No. 2003-SA-02658

IN THE SUPREME COURT OF MISSISSIPPI

QUITMAN COUNTY, MISSISSIPPI,
Plaintiff-Appellant

v.

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

On Appeal from the Circuit Court of Quitman County

BRIEF FOR APPELLEE

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State of Mississippi

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

This case is now before the Supreme Court of Mississippi for a second time. In the first appeal, the Court allowed Quitman County to proceed with its complaint that the State's "county-based system" for providing legal representation to indigent defendants violates Art. 3, § 26 of the Mississippi Constitution. *State of Mississippi v. Quitman County*, 807 So.2d 401, 402 (Miss. 2001). There is a difference, though, between alleging facts sufficient to survive a Rule 12 motion and actually proving those facts at trial. As the Court stated in its first opinion, "Whether Quitman County can prove [its] allegations at a full trial on the merits will be determined upon remand." *Id.* at 410. That trial has been completed, and the detailed opinion of the Circuit Court of Quitman County documents the gulf that exists between the factual allegations in the complaint and the evidence presented at trial. The court found that the County had not met its burden of proving that the current statutory scheme for providing indigent defense is unconstitutional, and the judgment should be affirmed.

STATEMENT OF THE ISSUES

I. Did the Circuit Court apply the correct standard for determining whether the Quitman County public defenders are regularly providing constitutionally ineffective assistance of counsel?

II. Did the Circuit Court clearly err when it found that Quitman County is able to pay for a constitutionally sufficient indigent defense system and that the County's financial troubles are not attributable to indigent defense costs?

III. Did the Circuit Court abuse its discretion when it (a) did not allow one of Quitman County's experts to offer an opinion that was so vague that it would not have been helpful to the trier of fact, and (b) allowed judges to testify about how the Quitman County indigent defense system operates?

IV. Is the Circuit Court's decision against the great weight of the evidence?

V. Did the Circuit Court evince bias or improperly inject a personal opinion into the proceedings when it stated that the Legislature should consider a statewide, state-funded public defenders' office, even though the court had no authority to grant that relief in light of the facts proven at trial?

STATEMENT OF THE CASE

Procedural History

Appellant Quitman County filed this action for declaratory and injunctive relief against the State of Mississippi, the Governor, and the Attorney General. Rec. 8. The County alleged that Mississippi's statutes requiring the counties to provide legal services for indigent criminal defendants are unconstitutional. Rec. 9. The County sought a declaratory judgment that the State has breached its duty to provide effective assistance of counsel, in violation of article 3, section 26 of the Mississippi Constitution, and an injunction to compel the state legislature to create a statewide, state-funded public defenders' office. Rec. 17-18. After the Circuit Court of Quitman County denied the defendants' motion to dismiss, this Court granted permission for an interlocutory appeal. *See State of Mississippi v. Quitman County*, 807 So.2d 401, 402 (Miss. 2001) ("*Quitman County I*").

The Court held that Quitman County had standing to bring this action and had pleaded facts which, if assumed to be true, were sufficient to withstand a motion to dismiss under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. *See id.* at 405, 409. The Court stressed that its decision "should not be construed as stating a position" on the constitutionality of the current funding scheme: "Whether Quitman County can prove [its] allegations at a full trial on the merits will be determined upon remand." *Id.* at 406, 410.

A bench trial was held in the Circuit Court of Quitman County from April 29 through May 6, 2003. Rec. 310; RE at tab 3. After the parties had submitted proposed findings of fact and conclusions of law, the court issued a thorough opinion concluding that Quitman County had not met its burden of proving that the funding mechanism established by statute had led to

systemic ineffective assistance of counsel in Quitman County and throughout the state. Rec. 335 [Op. ¶ 83]; RE at tab 3. The Circuit Court's final judgment was entered on November 10, 2003, and Quitman County filed a timely notice of appeal. Rec. 338, 340.

Statement of Facts

The Mississippi Constitution grants indigent criminal defendants the right to receive effective legal representation at the public's expense. *See, e.g., Quitman County I*, 807 So.2d at 407; Rec. 324 [Op. ¶54]. While the State has a duty to provide effective assistance of counsel, the State is free to experiment and find the most suitable method for delivering those services.

The Circuit Court heard evidence regarding the three primary methods that state and local governments use to provide counsel for indigent defendants: (a) public defender offices with a salaried staff of attorneys, who are employed either full-time or part-time and are paid either directly by the government entity or through public or private non-profit organizations; (b) assigned counsel programs in which attorneys are appointed on a case-by-case basis; and (c) contract attorney systems in which private attorneys contract with governmental entities to provide legal representation to indigent defendants for a specified amount of money and for a specified period of time. Rec. 323 [Op. ¶ 50]; DX 1, p. 3. State and local governments often combine these approaches, and "[e]ven within specific program types, the organization of the programs varie[s]." DX 1, p. 2.

Not only are the indigent-defense delivery systems varied, but so too are the funding mechanisms. Twenty-one states provide all of the funding for indigent defense, twenty states rely on a combination of state and county funds, and nine states rely solely on funding from

county governments. Rec. 322-23 [Op. ¶¶ 49-50]; DX 1, pp. 1-3.

Mississippi, like many other states, relies on a combination of state and county funds. Rec. 315 [Op. ¶ 17]. In this State, the type of delivery system and the source of funds depends upon whether the indigent defendant is being prosecuted for a capital or a non-capital offense. *Id.* The Mississippi Capital Defense Litigation Act of 2000, *see* Miss. Code Ann. §§ 99-18-1, *et seq.*, created a statewide Office of Capital Defense Counsel "for the purpose of providing representation to indigent parties under indictment for death penalty eligible offenses. . . ." Miss. Code Ann. § 99-18-5. The director of the Office testified at trial that his attorneys were serving as trial counsel in twenty-five capital cases and were assisting county public defenders in several others. Rec. 316-17 [Op. ¶¶ 20-21]; Tr. 593. He testified that the long-term goal was for the Office to serve as trial counsel in all capital litigation in the State. Tr. 600. The Capital Defense Litigation Act also gives trial courts the power to appoint local counsel for an indigent defendant in addition to, or in lieu of, attorneys from the Office of Capital Defense Counsel, with the costs of appointed counsel borne by the State. Miss. Code Ann. § 99-18-19.

While the Office of Capital Defense Counsel represents indigent defendants at trial and on direct appeal, a separate Office of Capital Post-Conviction Counsel handles petitions for post-conviction relief. *See* Miss. Code Ann. §§ 99-18-7 & 99-39-105; Rec. 317 [Op. ¶22]. The Mississippi Capital Post-Conviction Counsel Act, Miss. Code Ann. §§ 99-39-101, *et seq.*, provides that all expenses for litigation and investigation will be borne by the State, not by the county where the criminal proceedings began. *See* Miss. Code Ann. § 99-39-107. Thus, with the passage of the Capital Defense Litigation Act and the Capital Post-Conviction Counsel Act in 2000, the State created statewide, state-funded offices to provide legal representation

for indigent defendants at all stages of the litigation in capital cases.

