No. 20003-SA-02658

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.

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

REPLY BRIEF FOR APPELLANT

ORAL ARGUMENT REQUESTED

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INTRODUCTION

The crux of Mississippi's defense of its current system of indigent defense is that in fulfilling its duty to provide "effective legal representation at the public's expense," the State may "experiment" in funding a manner to provide that defense. Appellee's Br. at 4. But experimentation is not abrogation, and Mississippi's more than forty years of "experiments" with the lives and liberty of its poor citizens has lasted far too long. Quitman County demonstrated at trial that Mississippi's current patchwork system of funding indigent defense simply cannot do the job; it cannot provide poor defendants accused of a crime with even the semblance of an effective defense pursuant to the requirements of *Conn v. State*, 170 So.2d 20 (Miss. 1964) or *Gideon v. Wainwright*, 372 U.S. 335 (1963). As a result, this Court should reaffirm the principles it set forth most recently in *Quitman v. State*, 807 So.2d 401 (Miss. 2001) and order a statewide, state-funded system of indigent defense in Mississippi.

ARGUMENT

I. MISSISSIPPI, LIKE THE CIRCUIT COURT, IGNORES THE RECORD EVIDENCE DEMONSTRATING THAT QUITMAN COUNTY CANNOT PROVIDE EFFECTIVE INDIGENT DEFENSE.

At trial, Quitman County presented overwhelming evidence – factual, documentary, statistical and expert – proving that the defense routinely and systematically provided to its poor citizens is inadequate to secure their constitutional rights. Additionally, Quitman County demonstrated through statewide studies and surveys that indigent defense in many other Mississippi counties systematically fails to meet constitutional obligations.

Moreover, Quitman demonstrated that it is Mississippi's *funding system itself* that has resulted in constitutionally inadequate defense for the poor in counties around the state

(and particularly poor rural counties like Quitman). Much of the evidence Quitman County presented was either ignored or discounted by the Circuit Court, and likewise has been disregarded by Mississippi in its argument on appeal. When properly considered, this evidence requires that the trial court decision be reversed and that pursuant to the standards set forth in *Quitman*, a statewide, state-funded indigent defense be implemented.

A. The Circuit Court Ignored the Significance of the Statistical and Case-by-Case Evidence of Inadequate Indigent Defense in Quitman County.

The Circuit Court and the State in this appeal attempt to make much of Quitman County's supposed lack of proof that particular defendants received constitutionally *ineffective* defense under *Strickland v. Washington*, 466 U.S. 668 (1984) or *Simon v. State*, 857 So.2d 668 (Miss. 2003). Indeed, the State argues that it is "common sense" that these cases should have governed the proof to be presented at trial. Appellee's Br. at 22. That argument entirely misses the point of this Court's decision in *Quitman v. State* – that in a prospective indigent defense case (as opposed to a post-conviction appeal) the trial court is required to assess whether the "tools" of an effective indigent defense are provided and not simply look at the end-result of an inadequate defense in a particular case. The state's *Strickland* argument also ignores the substantial and highly significant *statistical* proof Quitman presented by painstakingly analyzing case-by-case all of the public defender cases for indicia of effective representation. For example, Quitman demonstrated conclusively that the public defenders routinely and systematically pled their clients guilty on the day of arraignment without first providing any semblance of the "tools" of an effective defense. Indeed, between February 1995 and March 2003, fully 57% of all guilty pleas involving the Quitman County public defenders were entered *on the very day*

of the arraignment. RE 3 (Tr. Ct. Op. ¶ 31) RE 11. During that same period over 40% of all public defender cases in Quitman pled guilty on the day of arraignment. *Id.*

The significance of this evidence cannot be minimized. It demonstrates that the Quitman County public defenders, who first meet their clients on the day of arraignment, do little or no case preparation before advising their clients to plead guilty. Indeed, the District Attorney admitted that he gives the public defenders their client's file *after* they have purportedly advised on a disposition "to legitimize maybe their suggestion to their client." RE 7 (Tr. 1018). District Attorney Mellen also conceded that public defenders often receive his plea offers and accept on behalf of their clients' significant sentences "within a matter of minutes." RE 7 (Tr. 1020-21). Defenders at trial testified that they *believed it was proper to rely on the prosecution's file*. RE 7 (Tr. 1003-4), Tr. 856-58, 515. One of the public defenders actually testified that this was done pursuant to a "gentleman's agreement" with the prosecution. Tr. 515. Moreover, this extraordinary level of arraignment day pleas also demonstrates that the Quitman County public defenders do virtually no investigation or motion practice to improve their clients' strategic position before advising on a case disposition.

