ORIGINAL

No. 2000-IA-01477

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

Defendants-Appellants,

vs.

QUITMAN COUNTY, MISSISSIPPI,

Plaintiff-Appellee.

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

BRIEF FOR APPELLEE

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

Plaintiff-Appellee
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- Quitman County Supervisor Bobby E. Turner
- Quitman County Supervisor Brooks Earnest
- Quitman County Supervisor Manuel Killebrew
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INTRODUCTION

Ten years ago, a majority of this Court called upon the Legislature to provide statewide, state-funded indigent defense, instead of imposing the obligation on the counties. "[T]he Legislature [should] address the problem of indigent representation on a statewide basis, rather than thrust the burden on financially-strapped counties." *Mease v. State*, 583 So. 2d 1283, 1285 (Miss. 1991). This followed a statement made the previous year by the Court, in the context of a death penalty case, to the effect that the State should fund the indigent function just as it does the prosecution function. "[W]e would encourage the Legislature to review the system and provide funds for the representation of indigent defendants in capital cases from State funds rather than county funds. Since the State funds the prosecution in these cases, why not the defense?" *Wilson v. State*, 574 So. 2d 1338, 1341 (Miss. 1990). As this Court has recognized, counties cannot afford to pay for indigent defense and most counties also lack the expertise to create a viable program. While the State funds a statewide system of full-time prosecutors, the system of indigent defense is a patchwork with each county operating on its own, resulting in a chaotic state of affairs that leads to delays, inefficiencies, waste of taxpayer dollars, and an adversarial process that varies by county and simply does not work as it should.

Now, over a decade later, the reform that this Court prescribed for a broken system still has not been implemented. Although the promise of reform was made with the passage of the Mississippi Statewide Public Defender System Act of 1998, the legislature in both 1998 and 1999 declined to create or fund any public defender offices, much less begin implementing the program set out in the Act. Quitman County, which patiently had waited since this Court's pronouncements in *Mease* and *Wilson*, and had

assumed since passage of the 1998 Act that the State would fulfill the legislature's promise, finally turned to the Court system. It filed this action in December of 1999, contending that it can no longer afford to operate the system of indigent defense, and certainly cannot afford to do it in a proper and constitutional manner. But rather than accepting the obligation of providing for indigent defense, the State has aggressively fought Quitman County at every juncture. With the trial in this case rapidly approaching, the Attorney General moved to dismiss, claiming that the question of indigent defense is the exclusive province of the legislature and is not the business of the courts. After the motion to dismiss was denied by the Circuit Court, the State took this interlocutory appeal.

STATEMENT OF THE ISSUES

Under the lenient standard of Rule 12(b)(6), Miss. R. Civ. P., must the Courts sit idly by when the State has failed to provide a constitutionally adequate indigent defense program and the Legislature has refused to address the problem?

Under the lenient standard of Rule 12(b)(6), Miss. R. Civ. P., must the Courts refrain from even considering the claim of a county that it cannot afford to provide for a constitutionally adequate program of indigent defense, or may the county present its claim and prove its contentions at a trial?

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) of the Mississippi Rules of Civil Procedure raises an issue of law, which is reviewed de novo. *Lowe v. Lowndes County Bldg. Inspection Dep't.*, 760 So. 2d 711, 712 (Miss. 2000); *Tucker v. Hinds County*, 558 So. 2d 869, 872 (Miss. 1990). This Court must take the well-pleaded allegations in the complaint as true when reviewing the trial court's decision on a motion to dismiss. *Mike Moore, ex rel. v. Byars*, 757 So. 2d 243, 246 (Miss. 2000); *Butler v. Board of Supervisors for Hinds County*, 659 So. 2d 578, 581 (Miss. 1995). The motion should not be granted unless it appears beyond any reasonable doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Moore, ex rel.*, 757 So. 2d at 246; *Butler*, 659 So. 2d at 581. In sum, "there must appear to a certainty that the plaintiff is entitled to no relief under any set of facts that could be proved in support of the claim." *Weeks v. Thomas*, 662 So. 2d 581, 585 (Miss. 1995); *Franklin County Coop. v. MFC Servs. (A.A.L.)*, 441 So. 2d 1376, 1377 (Miss. 1983).