In a non-capital case, the responsibility for providing indigent defense lies with the individual county in which the prosecution is commenced. Each county has the authority to enter into contracts with attorneys to represent indigent defendants on a part-time basis, to create a public defenders' office within the county, or to establish a public defenders' office in conjunction with other counties. *See* Miss. Code Ann. §§ 25-32-1, *et seq.* The testimony at trial indicated that three Mississippi counties—notably Hinds County, Jackson County, and Washington County—have created full-time public defenders' offices. Rec. 315 [Op. ¶15]. Eighteen counties authorize trial courts to appoint lawyers on a case-by-case basis, while the remaining sixty-one counties, including Quitman County, employ a contract system. Rec. 315 [Op. ¶16]. After establishing an indigent-defense system that best suits its needs, each county must then allocate sufficient funds to operate the program. *See* Miss. Code Ann. § 99-15-17 ("The fees and expenses shall be paid by the county treasurer out of the general fund of the county in which the prosecution was commenced."); Miss. Code Ann. § 25-32-7 (providing that counties are responsible for paying the salaries and expenses of a public defender office, if it elects to establish one). Even though the State does not directly pay for indigent defense in non-capital cases, the Mississippi Constitution explicitly links the counties' duty to pay for general court expenses with its right to retain all fines and forfeitures recovered by the State. *See* Miss. Const. art 14, § 261 ("The expenses of criminal prosecutions shall be borne by the county in which such prosecutions shall be begun; and all fines and forfeitures shall be paid into the treasury of such county."); Rec. 324 [Op. ¶55]. Moreover, the State provides direct payments to counties, with the result that a large part of each county's annual revenue—over

twenty-five percent in the case of Quitman County—comes from the State itself. DX 23, p. 7.

This dual-track system of providing legal representation for indigent defendants is the result of incremental, legislative reform over the last several years. The court heard testimony from the Quitman County Chancery Clerk (Thomas "Butch" Scipper) about the hearings that began during the Legislature's regular session in 1994. Tr. 106-09. Mr. Scipper and other county officials apprised legislators of the unpredictable and sizable expense associated with indigent defense in capital cases. Rec. 312 [Op. ¶6]. Quitman County, for example, spent more than $70,000 for legal representation for two indigent criminal defendants charged with capital murder in the early 1990s. Rec. 315 [Op. ¶15]. The Legislature responded to the counties' plea by creating a commission to "assess the feasibility and cost of implementation" of a statewide, state-funded public defenders' office. Rec. 316 [Op. ¶18]. The Mississippi Public Defender Commission did not try to determine whether the existing system was constitutionally adequate, nor did it consider limited reforms. Tr. 198-99. The Commission instead was charged only with showing the Legislature whether a statewide system could work and how much it would cost. *Id.* The Commission submitted an "implementation plan" on December 31, 1998, and recommended that a statewide system be implemented over a five-year period. Rec. 316 [Op. ¶18]; PX 1. Less than a month after the Commission submitted its plan, this Court held that indigent death-row inmates are entitled to appointed counsel in state post-conviction proceedings, not just on direct appeal. *Jackson v. State*, 732 So.2d 187, 191 (Miss. 1999); Rec. 316 [Op. ¶19]. The *Jackson* decision changed the terms of the indigent-defense debate by raising new issues not addressed by the Commission's implementation plan and by imposing new costs on county governments. The Court "strongly urged" the

Legislature to address the problem of indigent defense for death-penalty appeals and state post-conviction proceedings. *Id.*

The Legislature acted decisively during its 2000 regular session to reform the State's indigent defense system. Specifically, the Legislature repealed the 1998 Act that had created the Public Defender Commission, established the two offices described above—the Office of Capital Defense Counsel and the Office of Capital Post-Conviction Counsel—and created a new Mississippi Public Defender System Task Force to recommend further reforms in light of the changed situation. *See* Miss. Code Ann. §§ 99-39-101, 99-18-1, and 25-32-71; Rec. 316 [Op. ¶20]; Tr. 211. Mr. Scipper, who served on both the Public Defender Commission and Task Force, testified that the creation of the new offices in July 2000 removed the substantial and unpredictable cost of indigent defense in capital cases, thus making it easier for counties to stay within their budgets. Tr. 213. As will be discussed in detail below, the Legislature's reforms in 2000 addressed many of the specific financial concerns in the County's complaint, which had been filed in December 1999. Rec. 8-10.

Against this backdrop of important legislative reforms, the new Public Defender Task Force submitted its findings to the Legislature in September 2000. Rec. 317 [Op. ¶23]; PX 2. Significantly, after conducting its research and seeking the advice of the senior circuit judges in each district, the Task Force did not urge the Legislature to adopt a statewide, state-funded indigent defense system. The Task Force instead reasoned that

> each county and district is unique, and what works for one district may not be appropriate for others. In this matter, the Task Force realizes that many districts may wish to employ a full-time local office, whereas other districts may have a system whereby contract/appointive counsel performs adequately and, as is done in certain other states, local control is maintained with the state

> assuming the financial costs. The Task Force did not recommend the state-funding of district, trial-level representation for the 2001 Legislative Session, as this would be too much too soon, considering all of the factors.

PX 2, p. 6. The Task Force instead proposed several specific reforms to improve the existing system, such as creating a new office to handle felony appeals and increasing funding through a small assessment on criminal fines. Rec. 317 [Op. ¶23]; PX 2, pp. 3-6. Finally, the general thrust of the Task Force report is that our current indigent defense system definitely has room for improvement, but there is no finding that indigent defendants are receiving constitutionally inadequate assistance of counsel on a systematic or widespread basis.

To recapitulate: Mississippi's current system for providing indigent criminal defense is based upon the distinction between capital cases and non-capital cases. Rec. 315 [Op. ¶17]. Statewide, state-funded offices handle capital cases at every stage of the litigation, while the individual county governments are responsible for non-capital cases. *Id.* The county-based system allows each county to choose the organizational structure that best suits its needs, and it relies upon county boards of supervisors for proper funding and oversight. *Id.* Mississippi's county-based system is neither unusual when compared to those in other states nor inherently flawed: Even though the Mississippi Constitution and the United States Constitution confer a right to effective assistance of counsel, both are silent with respect to *how* a State fulfills its obligation.

The central allegation in this case was that the statutes creating Mississippi's system of indigent defense violate Art. 3, § 26 of the state constitution "because they result, in Quitman County, in widespread ineffective assistance of counsel due to the fact that the County cannot afford to discharge its burden of providing funding for indigent defendants in a constitutional

manner." *Quitman County I*, 807 So.2d at 407-08. Accordingly, the trial testimony focused on the financial condition of the County and on whether widespread ineffective assistance of counsel is present in Quitman County.

Over the last few years, Quitman County has spent $38,361 per year to represent an average of thirty-four indigent defendants per year. Rec. 330 [Op. ¶ 70]; DX 23. In 2001, the County's expenditures for indigent defense represented less than one percent of its budget of $4.7 million. *Id.* The County did not earmark any of the $136,241 in fines and forfeitures it received from the State in 2001 for the purpose of funding its indigent defense program. DX 23, p. 7. The County's witnesses testified that the County's financial condition was poor and that it could not afford to spend any more than it already does on indigent defense. Rec. 312-13 [Op. ¶7]. But despite its economic problems, the County found room in its 2001 budget for more than $100,000 in discretionary spending. DX 11, 12, 16, 23.