In fact, Quitman demonstrated through statistical analysis and other proof that this lack of motion practice and strategic case development pervades all of the public defense work in Quitman. Notably, public defenders filed *no substantive motions* (*i.e.*, motions

other than for substitution of counsel or form discovery) in almost 85% of cases between 2001 and March 2003. RE 14; RE 16 (Tr. 350-51).[1]

Perhaps even worse, the public defense system provides defenders with disincentives to file strategic or substantive motions and to investigate adequately a client's defense. Remarkably, District Attorney Mellen testified that it is his practice to withdraw a plea offer if a defense attorney were to make a motion for a psychological or psychiatric evaluation, or indeed any such motion he would consider "frivolous." RE 7 (Tr. 1011-1012,1021).

The entire structure of the defense system also undermines any possibility of an effective defense. First, as a poor county, Quitman begins with the structural handicap of holding only two trial sessions per year. As a result, Quitman defendants may spend many months in jail prior to arraignment or trial. And yet, as the defenders testified, they did not see themselves as having *any* attorney-client relationship with their clients from a Justice Court initial appearance to the arraignment in Circuit Court – a critical investigation phase in which the client is utterly without counsel as guaranteed by law. Tr. 475, Tr. 508-509. Even the defenders find this "gap" in the system to be "troubling." Tr. 475. Of course, the State and the Circuit Court made little note of this fact, because it is both objectively startling evidence of the inadequacy of the system, and because it demonstrates the lack of attention public defenders show towards their clients during critical phases of the case when a case needs prompt and thorough investigation and

[1] Further evidencing the negligible motion practice of the public defenders, Mr. Tisdell admitted for the record that the only motion to suppress he filed in Quitman (that the state had identified) was for a private client. Tr. 877.

presentation of the evidence that may favor the defense. In addition, the fact that public defenders appear at Justice Court but then are not actually appointed until the Circuit Court demonstrates one further point: the courts in Quitman are simply a "processing" system for the poor. *See* Tr. 752-56. This is not surprising in a system where the public defenders serve more than one county, are permitted private caseloads and outside employment, and serve counties with more extensive caseloads such as Tunica. The result is that the public defenders, even without their Justice Court caseloads, exceed substantially the maximum standard caseload recommended by professional standard-setting bodies.[2]

Moreover, the facts that caseloads are clearly excessive by recognized objective standards and that Circuit Court sessions last only a few weeks a year further encourage defenders to plead their clients guilty to enhance their time for other – and often more lucrative – opportunities. As District Attorney Mellen testified, the system encourages pleas on the day of arraignment because it is "convenient" and administratively easier to resolve cases on the day when all parties and the court are present. RE 7 (Tr. 1020-21).

Quitman's process-oriented structure results in some "bizarre" and disturbing practices, as the evidence at trial demonstrated. Tr. 753-756. First, clients accept felony pleas based upon categories of cases rather than the particular facts and circumstances of the alleged offense. RE 7 (Tr. 1005-07). Second, clients receive little or no "informed

[2] *See* National Advisory Committee on Criminal Justice Standards and Goals, RE 15 at MS 03843. Mr. Shackelford's and Mr. Tisdell's Circuit Court felony caseloads average 164 and 169 respectively, without appeals and private cases, well in excess of the maximum recommended caseload of 150. PX4.

advice" prior toward making what can be the most critical decision of their lives.[3] Third, because any advice that is given occurs on the very day and in the very courtroom where a disposition is rendered, such counsel occurs under circumstances that can only fairly be described as duress. Indeed, as the public defenders conceded and witnesses testified, public defenders actually advise clients in groups provided that they would "admit[ ] their guilt." Tr. 559-60. This creates a "chaotic" situation where some clients do not even recognize their lawyer, and a central hallmark of our judicial system, the attorney-client privilege, is absent. RE 5 (Tr. 703-05). Indeed, the Quitman arraignment day processing was so troubling that a local minister found it necessary to create a "court ministry" to witness the arraignments and advocate for the accused. RE 5 (Tr. 700-02, 708).

