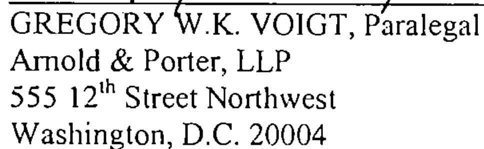

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