STATEMENT OF THE CASE

Although the State of Mississippi has created and funded a system by which full-time District Attorneys and Assistant District Attorneys prosecute violations of Mississippi's criminal code, it has done little to structure or fund public defender offices in the State. Instead, it has required the individual counties to shoulder the burden. Only three of the State's 82 counties have created full-time public defender offices to handle the indigent caseload. The other 79, ill-equipped to undertake this vital constitutional function, rely on a patchwork of systems. Many counties utilize part-time public defenders who are paid a relatively low salary – sometimes barely above the minimum

wage – and who must build separate private practices that compete with the time needed to represent their appointed indigent clients. Other counties rely on case-by-case appointments, resulting in laborious judicial administration of indigent defense. Paying for any indigent defense system is an expense that few counties in the State can afford, indeed, Plaintiff Quitman County had to raise taxes three times during the 1990s and take out a large bank loan to pay for the defense costs for two individuals. And while few counties can afford to pay for any system at all, almost no counties have the resources to provide a constitutionally adequate indigent defense system.

For several years after this Court in *Mease* and *Wilson* called upon the State to begin funding a statewide system of indigent defense, a number of bills were introduced in the legislature to accomplish this. Finally, after years of study and consideration, the Mississippi Statewide Public Defender System Act of 1998 was enacted. This Act included specific findings by the legislature that the existing county-based system does not protect the State's "defense interest" of "guaranteeing to each accused person the effective assistance of competent, loyal, and independent counsel," (Miss. Code Ann. §§ 25-32-33(1)(c), (2)); does not serve the State's "justice interest" of "administration of its criminal justice system, so as to secure the just, fair, speedy, and efficient adjustment and final adjudication of each charge formally made, to protect the innocent, and to punish offenders," (*id.* §§ 25-32-33(1)(d), (3)); and does not secure the State's "budgetary interest" in "holding the cost of administration of its criminal justice system to its optimal level." (Miss. Code Ann. §§ 25-32-33(1)(f), (3)). The Act authorized the creation of a mandatory statewide, state-funded public defender system, and a public commission to make recommendations regarding some of the particulars of the new

system. Rather than fund the system in 1998, the legislature directed the Commission to recommend an implementation plan.

The Public Defender Commission conducted an exhaustive review of the criminal justice process in Mississippi and released the requested Implementation Plan on December 31, 1998. In it, the Commission noted that Mississippi is one of the few states in the country that does not provide any state funds for indigent defense services, that the total amount of money expended for indigent defense in Mississippi (measured on both a per capita and a per case basis) is near the bottom of the nation, and that the county-based resources are not sufficient to provide adequate representation, particularly in those counties using the part-time contract public defender system. The Commission recommended the gradual phase-in of a new system with initial funding for an office to handle indigent appeals and for a pilot project of full-time public defender offices in three judicial districts.

Despite receiving the report and recommendation it requested – containing a modest phase-in proposal – the legislature took no action in 1999 and declined to fund any public defender offices. Quitman County, which had repeatedly raised taxes and had been waiting for the legislature to undertake this responsibility ever since the decisions in *Mease* and *Wilson*, assumed with passage of the 1998 Act that relief was on the way. But after the legislature refused to fund the Act in 1999, Quitman County decided it could wait no longer. This case was filed in December of 1999. Jefferson and Noxubee Counties filed similar cases against the State, and the part-time public defender in Forrest County filed a suit against the State and the Forrest County Board of Supervisors claiming that his office could not render constitutionally effective assistance in light of

the current structure and funding of the system. Those three cases have been held in abeyance pending the outcome of this appeal.

After these cases were filed, legislation was passed during the 2000 session to create an office of capital post-conviction counsel to represent death row prisoners in post-conviction proceedings. In addition, a death penalty trial office was created to assist local appointed attorneys in death penalty cases. However, the portions of the legislation creating the trial office never have been implemented and the office never has been operational. If it ever does open, it may provide some relief to counties, but the office is designed only to assist counsel who are appointed locally. Counties will remain obligated to pay for the local attorneys and to absorb a substantial portion of the defense costs in death penalty cases.

Moreover, death penalty prosecutions, while the most serious cases, are only a small percentage of the indigent felony docket in Mississippi. Unfortunately, while passing this legislation, which will only affect some portions of some death penalty cases, the legislature repealed the 1998 Public Defender System Act. Thus, while making a partial effort at addressing death penalty problems that are only the tip of the indigent defense iceberg, the State has abandoned all pretense of doing anything else to fix the problem. In the recently completed 2001 session, the legislature did nothing to address the lingering question of indigent defense.[1]

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[1] Notably, only a handful of states fail to provide state funding for the indigent defense system. One of those, Texas, recently announced plans to implement a system of State funding to move toward a statewide public defender system. "*Texas Nears Creation of State Public-Defender System*," N.Y. Times, April 6, 2001, at A12 (National Edition). In