Finally, statistical evidence also demonstrated at trial that those cases that do proceed beyond arraignment day and are set for trial receive little more attention. For the eight percent of felony cases that do go to trial, trials are scheduled only a few weeks after the public defender is first appointed at arraignment. RE 5, RE 3 (Tr. Ct. Op. ¶ 33). Any investigation during this period is likely to be based upon stale information or information that is obtained from the prosecution file. RE 7 (Tr. 1003-04). And unlike the typical public defender office or even the prosecution, public defenders in Quitman have no independent investigators.

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[3] Referring to the pattern of accepting pleas on the day of arraignment Mr. DeGruy asserted "when you have so many occurring on the same date, that causes concern and raises a red flag because you cannot have adequate communication with your client. You cannot have a 15 minute conversation with your client on a criminal felony and know all that you know." Tr. 628.

Indeed, in addition to simply relying on the prosecution's one-sided file, defenders actually used the Sheriff's office to find witnesses.[4] Tr. 539. Moreover, two defenders conceded they had never *asked for an investigator in a noncapital trial*, and a third indicated that his one request for such an investigation was summarily denied. Tr. 564, 517; Appellant's Br. at 18. And as to expert services, which the courts have recognized can be a critical tool of effective representation,[5] one defender did not know what an "outside expert" was and only one of the three defenders since 1990 had ever requested an expert in a noncapital case. Tr. 876. Where there have been psychiatric or forensic evaluations by the defense in Quitman, they have been through state experts or the state crime lab. Tr. 532, 534, RE (Tr. Ct. Op. 432), RE 18 (Tr. 773-74,775-776), RE10.

Thus, when looking at the overwhelming statistical evidence from case-by-case analyses of felony cases in Quitman County, together with the testimony and admissions of the District Attorney and public defenders themselves, there can be no question that Quitman County indigent defendants simply have not been provided with the tools of an effective and constitutional defense.

B. The Trial Court and Mississippi Ignore the Weight of the Evidence of The Systematic Failure to Provide Effective Indigent Defense.

Lacking any substantive response to the evidence introduced by Quitman as to the chronic constitutional effectiveness of its system for providing indigent defense, the State argues (1) that other states are no better; (2) that the Quitman caseload in particular (of the

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[4] During trial Deputy Sheriff Sims attested to assisting the defenders in locating indigent clients and witnesses citing the reason for such activity as "generosity and courtesy...because we know that they're short of man power." Tr. 539-40. Mr. Bright called this behavior "bizarre." Tr. 755.

[5] *See Ake v. Oklahoma*, 470 U.S. 68 (1985).

several counties served by the defenders) is not particularly excessive; (3) that the judges and defenders defended their own provision of services; (4) that resources – salary, expert, forensic, and the like – were readily available to the defenders had such resources been required; (5) that pleas and guilty verdicts are commensurate with other jurisdictions; and (6) that problems such as the lack of independence of the defenders from the judiciary, delays in processing cases, and gaps in representation and short time preparation times do not constitute constitutional ineffectiveness attributable to the county-based system itself. *See* Appellees' Br. 13-17.

These points all miss the mark. This case is about Mississippi's county-based system of indigent defense, not that of other states, and whether other states have similar or differently structured systems is of little relevance to the case before this Court. It is pertinent to note, however, that a marked trend towards statewide public defender organizations and systems has also been accompanied by recent substantial litigation in other states around the country where county-based or appointed systems still exist.[6] Moreover, the State's own exhibit introduced at trial refuted its claims that the majority of states fund indigent defense with state and county funds. The Bureau of Justice Statistics its cites actually support the County's case, by noting that in a 1999 study 21 states provided 90% or more of funding for indigent criminal defense, while only 11 provided 100% at funding. Furthermore, the report reflects that 27 states use primarily state-funded or completely state funded systems as compared to the mere 17 that use completely county or primarily county funds, far from a majority. DX1.