On this question of Quitman County's financial condition, the Circuit Court also found no evidence to support the allegation that the county-based system has caused "serious harm to Quitman County and its taxpayers." Rec. 16, 330 [Comp. ¶25; Op. ¶70]. On the contrary, the evidence suggested that the County's financial condition was attributable to overspending on solid waste collection, businesses' defaulting on economic-development bonds, and other factors. Rec. 313, 330 [Op. ¶¶8, 70]. The court found that Quitman County's duty to pay for indigent defense had not forced it to "substantially reduce[]" its spending on other government services like roads, medical care, education, and law enforcement. Rec. 15, 330 [Comp. ¶22; Op. ¶70]. Finally, the Circuit Court found that the cost of providing indigent defense is not "enormous," as the County had alleged: "With the creation of the Office of Post Conviction

Counsel and the Office of Capital Defense Counsel in 2000, the burden of funding indigent defense in capital cases has been taken from the counties. According to testimony, the defense of capital cases was the major source of the 'enormous and unpredictable indigent defense costs' alleged in the Complaint." Rec. 330 [Op. ¶71]; *see also* Rec. 15 [Comp. ¶22]; Rec. 335 [Op. ¶82]; Tr. 205-13. In fact, the creation of the Office of Capital Post-Conviction Counsel in 2000 saved the County, by its own estimate, "hundreds of thousands of dollars." Rec. 9-10 [Comp. ¶4].

Even at the present level of funding, Quitman County is able to retain two experienced attorneys—Allan Shackelford and David Tisdell—to represent indigent defendants in circuit court and justice court. Rec. 313, 321 [Op. ¶¶9, 43]. Mr. Shackelford has practiced law since 1966 and has represented indigent defendants in Quitman County since 1990. Rec. 314 [Op. ¶11]. He maintains a private law practice in Clarksdale, but he spends about seventy percent of his time working for indigent defendants in Quitman, Coahoma, and Tunica Counties. *Id.* Mr. Tisdell has practiced law since 1996 and served as an assistant district attorney for a year and a half before going into private practice. Rec. 313 [Op. ¶10]. About three-fourths of his practice is devoted to representing indigent defendants in Quitman, Coahoma, and Tunica Counties. *Id.* He has served as a public defender in Quitman County since 2000, when he was appointed to replace Mr. Thomas Pearson, who had occupied that position for ten years. Rec. 313-14 [Op. ¶¶10-12].

Quitman County's two public defenders represented an average of seventeen indigent defendants apiece in Circuit Court each year from 1999 through 2002. Rec. 314 [Op. ¶13]. In exchange for their services, each attorney has been paid a monthly fee of $1350 plus benefits

as a county employee. Rec. 313 [Op. ¶9].

Quitman County had the burden of proving at trial that the representation provided by these attorneys is generally ineffective as a result of the State's county-based funding system. Rec. 328 [Op. ¶67]. The County alleged in its complaint that requiring the counties to pay for indigent defense services in non-capital cases "has resulted in constitutional requirements for effective assistance of counsel often not being met" and, more ominously, that the "numerous post-conviction challenges to the adequacy of counsel provided to indigent defendants tried for felonies in Quitman County" was undermining confidence in the criminal justice system. Rec. 16 [Comp. ¶22]; *see also Quitman County I*, 807 So.2d at 407-08; Rec. 328 [Op. ¶67]. At trial, however,

> the County presented no evidence to the Court of any post-conviction proceedings which challenged the effectiveness of appointed counsel. The County did not present proof from any defendant who claimed to have received ineffective assistance, nor did they identify any single case where ineffective assistance was alleged. No proof was presented that any case has ever been overturned in Quitman County because of ineffective assistance.

Rec. 330-31 [Op. at ¶72]. In other words, the County tried to prove that there was widespread or rampant ineffective assistance of counsel in Quitman County without presenting specific evidence of inadequate representation in any individual case.

The County instead chose to rely on the testimony of three experts—two of whom had never personally observed the Quitman County Circuit Court or the public defenders in action, and the third had seen one arraignment day in 2003 when no pleas were taken. Rec. 318 [Op. ¶26]. The experts testified in general terms about the various "tools" of an effective criminal defense, including client communication, investigation, motion practice, plea and sentencing

negotiations, expert consultation, trial practice, and appellate advocacy. Rec. 318 [Op. ¶25]. These expert witnesses who testified at trial were Thomas Fortner, who has served since 1991 as the full-time public defender for Hinds County; Steven Farese, a criminal defense attorney who testified as to the generally recognized standards of the profession; and Stephen Bright, the director of the Southern Center for Human Rights in Atlanta. Rec. 318 [Op. ¶24]. The Circuit Court also heard testimony from the people who are directly involved in the Quitman County indigent-defense system—the three attorneys who have served as public defenders, the three sitting Circuit Judges who preside over the Quitman County Circuit Court (Hon. Albert B. Smith, III, Hon. Kenneth L. Thomas, and Hon. Larry O. Lewis), and the District Attorney for the Eleventh Judicial District (Hon. Laurence Y. Mellen); Rec. 321 [Op. ¶¶44-45]. And on virtually every point, the Circuit Court found the testimony of the actual participants more persuasive than the opinions of the County's experts.

First, the Circuit Court found that the caseloads of Quitman County's public defenders are not excessive. Rec. 331 [Op. ¶73]. Each public defender is required to appear in Quitman County Justice Court one day each month and represents an average of seventeen defendants in Quitman County Circuit Court each year. *See id.*; Rec. 313-14 [Op. ¶¶9, 13]. Taking into account their private law practices and their indigent cases from the other two counties, each public defender handles no more than 165 cases per year. *Id.* The court considered the public defenders' testimony that they do "not feel overburdened with their caseload" more credible that the experts' recommendations that they not take on more than 150 cases per year. *Id.*; Rec. 320 [Op. ¶36]. Moreover, the judges in Quitman County monitor the public defenders' caseloads to ensure that they are manageable. Rec. 322 [Op. ¶48].

Second, the Circuit Court found that the Quitman County public defenders were not shirking their duties to indigent defendants in order to devote more time and resources to their private clients. Rec. 334-35 [Op. ¶81]. The court found the attorneys' and judges' testimony more credible than the expert witness's assertions that "[p]rivate practice take precedence over part time public defender practice. It just does." Tr. 346; *cf.* Tr. 512 (Mr. Shackelford stated that he and Mr. Tisdell "will not allow, and our judges insist that we not . . . allow our private practice to interfere with our public defender work"). Rec. 320 [Op. ¶39]; Rec. 322 [Op. ¶48]; Rec. 331 [Op. ¶73].

Third, the Circuit Court found that Mr. Tisdell and Mr. Shackelford each earned $8150 per month representing indigent defendants in Coahoma, Tunica, and Quitman Counties. Rec. 313-14 [Op. ¶¶ 10-11]. These salaries meet or exceed those paid to part-time public defenders in federal courts, to public defenders in Mississippi and in other states, and to attorneys in the district attorneys' offices in Mississippi. *See* Rec. 320 [Op. ¶41]; Rec. 253.