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Thus, Quitman County has had no choice but to go forward with this lawsuit. The ultimate obligation of indigent defense – which is constitutionally mandated – belongs to the State and cannot be shifted to the counties. Moreover, even if the State in the abstract has the power to ask the counties to pay the bill, the proof at trial will show that Quitman County, like many other counties, cannot perform this job in a constitutional manner. As the evidence will demonstrate, this results in an inadequate and unconstitutional system of indigent defense and has devastating consequences for the county's budget, for the taxpayers, for government officials struggling to do their jobs, for the criminal justice system, and for the indigent defendants themselves. Accordingly, the State, upon which the constitutional obligation for the effective assistance of counsel is imposed in the first instance, should be held accountable to devise and implement a solution to the problem.

The complaint filed in the case specifically alleges that the State, through its failure to provide and fund an indigent defense system, has imposed enormous and unpredictable indigent defense costs on Quitman County and its taxpayers. As a result, 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. Complaint ¶ 22(a) (ARE 13). This increases tax burdens on counties, particularly economically depressed counties with small populations such as Quitman, and has led to unequal tax burdens among the counties. Complaint ¶ 22(b) (ARE 13). The complaint also alleges that chronic underfunding of indigent defense has

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recent years, Arkansas, Louisiana, Oklahoma, and South Carolina all have moved to state-funded systems.

resulted in a failure to meet constitutional requirements for effective assistance of counsel and has adversely affected the administration of justice in Mississippi and in Quitman County. This violates Article 3, Section 26 of the Mississippi Constitution, which imposes upon the State the obligation to ensure effective assistance of counsel. This has also resulted in undue pretrial delay, with counties spending limited funds for pretrial incarceration both of guilty defendants who should have been sent to state correctional facilities much sooner, and of innocent defendants who should not be in jail at all but must endure delays before going to trial. Complaint ¶¶ 22(d, e) (ARE 14). Quitman County seeks prospective declaratory and injunctive relief. Complaint, Prayer for Relief (ARE 15-16).

After this suit had been pending for eight months, the Attorney General's office moved to dismiss the complaint under Miss. R. Civ. P. 12(b)(6), arguing that the administration of the criminal justice system is not the business of the Courts, but instead is the exclusive province of the legislature. The Circuit Court of Quitman County denied the motion with respect to the County's constitutional claim, holding that the County's complaint should be fully aired in a trial at which it will have the opportunity to prove its contentions.[2] The State has filed this interlocutory appeal, asserting that Quitman County should not even be allowed to present its case at trial. This Court has granted interlocutory review to address this issue.

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[2] The Circuit Court granted the State's motion to dismiss the County's separate statutory claim, which is not at issue here.

SUMMARY OF ARGUMENT

This Court long has recognized the severe defects in delegating indigent defense funding to individual counties, calling upon the legislature in *Mease* and *Wilson* to implement a state-created program. But the legislature has abandoned this duty. In such a situation, particularly where the proper constitutionally mandated right to effective assistance of counsel is at stake, this Court has not only the power, but the duty, to take action. *Hosford v. State*, 525 So. 2d 789, 798 (Miss. 1988). The Attorney General contends this is purely a legislative matter that is beyond the authority of this Court. But precedent, as well as the consistent practice of this Court in cases like *Jackson v. State*, 732 So. 2d 187 (Miss. 1999), demonstrates that the Court rightfully possesses the authority to address problems in the judicial system that have not otherwise been corrected.

The cases that address the obligation to provide assistance of counsel to indigent persons make it clear that this is an obligation of "the State." *See, e.g., Conn v. State*, 170 So. 2d 20, 21 (Miss. 1964). Criminal cases are prosecuted in the name of the State of Mississippi by full-time state-funded prosecutors in order to punish violation of state statutes. By any measure, this is a responsibility that belongs to the State and not to the counties. Moreover, even if the State has the power somehow to impose this burden as an operational matter upon the counties, the State retains the ultimate responsibility to live up to its constituional obligations. When counties are unable to provide for a constitutionally adequate program of indigent defense, it is the State's duty to rectify the problem and create a constitutional system.

The Attorney General suggests that counties have no standing to sue the State, and that the only means by which courts may address the problems of the indigent defense system are through after-the-fact, case-by-case adjudications of ineffectiveness claims in post-conviction petitions. However, this Court's precedents clearly establish that counties may sue the State and may obtain declaratory and injunctive relief when necessary to secure compliance with the constitution. Moreover, in decisions like *Wilson* and *Jackson*, this Court has ordered prospective relief for entire classes of cases in order to cure problems in the indigent defense system, never suggesting that prospective challenges of this type are somehow precluded from the purview of the courts.