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[6] *See, e.g., Anderson v. Louisiana, No. 2004-5405 (La. Dist. Ct. filed Sept. 23, 2004).*

Second, the public defenders who serve Quitman County in addition to other more populous counties have excessive felony caseloads by any objective standard, and yet the county-based part-time defender system still results in their taking additional private cases and other work beyond their Circuit Court, appellate, and Justice Court matters. It is this fundamental built-in structural flaw in the part-time public defender system that results in the systematic undermining and underprovision of the tools of an effective defense.

Third, that the public defenders – who find their jobs to be lucrative while leaving free time for their ministry, fishing, "girl watching," real estate-investing and the like – testified to their own competence is neither surprising nor relevant in light of the extensive evidence at trial of the system's failure to provide the tools of an effective defense. Moreover, that the judges who oversee the processing of defendants on arraignment day believe that the representation they see is not ineffective is hardly surprising. As the District Attorney and public defenders admitted, the system is designed so that there is little investigation, little controversy, they "work real well with" and "get along with" each other, and the utter lack of independence or any meaningful balancing of the prosecution and defense leaves only the defendants worse for wear. Tr. 1004-05, 1021, 1018.

But more importantly, the non-expert testimony of the judges, peculiarly credited by the Circuit Judge over the expert testimony of nationally and statewide-prominent defense experts, simply was beside the point. All of the key tools of an effective pre-trial defense – investigation, research, advice and counsel, negotiation, expert and forensic consultation and trial preparation – take place outside of the purview of the court. As the

judges readily admitted, they were not and should not be privy to the provision of these tools of adequate indigent defense.[7]

With regard to resources available to the public defenders, Mississippi claims that the public defender salaries ($1350 per month, per defender) are fully adequate in light of the caseload of the County. But it is crystal clear that such salaries are simply not adequate to keep the defenders from taking appointments in other counties, private cases, and even sideline occupations. Moreover, these "salaries" are a misnomer because they are structured to cover office supplies, overhead and all of the investigative and other costs and services that public defenders may provide.[8] Tr. 448-50; RE 6 (Tr. 337). Clearly, the defender's compensation is reduced to the extent he devotes any portion of this sum to client services, only aggravating the disparity of resources between the prosecution and defense. RE 15 at MS 03868-69.

The built-in structural disadvantages of a part-time system that encourage the taking of other work and the underutilization of financial resources on behalf of clients in favor of added personal income for the defender, render the State's argument chimerical. The undeniable statistical evidence presented by Quitman County from a case-by-case analysis of the defenders' felony dockets demonstrates that they do no or virtually no investigation, negotiation, motion practice or even confidential counseling and advice.

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[7] Tr. 728. Judge Smith repeatedly affirmed that he did not observe any of the "out-of-court" activities of the defenders. *Id.* Thus he was unable to offer testimony on this crucial point.

[8] As the Mississippi Public Defender Commission report states it is the county's responsibility to provide office space, secretarial assistance and other operating expenses for public defenders. Yet the commission did not "encounter a single part-time contract public defender that received this minimal operating support from the annual salary." (PX 1 at MS 02838).

Similarly, the State's argument that other jurisdictions have comparable rates of guilty pleas or convictions is entirely irrelevant. The crux of Quitman's statistical proof was that a high percentage of cases in Quitman pled on the *date of arraignment*, typically on the same day the defender met the client, with typically no prior file review by the defender, with no motions or negotiations, and based upon the category of the offense rather than the client's circumstances. How often other jurisdictions plead or convict defendants simply cannot address these flaws in Quitman's and Mississippi's county-based system.

Finally, where the Circuit Court and the State concede flaws in the system, they quickly move the target by claiming that such flaws have nothing to do with the adequacy of the county-based system itself. And yet it cannot be denied that the justice system is shaped as a whole by the poverty that pervades county governments and that the meet-and-plead processing there reflects the realities of the system, and most particularly the need to plead most cases out on the day of arraignment. Moreover, it is equally clear that the "gaps" in representation that result from the Quitman defense system, including the total absence of counsel between Justice and Circuit Court (and thus the lack of any investigation or preparation) flow from a structural, systemic flaw in the county-based system and that simply would not occur in a more rational full-time defender system.