Fourth, the Circuit Court found that Quitman County's two part-time public defenders have sufficient resources to represent indigent defendants. Rec. 322 [Op. ¶46]. Even though Quitman County does not provide office space, both public defenders testified that they meet with their clients in the courthouse or in meeting-rooms at jail. Rec. 318 [Op. ¶28]. And even though the County does not provide extra funds for expenses or staff, the public defenders use their regular offices and employees when appropriate. Rec. 313, 322 [Op. ¶¶ 9, 46].

Fifth, the Circuit Court found that Quitman County public defenders have an adequate opportunity to investigate their clients' cases, even though the County does not contract with investigators who would be available to assist in every case. Rec. 319 [Op. ¶29]. Instead, the

public defenders generally prefer to conduct their own investigations. Rec. 322 [Op. ¶46]. If a public defender decides that an independent investigation is warranted, he must petition the Circuit Court for the necessary funds and demonstrate a "substantial need" for an investigator. Rec. 327, 334 [Op. ¶¶ 64, 80]. If the Circuit Court grants the petition for an investigator, the County must provide the funds. Rec. 319 [Op. ¶29]. The court did not accept the County's experts' opinion that it is impossible to have a constitutionally adequate system of indigent defense without a stable of investigators who are available to assist in every case. *Id.*

Sixth, the Circuit Court found that neither the number of guilty pleas nor the manner in which they are entered indicates that the Quitman County public defenders are systematically providing their clients with ineffective assistance of counsel. Rec. 333 [Op. ¶78]. Most of the public defenders' cases are resolved through guilty pleas, and fewer than ten percent of their cases from 1995 to 2003 went to trial. Rec. 319 [Op. ¶33]. The evidence also indicated that nearly half of the pleas during that period were entered on the same day as arraignment. Rec. 319 [Op. ¶ 31]. The court did not infer, however, that the practice of entering a guilty plea on the day of arraignment indicates a lack of communication with the client or a lack of adequate investigation. Rec. 333 [Op. ¶77]. The court pointed out that the frequency of guilty pleas in Quitman County Circuit Court is identical to that in other state and federal courts. Rec. 333 [Op. ¶78]; DX 25; PX 5. Further, the procedures for taking guilty pleas are designed to ensure that each plea is made intelligently and after sufficient consultation with attorneys. Rec. 333 [Op. ¶78].

Seventh, the Circuit Court found that the County's public defenders filed substantial motions (including, for example, a motion to suppress but not basic discovery requests) in

seventeen percent of their cases between 1998 and 2000. Rec. 319 [Op. ¶30]; PX 4; Rec. 258. The court drew no inferences from the mere number of motions filed and accepted the judges' testimony that the frequency and type of motions filed was appropriate. Rec. 333 [Op. ¶79]. The County did not identify a case in which a substantial motion was warranted but not filed.

Eighth, the Circuit Court found that the public defenders may file petitions for mental examinations or other expert services. Rec. 319 [Op. ¶32]. As was true with the procurement of independent investigators, the public defenders must use professional judgment on a case-by-case basis to determine whether an expert is necessary. *Id.* The evidence indicated that public defenders file motions for psychiatric examinations, which are handled by the State mental hospital, but that they have requested the services of an expert only once in their non-capital cases. *Id.* Again, the County did not identify a case in which such a motion was warranted but not filed.

Ninth, the Circuit Court found that Quitman County's indigent defendants were found guilty in about eighty percent of the cases that went to trial, and half of those convictions were appealed. Rec. 319 [Op. ¶34]. The conviction rate in Quitman County cases (like the rate of guilty pleas) is comparable to that in other state and federal courts; accordingly, the court drew no inferences from that evidence. DX 25; PX 5. This comparative testimony was especially relevant since federal courts also use part-time public defenders. DX 25.

Tenth, the Circuit Court acknowledged the expert witnesses' opinion that the public defenders in Quitman County are not sufficiently independent of the circuit judges, especially since the senior circuit judge is involved in the hiring decisions. Rec. 320 [Op. ¶¶37-38]. The court did not find, however, that the alleged "lack of independence" had resulted in ineffective

assistance of counsel.

Eleventh, the Circuit Court found that pretrial delays in processing cases and the short time periods in which to prepare for trial could not be attributed to the county-based indigent defense system; while those problems clearly exist, they also affect non-indigent defendants in Quitman County. Rec. 319, 331-32 [Op. ¶¶33, 74]. The court was concerned that indigent defendants were not represented during the time when their cases were on appeal from justice court to circuit court. Rec. 332 [Op. ¶74]. But once again, the court did not find that flaw to be attributable to the county-based system itself.

The Circuit Court thus considered all the County's evidence on the "essential tools of a criminal defense" and the alleged shortcomings of the Quitman County system. Rec. 318, 332 [Op. ¶¶24-25, 75]. In light of the evidence described above, the Circuit Court concluded that the County's evidence "falls short of demonstrating that indigent defendants in Quitman County are receiving ineffective assistance of counsel" as a result of the County's use of part-time, flat-fee public defenders. Rec. 335 [Op. ¶83].

The Circuit Court had stated that the first issue to be decided was "[w]hether the State has breached its constitutional duty to provide indigent defendants with effective assistance of counsel by requiring Quitman County to fund indigent criminal defense in that County." Rec. 311 [Op. ¶4]. Because Quitman County did not carry the burden of proving that the county-based system has led to chronic underfunding and systemic ineffective assistance of counsel, the Circuit Court had no authority to enjoin the Legislature to create a statewide, state-funded system of indigent defense. Rec. 336 [Op. ¶83]. But Judge Lamar did take the opportunity to encourage the Legislature to continue to address the issue of indigent defense in Mississippi.

SUMMARY OF THE ARGUMENT

Two issues were presented to the Circuit Court. First, is Mississippi's county-based indigent defense system, which requires counties to provide the funding in non-capital cases, the cause of chronic underfunding and systemic ineffective assistance of counsel in Quitman County? Second, if the State is systematically failing in its duty to provide effective counsel, are the defects so extreme that the courts must intervene and order the Legislature to establish a statewide, state-funded system of indigent criminal defense? Those issues were articulated in this Court's first *Quitman County* opinion and also in the Circuit Court's opinion. *Quitman County I*, 807 So.2d at 408, 410; Rec. 311 [Op. ¶4].

On the first issue, Quitman County did not meet its burden of proving that the present indigent defense system is unconstitutional because the County (a) did *not* prove that its part-time public defenders are providing constitutionally ineffective assistance of counsel on a systematic or regular basis, and (b) did *not* prove that the deficiencies in the County's indigent defense system are attributable to the current funding system.