Since this is an appeal of the denial of a motion to dismiss, the allegations of the complaint must be taken as true. *See Butler v. Board of Supervisors of Hinds County*, 659 So. 2d at 581. No evidence need be presented and it is not the function of the Circuit Court to examine or weigh the evidence. Here, as the Circuit Court held, the allegations are sufficient to survive a Rule 12(b)(6) motion, and the County should be allowed to present its claims at trial. Thus, the Attorney General's selective discussion in his brief of certain facts concerning the Quitman County indigent defense system are as irrelevant as they are misleading. But even if the facts were relevant at this stage, even a cursory examination of the system that exists in this State, and the manifestations of that system in Quitman County, shows that indigent defense is in a crisis. This is, of course, what the legislature expressly concluded in 1998 when it passed the Act. Unfortunately, when faced with the obligation of funding the Act, the legislature repealed the Act two years later and abandoned the effort to cure the systemic deficiencies. But the constitutional

problems remain, and Quitman County should be allowed to present its case at a trial so that the Circuit Court can determine what judicial remedy is appropriate.

ARGUMENT

I. THE COURTS OF MISSISSIPPI ARE VESTED WITH THE AUTHORITY *AND DUTY* TO ADDRESS CONSTITUTIONAL DEFICIENCIES IN THE OPERATION OF THE CRIMINAL JUSTICE SYSTEM.

As this Court repeatedly has recognized, the county-based system of funding indigent defense gives rise to serious problems. Thus, ten years ago, this Court called upon the legislature to "address the problem of indigent representation on a statewide basis, rather than thrust the burden on financially-strapped counties." *Mease v. State*, 583 So. 2d at 1285. A year earlier, the Court suggested that the legislature revisit the funding system, and asked: "Since the State funds the prosecution in these cases, why not the defense?" *Wilson v. State*, 574 So. 2d at 1341.

According to the Attorney General, no matter how serious the crisis in this State's criminal justice system, this is exclusively a legislative matter, is not the business of the courts, and should be immune from judicial review. AG Br. at 25-27. However, as illustrated by a long line of cases, when the Legislature does not act, courts have authority and the inherent duty to ensure the integrity of the judicial process. As the Court said in *Hosford v. State*:

> If [the Legislature] fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate, and the Judicial branch has the authority as well as the duty to see that courts do not atrophy.

525 So. 2d at 798.

More recently, the Court again invoked its inherent duty to protect the integrity of the court system:

> [I]f the Legislative branch fails in its constitutional mandate to furnish the absolute essentials required for the operation of an independent and effective court, then no court affected thereby should fail to act. It is the absolute duty of a court in such latter circumstances to act, and act promptly.

Wilson v. State, 574 So. 2d at 1339 (quoting *Hosford v. State*, 525 So. 2d at 797-98). *Accord, e.g., State v. Blenden*, 748 So. 2d 77, 86-87 (Miss. 1999) (trial courts have inherent authority to impose monetary sanctions upon State or political subdivision for discovery violations in criminal cases); *Newell v. State*, 308 So. 2d 71, 77-78 (Miss. 1975) (statutory provision which prohibited judge from instructing jury on law except on request by party contravened constitutional mandates that judiciary fairly administer justice).

This principle encompasses matters of funding when necessary. In *Wilson*, the Court noted that in *Hosford* "we discussed our inherent authority to provide adequate funding for the operation of the court if the Legislature should fail to so provide." 574 So. 2d at 1339.

One of the most recent examples of the Court's decisiveness in the wake of legislative default came two years ago with the decision in *Jackson v. State*. For several years, the legislature had declined to resolve the problem of counsel for indigent death row prisoners in post-conviction proceedings. Finally, by 1999, when it "ha[d] become apparent that the system is flawed," the Court concluded it could "no longer sit idly by" and ordered appointment and adequate compensation of counsel, as well as payment of

reasonable litigation expenses, including investigation and expert costs, in capital post-conviction proceedings. 732 So. 2d at 188-89, 191. As the Court stated:

> The Legislature has been aware of this acute problem [since 1995]. In the 1998 session, it took the first step toward the institution of a statewide public defender system. It is strongly urged that the Legislature proceed toward a solution to this serious problem by enacting the program utilized in Virginia or some other system. *We can no longer sit idly by*. We therefore grant the motion.

Id. at 191 (emphasis added).