II. THE CIRCUIT COURT AND THE STATE IGNORE THE EXPERT TESTIMONY AND EVIDENCE THAT THE COUNTY-BASED SYSTEM IN MISSISSIPPI IS CONSTITUTIONALLY FLAWED.

A. Quitman's Expert Testimony Was Undisputed.

It was not only the substantial evidence from Quitman County public defenders and other State witnesses that should have resulted in a decision for Quitman County. In

addition, Quitman presented extensive expert evidence and testimony that received little or no credit by the Circuit Court, even though it was unrebutted by *any* expert testimony or evidence from the State.

These expert and lay witnesses, including Hinds County public defender Thomas Fortner, nationally-known indigent defense expert Stephen Bright, noted Mississippi defense counsel Steven Farese, and Mississippi Office of Capital Defense Counsel Director Andre DeGruy, all testified to the problems inherent in and rampant throughout the Mississippi part-time public defender system. Moreover, the Circuit Court wholly ignored evidence in the record from the Spangenberg study, "a comprehensive expert study of indigent defense provision in Mississippi," as well as studies conducted or collected by various entities within Mississippi, such as the Public Defender Commission, the Public Defender Task Force and its survey of Circuit Court Judges, and the Study Commission on the Mississippi Judicial System. *See Appellants' Br.* at 12, 13, 23.

All of this expert testimony and evidence was admitted but not given proper weight. This was both clear error and an abuse of the Circuit Court's discretion. *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, 93 (Miss. 1931); *Holmes v. Holmes*, 123 So. 865 (Miss. 1929.)

For example, expert Thomas Fortner provided unrebutted testimony that the county-based part-time public defender system in Mississippi encourages

- "spending the least amount of time possible on a case";

- "disposing of these cases quickly as possible so that you can . . . go to other counties you serve and do the same thing there and still have time to engage in your private practice"; and
- "disposing 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."

Tr. 345, 52-53.

Indeed, Mr. DeGruy, an experienced capital defense counsel who has seen trials around Mississippi, testified that he had seen the same lack of vigorous defense endemic to Quitman as set forth above, in counties throughout the state including a lack of investigation, use of expert witnesses, motion practice or effective plea or sentencing negotiations. RE 4 (Tr. 587-90). And unlike the judges whose testimony was credited as if they were qualified as experts in indigent defense, Messrs. DeGruy and Fortner are highly trained and qualified Mississippi defense counsel who have direct experience observing and evaluating the out-of-court conduct and preparation by part-time public defenders in Mississippi.

Similarly, the Spangenberg Group, who published a study of indigent defense in Mississippi under the auspices of the Mississippi Bar that was received into evidence but then ignored by the Circuit Court, concluded that the same system in Quitman County existed throughout the state:

> 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.

RE 15 at MS 03868-69.

In particular, the Spangenberg study identified problems throughout the public defense system in Mississippi that are identical to those in Quitman County:

> [T]here 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.

Id. Indeed, for each of these flaws identified by the Spangenberg Group as existing throughout Mississippi, Quitman introduced evidence at trial to prove proceedings in its courts are no different. *See, e.g.*, Tr. at 475, 508-509, Tr. 591, Tr. 339, Tr. 876, Tr. 559-560, Tr. 352 760-61, RE 16 Tr. 341.

Similarly, the Circuit Court gave inadequate consideration the expert testimony of noted defense experts Steve Bright and Steven Farese. Mr. Farese, based upon his study of the system and representation of indigent defendants in counties around the state, found that the system was "broken," "made to fail," and in some regards a "shock [to] our legal conscience." RE 17 (Tr. 647-48, 697). He concluded that the part-time public defender system with its built-in disincentives and lack of defense counsel independence is imbalanced and unlikely to yield "justice as the final product." RE 17 (Tr. 648-49). And Mr. Bright, who has studied indigent defense systems and structures around the United States, concluded that the best the Mississippi system could offer was "superficial processing" of defendants with "no" real provision of a vigorous criminal defense. RE 18 (Tr. 760-61). These experts also concluded that the only way to resolve these problems is for the state to establish a statewide system of indigent defense. *See Appellants' Br.* at 45.[9]

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[9] Mr. Farese testified that a statewide system would give balance to an otherwise unbalanced system. RE 17 (Tr. 648-49). While Mr. Fortner insisted that a system such as Quitman's encourages the type of practices brought to light during trial and MS part-time

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B. The Court's Error in Ignoring Unrebutted Expert Testimony Was Compounded by Crediting the Testimony of Local Judges.