Quitman County sought to prove its case by using expert witnesses who testified about the "tools of a criminal defense" and presented the court with raw data concerning conviction rates, the frequency of guilty pleas, the public defenders' caseload, and access to experts and professional investigators. The Circuit Court did not accept the expert witnesses' sweeping generalizations uncritically. Many of the experts' assertions were undermined or contradicted by the testimony of the two current public defenders, a former public defender, three Circuit Court judges, and the district attorney—all of whom were in a position to observe whether the experts' categorical statements had any real-world validity. Moreover, the statistics that the

County's experts relied upon could not bear that was placed upon them. For example, the court did not infer that the frequency of guilty pleas in Quitman County is a sign of ineffective assistance of counsel because a virtually identical percentage of indigent defendants in federal courts and other state courts plead guilty. The Circuit Court did not clearly err when it found that Quitman County's current indigent defense system satisfies the constitutional obligation to provide adequate legal representation.

The evidence also showed that Quitman County is able to provide the necessary funds to support a constitutionally adequate indigent defense system. The Circuit Court found that the County spent less than one percent of its entire budget in 2001 on indigent defense; that the Legislature's decision in 2000 to assume the costs for capital litigation further decreased the burden on the counties; that the County's duty to pay for non-capital indigent defense is not the cause of the County's financial difficulties; and, finally, that the County could allocate additional resources to indigent defense, if its board of supervisors really believed that it was necessary. Thus, even if the County had proven widespread ineffective assistance of counsel, they still would not have established the necessary link between the ineffectiveness and the county-based funding mechanism.

Without proof that the State had violated Art. 3, § 26 by requiring the counties to pay for indigent defense in non-capital cases, the Circuit Court had no authority to enjoin the Legislature to establish a statewide, state-funded system. The responsibility for expending public funds on indigent criminal defense is traditionally a legislative question, and the courts may intervene only in cases of absolute necessity. This is not such a case.

Quitman County has presented five issues for appellate review, none of which has

merit. First, the Circuit Court did not require the County to prove that individual defendants had suffered actual prejudice from the public defenders' performance as counsel. The court did find it probative, however, that the County presented no evidence of specific instances when the public defenders' performance fell below an objective standard of reasonableness—even though the County had alleged in its complaint that there have been "numerous" post-conviction challenges involving Quitman County's public defenders.

Second, the Circuit Court did not apply an incorrect legal standard or commit clear error when it made the findings mentioned above regarding Quitman County's financial condition.

Third, the Circuit Court did not abuse its discretion with respect to certain evidentiary rulings. The court liberally allowed the County's experts to offer their opinions as long as the grounds of the opinion were clear. Yet the County now complains that one of its experts was not allowed to offer his opinion on whether we should "fear[] for the integrity of the court system." Such a vague and irrelevant opinion could not have been helpful to the court, and it was properly excluded. Nor did the court abuse its discretion in allowing three sitting judges to testify about their personal observations on how the indigent defense system operates in Quitman County.

Finally, the Circuit Court's decision is amply supported by the evidence presented at trial and is not the result of improper bias or other factors.

STANDARD OF REVIEW

When reviewing a judgment from a bench trial, this Court will not disturb findings of fact unless they are manifestly wrong: "'A circuit judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor,' and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence." *City of Clinton v. Smith*, 861 So.2d 323, 326 (Miss. 2003) (internal citations omitted). Conclusions of law are reviewed *de novo*. *Par Indus., Inc. v. Target Container Co.*, 708 So.2d 44, 47 (Miss. 1998).

A court's evidentiary rulings are reviewed only for an abuse of discretion. *Whitten v. Cox*, 799 So.2d 1, 13 (Miss. 2000). "The admission of expert testimony is addressed to the sound discretion of the trial judge. Unless we conclude that the discretion was arbitrary and clearly erroneous, amounting to an abuse of discretion, that decision will stand." *Seal v. Miller*, 605 So.2d 240, 243 (Miss. 1992); *see also Terrain Enter., Inc. v. Mockbee*, 654 So.2d 1122, 1131 (Miss. 1995) (evidentiary rulings are subject to harmless error analysis).

The substantive legal standards are equally clear: Quitman County is challenging the constitutionality of Miss. Code Ann. § 99-15-17 and the other statutes that establish a system of indigent defense in non-capital cases that is funded by the counties and organized as each county chooses. The County had to establish the unconstitutionality of this system beyond a reasonable doubt. *Jones v. State*, 710 So.2d 870, 877 (Miss. 1998). Statutes are presumed to be constitutional, and the conflict between a statutory scheme and a constitutional provision must be "palpable" before the courts of this State will declare a statute unconstitutional. *State v. Mississippi Ass'n of Supervisors, Inc.*, 699 So.2d 1221, 1223 (Miss. 1997).

ARGUMENT

I. The Circuit Court applied the correct legal standard for determining whether the indigent defense system in Quitman County has produced widespread ineffective assistance of counsel.

The Circuit Court unambiguously stated that the question before it was *not* "whether in isolated cases the public defenders were ineffective." Rec. 336 [Op. ¶84]. Nevertheless, the County now contends that the 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. . . ." Brief for Appellant at 26.

To be sure, the Circuit Court was expecting to hear testimony about individual cases and examples of ineffective assistance of counsel. Common sense suggests that if Quitman County claims there is widespread and pervasive ineffectiveness, the most probative evidence to support that claim would be testimony about specific instances when the public defenders' performance fell below "an objective standard of reasonableness" as measured by professional norms. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984) (defining a constitutionally "deficient" performance by counsel); *Simon v. State*, 857 So.2d 668, 682-83 (Miss. 2003) (same). The trial court also expected to hear such testimony simply because the County alleged in its complaint that requiring each county to pay for its own public defenders had "resulted in constitutional requirements for effective assistance of counsel often not being met" and in "numerous post-conviction challenges to the adequacy of counsel provided to indigent defendants tried for felonies in Quitman County." Rec. 16 [Comp. ¶22]. If the County had such evidence, they chose not to present it at trial. And the Circuit Court was hardly remiss in pointing out the absence of proof:

> The County alleged that "there have been "numerous post-conviction challenges to the adequacy of counsel provided to indigent defendants tried for felonies in Quitman County." However, the County presented no evidence to the Court of any post-conviction proceedings which challenged the effectiveness of appointed counsel. The County did not present proof from any defendant who claimed to have received ineffective assistance, nor did they identify any single case where ineffective assistance was alleged. No proof was presented that any case has even been overturned in Quitman County because of ineffective assistance.

Rec. 330-31 [Op. ¶72]. As this passage suggests, the court took notice of the fact that the County did not present any evidence on one of the central factual allegations in its complaint.

Quitman County cites that passage as evidence that the Circuit Court "fundamentally misconceived" the nature of its case. Brief for Appellant at 26. Neither the court nor the State Defendants thought the County was seeking to overturn particular convictions. *Id.* Nor does any party dispute that an ineffective assistance claim may be raised prospectively; this Court's decision in *Quitman County I* resolved that issue. Even so, the *Strickland* standard does not become completely irrelevant in cases for prospective, systematic relief.

The County still had to show that the public defenders are performing in a "deficient" manner (the first prong of *Strickland*) and are doing so regularly. *See, e.g., State of Lousiana v. Peart*, 621 So.2d 780, 789 (La. 1993). The Circuit Court did not require Quitman County to prove, on a case-by-case basis, that the deficient performance actually affected the outcome of the trial (the second prong of *Strickland*). The salient point is that the County did not try to show specific examples of when the public defenders' legal representation fell below the objective standard of professional reasonableness. While perhaps not fatal to the County's claim, the absence of specific evidence could not have helped.