Jackson provides a constructive lesson about the interplay between courts and legislatures when the courts, acutely aware of the need, exercise their authority to reform aspects of the judicial system. *Jackson*, like *Wilson* and *Hosford* before it, demonstrate that it is the province of the courts in this State in the first instance to determine whether, and if necessary, to ensure that the criminal justice system functions in a constitutional manner. If the legislature fails to act, the courts are not obligated to "sit idly by." *Id.* Indeed, contrary to what the Attorney General suggests in his brief, "it is the absolute duty of a court in such latter circumstances to act, and act promptly." *Wilson v. State*, 574 So. 2d at 1339. Only after this Court issued its decision in *Jackson* and held, for the first time, that death row prisoners were entitled to appointed post-conviction counsel, did the legislature comply with its obligations and create a State-funded capital post-conviction office.

If the courts in the present case issue a decision holding that the responsibility for indigent defense properly rests with the State, the legislature would no doubt comply with the court's rulings as it did in *Jackson* and devise a solution. But without decisive action by this Court, the status quo will remain in place for years to come, to the detriment not

only of indigent defendants, but also of victims forced to endure delays before the accused is brought to trial, sheriffs operating jails overcrowded with pretrial detainees, judges and prosecutors and lawyers laboring in an inefficient system, and taxpayers wasting money on a criminal justice system that simply does not work.

II. THE DUTY TO PROVIDE FOR ADEQUATE ASSISTANCE OF COUNSEL IN INDIGENT CASES RESTS WITH THE STATE, PARTICULARLY WHERE COUNTIES CANNOT AFFORD TO PROVIDE IT IN A CONSTITUTIONAL MANNER.

In the landmark case of *Conn v. State*, 170 So. 2d 20 (Miss. 1964), in which this Court implemented the holding of *Gideon v. Wainwright*, 372 U.S. 335 (1963), this Court made it clear that the right to counsel for indigent defendants is not only "fundamental and essential to a fair trial" but "is . . . obligatory upon the *States*." *Conn,* 170 So. 2d at 21 (quoting *Gideon*, 372 U.S. at 342) (emphasis added). In *Triplett v. State*, 666 So. 2d 1356, 1357 (Miss. 1995), the Court reiterated that this right "is obligatory on the *States*," (emphasis added). Once again, in *Vielee v. State*, 653 So. 2d 920 (Miss. 1995), the Court stated "[o]ur decisions *make clear* that inadequate assistance does not satisfy the [constitutional] right to counsel made applicable to the States . . . ." *Id.* at 922 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1989)). Thus, the case law makes it clear that the maintenance of a constitutional system of indigent defense is, as a matter of first principles, the obligation of the "State" and not the counties.

Indeed, criminal cases are prosecuted not in the name of counties, but in the name of the State of Mississippi. They are prosecuted by full-time State-funded prosecutors, and they are prosecuted in order to punish alleged violations of State statutes. By any

measure, the proper functioning of the criminal justice system is a responsibility that belongs to the State and not to the counties.

But even if the Attorney General is correct that the State can seek to enlist local government entities in helping to discharge the State's constitutional obligation, the obligation remains with the State, and the State must ensure that its obligation is met. For example, if a county refused to provide and fund a system of indigent defense – either because of financial bankruptcy or other reasons – the duty would unquestionably fall to the State. Either the courts, or the executive, or the legislature would be required to find a means to ensure an adequate defense for indigents in the county, and the State would be required to pay any necessary bills in the absence of county funds. Thus, it is clear that when counties are unable to provide for a constitutionally adequate program of indigent defense, it is the State's responsibility to rectify the problem and to create a constitutional system.[3]

The Attorney General cites Article 14, Section 261 of the Mississippi Constitution, which provides "the expenses of criminal prosecution shall be borne by the county in which such prosecution shall be begun." Whatever that provision means about the prosecution of cases, it says nothing about the obligation to enforce the right of

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[3] This principle has been illustrated in other contexts where states sought to impose their obligation to provide an effective public education on local governments that did not have the resources to do so. *See Robinson v. Cahill*, 303 A.2d 273, 292 (N.J. 1973) ("[t]he obligation being the State's to maintain and support a thorough and efficient system of free public schools, the State must meet that obligation itself or if it chooses to enlist local governments, it must do so in the terms which will fulfill that obligation"); *Brigham v. State*, 692 A.2d 384, 395 (Vt. 1997) (the State cannot "abdicate the basic responsibility for education by passing it on to local governments").