While the Circuit Court's refusal to properly credit Quitman County's extensive expert testimony already was error, that error was seriously compounded when the court chose to give substantial weight to the subjective opinions and observations of the local circuit judges, whom it previously had held would not be allowed to testify as experts in indigent defense. The State relies heavily in its appeal brief on this judicial testimony as a basis for upholding the decision on appeal. And yet as set forth in Quitman's opening brief and herein, reliance on that testimony as to the competence of the public defenders was error for several reasons. First, to permit testimony at all over the objections of the County put both the Circuit Court Judges and the defenders who testified in an irreconcilable double bind – where an admission of constitutional error by either group of participants could result in serious professional consequences. This testimony simply should not have been permitted. Second, the Circuit Court continually allowed testimony from the judges that went to an ultimate issue in the case, and that was not proper testimony from a non-expert witness, such as that the defenders were "competent" and "effective advocates."[10] But finally, and perhaps most importantly, this testimony simply

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defense system will always be inadequate, while a statewide system would solve these problems (Tr. 358-59), RE 16. Mr. Bright cited such "bizarre" practices as using the sheriff to find witnesses for cases as evidence of a system that is far too cozy and interdependent to ensure responsibility to the system and not only superficial processing. *Id.* He also provided as evidence several states that have implemented statewide systems that solve many of the same problems faced by counties in Mississippi. RE 18 (Tr. 827-28).

[10] The admission of and reliance upon what at best could be lay opinion evidence was even more striking in light of the manner in which the Court hamstrung the testimony of Quitman's experts to prevent them from opining whether the county-based system is

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was not probative on the critical issue before the court – whether the defenders were providing the "tools" of an effective indigent defense.

Indeed, Circuit Judge Smith admitted that "a very large part" of a criminal defense counsel's work is done out of court and he has no personal knowledge of this vital work. RE 6 (Tr. 728-38). Similarly, Judge Lewis testified that he has no personal knowledge whether the public defenders investigate their cases, attempt to negotiate pleas or communicate with clients prior to entering a plea or going to trial. Tr. 918-19. As a result, the Circuit Court's reliance on this evidence for a finding of effectiveness was both legal error and an abuse of the trial court's discretion.

III. THE CIRCUIT COURT AND MISSISSIPPI ERR IN CONCLUDING THAT QUITMAN COUNTY IS CAPABLE OF PROVIDING FOR AN ADEQUATE INDIGENT DEFENSE.

A. Mississippi and the Trial Court's Insistence Upon Quitman's Lack of Poverty Belies the Undisputed Record.

Quitman is poor. That seems an obvious observation. And yet both the Circuit Court and the State go to great lengths to try to demonstrate that Quitman is either just not poor enough, or perhaps just making bad choices with taxpayer money. While the exercise seems almost absurd, the Circuit Court and State seem to believe that Quitman County should be required to demonstrate that every dollar allocated to such needed services like Meals on Wheels and the small public library is money taken from indigent defense. But this was simply not the task set out by this court in *Quitman v. State*, 807

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providing an adequate or effective indigent defense. *See* Appellant's Br. at 31-33. It was clear error for the court to allow that evidence in but then preclude experts Farese and Fortner to from utilizing their extensive knowledge and expertise to provide expert testimony on directly relevant matters at issue. *See* Appellant's Br. at 31-37.

So.2d at 408. Rather, the question this Court asked was whether if the current system of indigent defense is not adequate, can Quitman County or counties like it pay the much higher costs of providing constitutionally adequate indigent defense? On this question, the answer is a resounding no. *See, e.g.*, RE 3 (Tr. Ct. Op. ¶¶ 41-42) (unrebutted expert testimony that standalone county system provide adequate tools would cost 10-15 times more than Quitman pays now). Simply stated, Quitman is a county that survives on a revolving credit line. Like many poor Mississippi counties, Quitman has a low per capita income, high unemployment and a high demand for public services. These characteristics were detailed extensively by Quitman's county executives at trial below.