II. The evidence of Quitman County's financial condition shows that (a) the County has sufficient resources to fund a constitutionally adequate indigent defense system and (b) the County's obligation to pay for indigent defense in non-capital cases has neither caused the County's present economic troubles nor forced the County to substantially reduce other governmental services.

The County alleged in its complaint that Mississippi's current indigent defense system has "imposed enormous and unpredictable" costs and that the "financial resources available to fund schools, hospitals, local law enforcement and the traditional health, safety, and welfare obligations of county government have been substantially reduced." Rec. 15 [Comp. ¶22], quoted in *Quitman County I*, 807 So.2d at 409. But, as the Quitman County Chancery Clerk admitted, the reason for the unpredictable spikes in budgetary outlays was the expense of defending capital cases—a potentially ruinous cost that is no longer borne by the counties. Tr. at 213. (Indeed, the County had alleged in its complaint that it faced "possible financial ruin" because the Court's *Jackson* decision would require it to pay for post-conviction proceedings in capital cases, at a cost of "hundreds of thousands of dollars." Rec. 9-10 [Comp. ¶4].) The changed circumstances did not go unnoticed by the Circuit Court. Rec. 330 [Op. ¶71].

The court also found no evidentiary support for Quitman County's allegation that the cost of providing indigent defense services had led to decreased funding for other essential services. Rec. 330 [Op. ¶70]. Nor, more generally, was there any evidence that the County's current fiscal problems are the result of spending on indigent defense. Instead, the court found that Quitman County's deficit has been caused by spending on "solid waste, other unfunded mandates, natural disasters, and economic development bonds that were not being repaid." *Id.* As the court remarked, the cost of non-capital indigent defense is not the cause of Quitman County's budget problems, and a wholly state-funded system be the solution to the County's

difficulties.

Quitman County seems to argue that it put on all the proof it needed when Chancery Clerk Scipper announced that the County cannot afford to pay any more for indigent defense than it already does. Brief for Appellant at 29. The County neglects to mention the testimony and documentary evidence on the County's discretionary spending and its spending priorities. *See, e.g.*, DX 11, 12, 16, 23. If the Quitman County Board of Supervisors made indigent defense a higher priority, the County could find the additional funds—even if that meant less discretionary spending on recreation and similar projects.

On a related but distinct point, the County argues that it could not afford to pay for a constitutionally adequate system. They reason as follows: (a) the County's experts opined that the *only* constitutionally permissible system is a full-time public defender's office; (b) the cost of establishing of a full-time office in Quitman County would cost approximately $300,000 to $500,000; (c) the County cannot afford to bring its indigent defense system into compliance with constitutional requirements by creating its own public defenders' office; and, therefore, (d) the State has to relieve the County of that burden by creating a statewide and state-funded office. Brief for Appellant at 29-30. Of course, the County's expert did not explain why a full time public defenders' office in a county with a population of 10,000 would cost more than the full-time office in a county (Jackson County) with more than 130,000 people. *See* Rec. 315 [Op. ¶15]; *Mississippi Official and Statistical Register, 2000-2004*, at 238, 282.

But even assuming that the cost estimate is correct, the County's argument ignores a crucial point: The Circuit Court found that Quitman County's system of providing indigent defense services is not providing constitutionally inadequate legal representation, *even at the*

current level of funding. Unless the County was able to show that it was providing inadequate services, the question of its ability to pay thousands of dollars more per year simply does not come into play.

Moreover, the County cannot plausibly maintain that the Legislature is prohibited from imposing financial burdens on counties. It has long been established that each county is an agency or subdivision of the state, created for administration and other public purposes. *See State of Mississippi v. Hinds County Board of Sup'rs*, 635 So.2d 839, 843 (Miss. 1994). The State's "creator power" over the counties extends to the control of funds in the possession of counties: "The revenues of a county are subject to the control of the Legislature, and when the Legislature directs their application to a particular purpose or to the payment of the claims of particular parties, the obligation to so pay is thereby imposed on the county." *Jackson County v. Neville*, 95 So. 626, 629 (Miss. 1932).

In sun, the County's main allegation is that the county-based system is unconstitutional because it results, "in Quitman County, in widespread ineffective assistance of counsel due to the fact that the County cannot afford to discharge its burden of providing funding for indigent defendants in a constitutional manner." *Quitman County I*, 807 So.2d at 407-08. The Circuit Court found insufficient evidence that the County's public defenders are providing ineffective assistance on a regular basis, and that finding alone is fatal to the County's claim. The court went further and found that the County could indeed afford to spend more if it chose; that the creation of the statewide offices for capital litigation eliminated the possibility that the County could suffer serious financial setbacks because of indigent defense costs; and that spending on indigent defense had not led to deficit spending or substantial cuts in other essential services.

Nothing in the Circuit Court's discussion of Quitman County's financial condition indicates that the trial court disregarded this Court's prior opinion, applied a "newly devised test," or considered a "different issue." Brief for Appellant at 30. The County's second assignment of error is thus without merit.

III. The Circuit Court did not abuse its discretion with respect to its evidentiary rulings.

A. The court allowed Quitman County's expert witnesses to freely offer opinion testimony, including opinions on the ultimate issue before the court, as long as the factual bases and legal criteria were clearly established and the testimony was not redundant.

Quitman County relied heavily on the opinion testimony of its three expert witnesses: Thomas Fortner, Steven Farese, and Stephen Bright. As soon as Mr. Farese was designated as an expert on the generally recognized standards of criminal defense practice, the County asked for his opinion on "whether . . . Quitman County's public defenders . . . are rendering the – an effective criminal defense." Tr. 619, 624-25. The court sustained the State's objection to that question and reminded the County's attorney of the agreement the parties had reached one day earlier when Mr. Fortner was testifying. Tr. 625. At that time, the State Defendants objected to the general practice of allowing attorneys to offer expert opinions on the legal conclusions to be drawn from the evidence. Tr. at 329. The State argued that such opinion testimony was inadmissible, irrelevant, and unhelpful in the sense that allowing attorneys to testify as experts on the ultimate legal issue "just invites the other side to go get another practicing attorney to take the stand to have a battle of experts on an issue which is squarely resolvable only by the Court." Tr. 329-330; RE tab 21. The County's attorney protested that the State's objection

was "much ado about little" because, even if the court did not permit expert opinions on the ultimate issue, the County would "certainly ask" its experts for their opinions about subsidiary issues like conviction rates, motion practice, plea agreements, and other aspects of criminal defense practice. Tr. 330-31.

The court acknowledged that having attorney experts offering opinions on the ultimate legal issue might not be very helpful, but the court ruled that she would

> allow this witness [Mr. Fortner] 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. But I know there are matters that Mr. Fortner can assist the Court on and I will allow him to testify and give those opinions.