indigent citizens to the effective assistance of defense counsel. When Section 261 was adopted as a part of the 1890 constitution, government played no role in the defense function. It is only with the decisions in *Gideon* and *Conn* that the courts imposed upon the State the duty to provide adequate defense assistance in indigent cases. Thus, Section 261 is completely irrelevant. Indeed, in *Board of Supervisors of George County v. Bailey*, 236 So. 2d 420 (Miss. 1970), a case in which the Court declined to impose on counties the obligation to pay appointed defense counsel, the Court expressly rejected a claim that Section 261 requires counties to pay for defense counsel: "There is nothing in this section of the Constitution to indicate what shall constitute an expense in criminal prosecutions." *Id.* at 422.[4]

III. WHERE COUNTIES ARE ADVERSELY IMPACTED BY THE STATE'S FAILURE TO ASSUME ITS CONSTITUTIONAL RESPONSIBILITY, COUNTIES HAVE STANDING TO SUE, AND THIS COURT IS NOT LIMITED TO AFTER-THE-FACT, PIECEMEAL ADJUDICATION TO CURE SYSTEMIC INDIGENT DEFENSE PROBLEMS.

The Attorney General contends that counties do not have standing to sue the State in this instance. According to the Attorney General, only individual defendants can raise issues regarding effectiveness of counsel, and they can do so only in the context of their own cases. Thus, the Attorney General assets this Court is limited to after-the-fact, case-by-case adjudication if it wants to address ineffectiveness problems stemming from the operation of the indigent defense system. AG Br. at 25-36.

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[4] Moreover, a literal reading of Section 261 would make no sense. Although it says the "expenses of criminal prosecution *shall* be borne by the county," (emphasis added) the State obviously pays for the bulk of criminal prosecution, including the prosecutors' salaries.

This case does not seek relief on behalf of any individual defendants and does not seek to set aside any particular convictions. *See* Complaint, Prayer for Relief (ARE 15-16). It is not focused on particular cases, but instead on the intolerable burden that the State is imposing upon counties like Quitman County, their taxpayers, their governmental officials, and indigent defendants. Relief should be granted because the constitutional obligation of indigent defense belongs to the State, not the counties, and at any rate, Quitman County cannot afford to perform it in a constitutional manner. Moreover, this Court is not limited to the case-by-case adjudication in individual criminal cases that the Attorney General contends is the only means for correcting problems in the operation of the indigent defense system in this State. If the Court's role were as limited as the Attorney General suggests, the judiciary would be handcuffed in its ability to instigate systemic reform in the justice system.

On the question of standing, it is well-settled that "Mississippi's standing requirements are quite liberal." *Dunn v. Mississippi State Dep't of Health*, 708 So. 2d 67, 70 (Miss. 1998); *see also Mississippi Gaming Comm'n v. Board of Educ.*, 691 So. 2d 452, 460 (Miss. 1997) (same). Mississippi courts have been "more permissive in granting standing to parties who seek review of governmental actions" because the State has no "case or controversy" requirement. *Van Slyke v. Board of Trustees*, 613 So. 2d 872, 875 (Miss. 1993) ("*Van Slyke II*"); *see also Fordice v. Bryan*, 651 So. 2d 998, 1003 (Miss. 1995) (same); *Board of Trustees v. Van Slyke*, 510 So. 2d 490 (Miss. 1987) ("*Van Slyke I*"). In Mississippi, parties have standing to sue or intervene "when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law." *Fordice*, 651

So. 2d at 1003 (quoting *State ex rel. Moore v. Molpus*, 578 So. 2d 624, 632 (Miss. 1991)).

Mississippi's statutes expressly provide that a county may sue and be sued. Miss. Code Ann. § 11-45-27. Mississippi's statutes also specifically authorize counties to bring suit "in the name of the county, where only part of the county or its inhabitants are concerned, and where there is a public right to be vindicated." Miss. Code. Ann. § 11-45-19. *See also Van Slyke I*, 510 So. 2d at 496 (standing by individuals and boards is also permitted in Mississippi in any "action . . . concerning a matter of general public interest . . . ."). Moreover, this Court repeatedly and consistently has held that counties have standing to obtain declaratory and injunctive relief against unconstitutional statutes or actions by the State. *State v. Hinds County Bd. of Supervisors*, 635 So. 2d 839, 842 (Miss. 1994). *See also State v. Mississippi Assoc. of Supervisors, Inc.*, 699 So. 2d 1221 (Miss. 1997) (action by counties and association against State resulting in a decision of this Court striking down a state statute as unconstitutional); *Burrell v. Mississippi State Tax Comm'n*, 536 So. 2d 848 (Miss. 1988).[5]

Under Mississippi law, counties, like any other plaintiffs, have standing to sue where "they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant or as otherwise authorized by law."