The evidence showed that Quitman County cannot raise taxes to pay for existing or new programs. Tr. 147-51. The evidence also showed that Quitman already has an accumulated deficit – due in large part to federal and state mandates – 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. Further, the evidence showed that Quitman cannot change its priorities by cutting expenditures to start new programs or expand existing ones such as indigent defense, since services are already below a bare bones level. Tr. 145-46. Indeed, 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, and make other major cuts. Tr. 162. And, contrary to the State's suggestion that the county has substantial discretionary funds, 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.

In short, the State's argument that the county could fund an adequate indigent defense if only it eliminated its minimal contributions to keeping alive programs desperately needed by poor children and senior citizens is contrary to the evidence at trial and legally irrelevant under this Court's *Quitman* decision.

IV. MISSISSIPPI SIMPLY IGNORES ALL OF THE ARGUMENTS IN FAVOR OF STATEWIDE PUBLIC DEFENDER SYSTEM EFFORT TO DEFEND THIS CASE.

Mississippi, like any defendant, surely has its right to an adequate defense. And yet the State, who represents all of its citizens, goes to extraordinary length to avoid the critical judicial, legal, and constitutional questions at the heart of this case. Those questions are few, and have been wrestled with by this Court for decades. Is Mississippi providing constitutionally effective defense for its indigent defendants? Is the current, hodgepodge and patchwork system inherently flawed, broken, and imbalanced such that the integrity of the system has been put at risk? And is the system so in danger that only a statewide state-funded system can fix these fundamental flaws?

The answer to these questions is clear from the trial court record below. Mississippi counties simply cannot provide indigent defendants with constitutionally effective defense, and the current structure of the system renders such effective representation a practical impossibility.[11] Moreover, in light of the abject failure of

[11] Indeed, Mississippi's only purported solution to the problem, to provide some limited funding for capital defense, was firmly and soundly rejected at trial by the very director of the Office of Capital Defense, Andre DeGruy. Tr. 587-90. Moreover, this funding occurred after Quitman filed suit, was underfunded, and was wholly inadequate to solve

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Mississippi in its forty year "experiment" requiring counties to supply such defense, history shows that only one solution is possible – that the State take over the funding of indigent defense. Since this case was filed five years ago, neither the Mississippi Attorney General's Office nor the State Legislature has made a positive step towards advocating statewide funding for the funding of noncapital indigent defense. The defense system continues to languish, despite ample evidence from constituencies around the State -- many of whom have filed amici briefs in the case -- that it is simply too broken to fix.[12] Mississippi fails even to address in their brief the inherent right of the judiciary to protect its own integrity, but that is a right well-recognized at law. [13] This Court should not hesitate where others fear to tread, and should order a state-funded system forthwith.

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the chronic underfunding of the system as a whole. *Id.* at 587-90, *see also* Tr. 180-82. 183-84.

[12] *See e.g. Study Commission on the Mississippi Judicial System. Report to the Mississippi Legislature*: P 3: ("the present system of indigent defense in Mississippi is woefully inefficient. It is a burden on the counties. Part-time public defender system lead to part-time justice as can be seen by the delays caused by conflicts in public defenders' schedules.")

[13] *See, e.g. Hosford v. State*, 525 So. 2d 789 (Miss. 1988) (The "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 the courts do not atrophy."); *Gideon v. Wainwright*, 372 U.S. at 344 ("From the very beginning, our state and national constitutions 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.")

CONCLUSION

For the reasons set forth herein and its opening brief on appeal, Quitman County hereby requests that the Court reverse the Circuit Court's judgment and order as a remedy the implementation of a statewide state-funded public defender system.

January 4, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have caused J. Christopher Klotz, to deliver on this 4 day of January, 2005, as indicated below, a true and correct copy of the foregoing Reply Brief for Appellant and Appellant's Record Excerpts to the following:

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