Tr. 333. By asking the parties to "stay away" from opinions on the ultimate issue, the court indicated that she would allow expert opinion testimony on specific, fact-based matters while being less receptive to the sweeping and unsupported opinions that the County's attorneys repeatedly elicited. In that respect, the Court was following closely to the Comment to Rule 704. Although "ultimate issue" opinions may be admissible, "[a] question may not be asked which is based on inadequately explored legal criteria since the answer would not be helpful." Comment, Miss. R. Evid. 704. The trial court, who was sitting as the trier of fact, was merely giving the parties some guidance about what opinion testimony would be useful in deciding the issues.

This interpretation of the court's ruling is supported by an exchange that occurred just a few minutes later when Mr. Fortner was asked for his expert opinion "regarding how the system is working in Quitman County." Tr. 338. When the attorney for the State asked if that

was the kind of legal conclusion that the witness should avoid, the Court allowed the witness to answer. *Id.* Mr Fortner responded that the Quitman County indigent defense system is "not a fair system" and that defendants "aren't being adequately represented," but the court quickly interrupted him and said, "Well, I would like you to tell me *what your opinion is based on.*" Tr. 338 (emphasis added).

That single exchange encapsulates the trial court's approach to expert testimony: The court, sitting as the trier of fact, did not find it helpful to have a parade of experts declaring *ex cathedra* that the system is unconstitutional. Therefore, after Mr. Fortner already had testified about specific aspects of the Quitman County system, the court allowed him to offer his expert opinion on the more general question of whether it is "possible for a part-time public defender to do his or her job in an adequate manner." Tr. 358. The trial court, in other words, allowed opinion testimony as long as there was sufficient background testimony to make the opinion helpful.

One day after the court had addressed the proper scope of expert testimony, the County called Mr. Farese to the stand, and after he was designated as an expert, the very first question he was asked was whether, in his expert opinion, the Quitman County public defenders were providing constitutionally adequate representation. Tr. 624. The State objected, and the trial court's understandable response was, "We did hash this [out] yesterday, right . . . ?" *Id.* The County's attorney decided to "focus on some of the specific practices with regard to indigent defense," and Mr. Farese offered many opinions on indigent defense systems in general and on the Quitman County system in particular. (Indeed, his full testimony takes up almost one hundred pages of the trial transcript.)

The trial court did not allow Mr. Farese to answer the two final questions asked by the County's attorney. When Mr. Farese was asked during re-direct examination if he supported a "particular type of defense system," the court intervened:

> BY THE COURT: I think it's in the record two or three times, what kind of system he would support, is it not?
> BY THE WITNESS: I think the Court is correct.
> BY THE COURT: I would sustain the objection on the basis of accumulative nature. I've heard it.

Tr. 698. The County's attorney said that she had "one last question," and that was whether he had "any fears for the integrity of the court system." Tr. 698-99. The State objected and the court sustained the objection, without further protest or explanation from the County. Tr. 699.

The trial court had ruled many times before that such open-ended and sweeping expert opinions were not helpful to the court and, as a general rule, would not be admitted for that reason. At trial, the County described the court's approach to expert testimony as "much ado about little." Now, the County argues that the exclusion of this "one last question" for Mr. Farese's opinion on the "integrity of the court system" constitutes reversible error. Brief for Appellant at 32. Mr. Farese already had addressed his specific concerns about the indigent defense system in his extensive testimony, and allowing one final, sweeping opinion during re-direct examination was redundant and unhelpful. (The Court had not allowed some of the questions for Mr. Fortner on the grounds that they were redundant. *See, e.g.*, Tr. 356.)

The trial court thus took a consistent approach with the expert witnesses by allowing opinion testimony that had a sufficient factual predicate but excluding testimony that either lacked a basis in fact or was unduly repetitive. These rulings were guided by the principles that expert opinion testimony should not be admitted unless it is helpful to the trier of fact and

based on adequately developed facts and legal criteria. Accordingly, the trial court's decision to limit Mr. Farese's opinion testimony was not an abuse of discretion and, moreover, cannot constitute reversible error in light of the extensive opinion testimony he was allowed to give on specific aspects of the system.

B. The court properly allowed sitting Circuit Judges to testify about their personal observations about how the public defender system functions in Quitman County and did not allow the judges to offer improper expert opinion testimony.

Quitman County complains that it was whipsawed by the court's evidentiary rulings that prevented them from introducing some expert opinion testimony but allowed the State to call circuit judges to testify about the public defenders who appear in their courtrooms. Brief for Appellant at 36.

The court correctly handled the difficult issue of judicial testimony. When rejecting the County's request to exclude the judges' testimony, the court observed that it would have been unfair to allow the Plaintiffs to challenge the constitutionality of "this very system over which these three circuit judges preside" but not let the judges share their observations on how the system works or respond to the concerns raised by the County. Tr. 411. The court ruled that the judges could testify if they wanted to and that they would not be designated as experts and thus could not offer legal opinions on the constitutionality of the system. Tr. 410-13. The court added that the judges' testimony would be very useful because it would be "based on their own personal knowledge about the system and how it works in this county and their own personal observations" of the part-time public defenders. Tr. 412.

When Circuit Judge Albert B. Smith III was called to the stand, the court reiterated, for the benefit of the witness and the parties, that the judges' testimony should not include legal opinions or discussions of specific cases but should be limited to personal observations about how the Quitman County public defender system works. Tr. 717. Judge Smith made general observations about the public defenders' "winning a lot of their cases" and the frequency and quality of motions. Tr. 718-19. Judge Smith also testified about the procedures for handling guilty pleas—an issue that was the subject of extensive criticism from the County's experts. Tr. 720-25. None of Judge Smith's testimony could be fairly characterized as improper expert opinion testimony. Indeed, when the State's attorney asked Judge Smith whether he believed that they are "effective advocates for their clients," the court sustained the County's objection. Tr. 725-26.

Circuit Judge Larry Lewis was then called to testify about the appointment of public defenders in Quitman County Circuit Court, the judges' standard practices for accepting pleas, and the public defenders' handling of motions and trials. Tr. at 895-918. He explained that before taking a guilty plea, the judges require each defendant to "certify to the Court that the defendant has informed his lawyer [of] everything that he knows about the charge, the facts of the case." Tr. 898. While the judge would not have direct knowledge of the content or scope of an attorney's private communication with his client, the plea colloquy is designed to ensure that such communication does occur. Tr. 898-99. The circuit judges also ask each defendant directly whether he has committed the crime, and, as Judge Lewis put it, "If the defendant falters in any way at that point, the plea is off." Tr. 899. The circuit judges also require each defendant to certify that he is competent to enter a plea, and Judge Lewis emphasized that the

County's public defenders "understand their obligation . . . to file for a mental examination" if there is any doubt about the defendant's mental condition. Tr. 902.

Judge Lewis testified that he had observed Quitman County's public defenders both in his capacity as a county prosecutor and as a circuit judge and that he always found them well-prepared. Tr. 913-15. He testified that the public defenders regularly file various motions, including motions to suppress evidence. Tr. 915-17. When asked whether he had observed any differences in how the public defenders represented indigent defendants as opposed to their paying clients, Judge Lewis replied, "No, sir. None at all." Tr. 915. When he was asked whether the public defenders were "effective advocates," Judge Lewis carefully limited his answer to the "results of their work," and testified that they are competent in the sense that they prevail in many of their cases. Tr. 916-17.