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[5] Despite defendants' efforts to treat the county as an abstraction, the interest of the county is derived from the interest of the citizens of the county. *Harrison County v. City of Gulfport*, 557 So. 2d 780, 783 (Miss. 1990). The board of supervisors is the governmental authority closest to those people and is charged to protect their welfare. *Id.* For this reason, the county is a particularly appropriate plaintiff in this case. Moreover, the county's citizenry includes indigent criminal defendants prosecuted in the Circuit Court of Quitman County.

Harrison County, 557 So. 2d at 782 (citations omitted). Quitman County and its taxpayers have alleged a colorable interest in the subject matter of the litigation; they have alleged an adverse effect from the conduct of the defendants; and the county is specifically authorized to sue by Miss. Code Ann. §§ 11-45-17, 19 and 19-3-47(1)(b). This suit was duly authorized by the Quitman County Board of Supervisors. Complaint ¶ 6 (ARE 8). Accordingly, it is clear Quitman County has standing to assert its claims.

Likewise, the Attorney General's assertion that prospective systemic relief is unavailable in this case, and that this Court is limited to case-by-case, after-the-fact adjudication is wrong, both as a matter of law and as a matter of practicality. It is wrong as a matter of law because the precedents of this Court make clear that the courts of this state have the power to grant prospective relief to remedy systemic problems with the criminal justice system. Specifically, in both *Wilson* and *Jackson*, this Court granted prospective relief to entire classes of future cases as a means of addressing deficiencies in the indigent defense system.

In addition, other courts addressing the precise issue here have held that prospective relief can be granted. In *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *rev'd on abstention grounds sub nom., Luckey v. Miller,* 976 F.2d 673 (11th Cir. 1992) the United States Court of Appeals for the Eleventh Circuit reversed the granting of a Rule 12(b)(6) motion and allowed an action seeking prospective injunctive relief to remedy systemic deficiencies in the Georgia indigent criminal defense system to proceed. The *Luckey* case concerned a class action filed on behalf of all indigent persons who would be charged with criminal offenses in the future in Georgia, and all attorneys in the State of Georgia who represent such persons, alleging systemic deficiencies in the

Georgia criminal justice system, including failure to provide adequate resources. The Court of Appeals specifically held that it is perfectly appropriate and consistent with the Supreme Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984) for a plaintiff to prove that a criminal justice system systemically results in ineffective defense services. 860 F.2d at 1017. This is precisely how the present litigation has been structured.

Likewise, the highest courts of numerous states have granted prospective relief to remedy systemic inadequacies in indigent criminal defense systems where the legislature failed to act. *See, e.g., State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (creating a "presumption that indigents . . . are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards" to be applied prospectively); *State v. Lynch*, 796 P.2d 1150, 1163-64 (Okla. 1990); *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W. Va. 1989) ("[I]t is unrealistic to expect all appointed counsel . . . to remain insulated from the economic reality of losing money each hour they work. . . . Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted.") (ordering increased compensation for appointed counsel in future cases); *State v. Smith*, 681 P.2d 1374, 1384 (Ariz. 1984) (creating in future trials "an inference that the procedure resulted in ineffective assistance of counsel").[6]

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[6] Many other courts have recognized the existence of a link between the features of the indigent defense system and the quality of representation provided, thus demonstrating that prospective injunctive relief to remedy systemic deficiencies is appropriate. *See, e.g., Hill v. Reynolds*, 942 F.2d 1494, 1496 (10th Cir. 1991) (holding that public defenders' inability to file appellate briefs rendered their assistance ineffective); *State ex rel. Friedrich v. Circuit Court*, 531 N.W.2d 32, 35 (Wis. 1995) (holding that courts should order compensation at rate exceeding statutory fee schedule when necessary to

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Moreover, the nature of the particular claims brought here do not lend themselves to a series of challenges by individual defendants in an individual criminal cases. In an individual case, the defendant must prove that his counsel's performance fell below acceptable standards, and that this deficiency prejudiced the outcome in the particular case. The inquiry is, by necessity, case-specific, and in no way examines or addresses the larger impact of systemic problems. Consequently, the available relief is also, by necessity, individual to each defendant. Thus, while it is true that in an effective system any defendant who received ineffective assistance of counsel which unfairly prejudiced his case could ultimately get his conviction reversed, no relief would be available to the County or its taxpayers. Rather, ironically, the County and its taxpayers would pay twice -- once for the ineffective assistance and again to challenge it. In the present case, by contrast, Quitman County seeks to prove that it does not have the resources to carry the burden thrust upon it, and that absent those resources, it cannot do the job in a constitutional manner. It will not need to demonstrate prejudice in some particular