The judges' testimony should be read in the proper context. Quitman County built its case around abstruse opinion testimony (such as Mr. Fortner's view that economic pressures on part-time public defenders would invariably result in the neglect of indigent clients) and raw statistical data (such as the percentage of indigent cases in Quitman County that proceed to trial). Allowing the trier of fact to hear testimony from the people who actually participate in the indigent defense system helped assign the proper weight to the County's evidence. For example, the County presented evidence that more than three-fourths of indigent defendants represented by Quitman County public defenders plead guilty and then asked the court to infer that the percentage of guilty pleas is attributable to ineffective assistance of counsel. But that inference was not warranted in light of the State's evidence of plea rates in other courts plus the judges' testimony about how pleas are entered in Quitman County Circuit Court.

The County acknowledges that the circuit judges "have personal knowledge of what they observe the lawyers doing in their courtroom," *see* Brief for Appellant at 36, which is exactly why they were called as witnesses. The Circuit Court did not abuse its discretion in relying on the judges' testimony to help it determine whether the public defenders' caseload is excessive, whether indigent defendants are entering into ill-advised plea agreements, and whether the public defenders take seriously the obligation to represent indigent defendants. Rec. 331, 333-34 [Op. ¶¶ 73, 78, 79]. The court did not treat the judges' testimony as expert opinion testimony on whether the public defenders were providing constitutionally adequate representation.

IV. Quitman County did not meet its burden of proving that Mississippi's county-based system of providing indigent defense services is unconstitutional.

Quitman County contends that the Circuit Court's "decision goes against the weight of the evidence." Brief for Appellant at 41. Although the County repeatedly accuses the court of ignoring some of the evidence, the County's own discussion reveals that the court either found the County's evidence less probative than the evidence submitted by the State Defendants or, in some cases, refused to draw the inference that the County wanted.

The County cannot re-try its case on appeal. This Court is required to accept as true all "evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact. That there may be other evidence to the contrary is irrelevant." *Par Indus.*, 708 So.2d at 47 (internal quotation marks omitted). A point-by-point examination

of the County's argument shows that the County is not taking into account the evidence in the record that its unfavorable to its position. Quitman County points out, for example, that its public defenders have a total caseload of around 165 cases a year even though the American Bar Association standards recommend handling no more than 150 cases per year. Brief for Appellant at 40. Because first-hand testimony about the public defenders' caseload indicated that they were not overwhelmed by their work, the court surely was not required to find that handling 165 cases instead of 150 cases had either resulted in or contributed to widespread ineffective assistance of counsel.

Similarly, Quitman County does not take into account the judges' testimony, which generally conflicts with the County's evidence. Nor does Quitman County address the public defenders' testimony about how they generally conduct investigations themselves and decide on a case-by-case basis whether to use the services of a professional investigator or retain an expert witness, *see, e.g.*, Tr. 449, 461, 517-18, 522-23; use their own offices, secretarial staff, computers, and other resources, *see, e.g.*, Tr. 449-50; conduct discovery, *see, e.g.*, Tr. 856-57; and communicate with clients, *see, e.g.*, Tr. 458-59, 514-17, 562-64, 854-56. The testimony of the judges and public defenders was the only first-hand account of how the system actually operates, and it should not be surprising that the court considered that testimony helpful in determining whether there has been widespread ineffective assistance of counsel in Quitman County as a result of the county-based indigent defense system. Finally, the County does not address the State's documentary evidence, which has been discussed elsewhere in this brief and need not be summarized here.

Quitman County also refers to its sparse evidence of deficiencies throughout the State.

Brief for Appellant at 38. Perhaps evidence of statewide failures in indigent defense could have been useful for fashioning the proper remedy. But the court found insufficient evidence of chronic ineffectiveness in Quitman County and thus did not reach the difficult remedial question of whether to order the county to improve its indigent defense system or whether to order the Legislature to create a new statewide, state-funded system. Even if the County had prevailed on the first issue addressed by the Circuit Court, the County still would not have been entitled to the relief it requested. *See Peart*, 621 So.2d at 784, 791 (refusing to order a statewide system where the local public defender had a truly staggering caseload of nearly 420 cases in an eight-month period); *see also Wilson v. State*, 547 So.2d 1338, 1340-41 (Miss. 1990) (finding insufficient grounds for enjoining the Legislature to expend public funds on indigent criminal defense). For these reasons, the Circuit Court's decision is amply supported by the evidence presented at trial.

V. The Circuit Court's observation that Mississippi's system of providing indigent defense should be improved by the Legislature—even though there was no proof in this case of a constitutional violation that would warrant judicial intervention—is not a showing of improper bias or opinion.

Quitman County's final argument focuses on the closing paragraphs of the Circuit Court's opinion. The County charges that Circuit Judge Ann H. Lamar violated Canon 3A of the Code of Judicial Conduct and "injected an unfortunate note of personal opinion into a decision of statewide significance and constitutional import, *and* contrary to the expressed view of the majority of the *Quitman* Court." Brief for Appellant at 42-43. Here, quoted in full, are the passages that the County finds objectionable:

> The County bears the burden of proving that the rights of indigent defendants are being violated in Quitman County and across the state to the extent that this court should hold the funding scheme established by our legislature as unconstitutional. While this lawsuit has raised issues of statewide concern which give rise to serious constitutional dilemmas, the Court concludes that the County falls short of demonstrating that indigent defendants in Quitman County are receiving ineffective assistance of counsel. . . .
>
> The question before this Court is not whether the county-based system is the best system of indigent defense. The question is not even whether in isolated cases the public defenders were ineffective. Rather, the question is whether Mississippi's county-based system is a constitutionally adequate system of indigent defense. This Court finds that our system meets constitutional demands. This is not to say that another approach would not be more desirable. 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.

Rec. 335-36 [Op. ¶¶83-84].

Circuit Judge Lamar's ability to distinguish between her own personal views about the desirability of a statewide public defenders' office and her judicial authority to grant that relief given the facts of this case is commendable; it is not grounds for reversal. Our judiciary does have the extraordinary power to order the Legislature to expend public funds, but only "in cases of absolute necessity." *State v. Hosford*, 525 So.2d 789, 798 (Miss. 1988) (holding that a court may compel a county board of supervisors to comply with its statutory duty to provide adequate courtroom facilities). But in this case, Quitman County did not meet its burden of

proving that the county-based system has resulted in widespread ineffective assistance of counsel and could not carry the further burden of showing that their requested injunction was the proper remedy. Until such a showing is made at trial, the decision whether to implement a statewide, state-funded public defender office is a question for the Legislature.

CONCLUSION

For the reasons set forth above, the Defendants-Appellees—the State of Mississippi, Governor Haley Barbour, and Attorney General Jim Hood—request that the judgment of the Circuit Court be affirmed.

Respectfully submitted, this the 15th day of November, 2004.

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CERTIFICATE OF SERVICE

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This the 15th day of November, 2004.

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