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secure qualified and effective counsel); *Madden v. Township of Delran*, 601 A.2d 211, 219 (N.J. 1992) ("[F]inancial pressures on unpaid counsel can affect their performance."); *White v. Board of County Comm'rs*, 537 So. 2d 1376, 1379 (Fla. 1989) (holding statutory fee cap unconstitutional when applied in manner that curtails courts' inherent power to secure effective, experienced counsel for indigent defendants in capital cases); *State ex rel. Stephan v. Smith*, 747 P.2d 816, 831 (Kan. 1987) (noting that system of court appointments for indigent defense may violate right to effective assistance of counsel because it creates inherent conflict of interest between attorney and client and requires attorneys with no criminal law experience to represent indigent criminal defendants); *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986) (finding that attorney's right to adequate compensation and violations of indigent defendants' rights to effective assistance are "inextricably interlinked"); *State v. Robinson*, 465 A.2d 1214, 1216 (N.H. 1983) (holding that fee limit must sometimes be exceeded in order to protect indigent defendant's right to effective assistance of counsel).

number of cases inasmuch as no one is seeking to set aside criminal convictions here. Instead, it will focus on how the system inhibits the ability of all of the people working in the process, including counsel for the indigent defendants, to do their jobs properly.

Furthermore, part of the ultimate remedy sought here is for the State to assume the burden (or at least some of the burden) of indigent defense from the shoulders of the counties. An individual criminal defendant arguably would not have as great an interest as the counties in litigating who should fund indigent defense. The individual defendant is seeking relief in his or her own case. Even if the courts were to order in such cases that more money be spent on a particular defense service in future cases (such as expert witnesses), the defendant arguably would not as strong an interest in arguing that the costs be paid by the State as opposed to the counties.

The Attorney General claims that "the adequacy of public defender funding has been, and will continue to be, challenged in proper criminal proceedings." AG Br. at 33. But that is not the case. While some funding issues have been raised in individual cases, the sort of systemic issues raised here – including those about who has ultimate responsibility for indigent defense – simply do not arise in individual cases.

In sum, Quitman County has standing to bring this case, the courts of this State have the power to adjudicate it, and, if the County's claims are proven at trial, the courts of this State also have the power to order appropriate relief necessary to cure the problems, including, if necessary, prospective, systemic relief.

IV. THE ATTORNEY GENERAL'S FACTUAL CONTENTIONS ARE IRRELEVANT TO AN APPEAL FROM THE DENIAL OF A MOTION TO DISMISS, BUT THE RECORD DEMONSTRATES SYSTEMIC, CONSTITUTIONAL DEFICIENCIES IN MISSISSIPPI'S INDIGENT DEFENDER SYSTEM.

The Attorney General's brief identifies a few selective facts about the quality of representation for indigent persons in Quitman County that are irrelevant, particularly in light of the procedural posture of this appeal from the denial of a motion to dismiss. In such a situation, the allegations of the complaint must be taken as true, and the denial of the motion to dismiss must be affirmed unless there is a "certainty that the plaintiff is entitled to no relief under any set of facts that could be proven in support of the claim." Miss. R. Civ. P. 12(b)(6), comment.

But even if the facts were relevant at this stage, the information obtained through discovery, as well as that which Quitman County will present at trial, demonstrates significant constitutional flaws in the current system of indigent defense.

For example, the record includes the affidavit of Thomas Fortner, the Chief Litigator and Chief of Staff for the Office of the Hinds County Public Defender, one of the few full-time indigent defense offices in the State. Fortner Aff. ¶ 2 (ARE 863). In an analysis of the deficiencies of the county-based funding system (particularly the part-time flat-fee system) as manifested throughout the State, Mr. Fortner concluded, "that there exists a serious, systemic, statewide deficiency in the provision of defense services to indigent defendants in the state courts of Mississippi." Fortner Aff. ¶ 6 (ARE 864-65). The Fortner affidavit describes how these inadequacies play out in virtually every aspect

of the provision of defense services, including pretrial detention,[7] inadequate pretrial investigation,[8] use of experts,[9] and trial performance.[10]

The Fortner affidavit also explains how inadequate resources -- and the gross disparity between the funding and resources available to prosecutors' offices as compared to part-time indigent defenders -- directly and severely harm the quality of representation afforded to defendants. *Id.* ¶¶ 7-10 (ARE 865-67). He describes how as a result of this disparity, "there are far fewer defense counsel representing indigent defendants than there are prosecutors prosecuting those defendants, for the same number of cases." *Id.* ¶ 6 (ARE 864). Furthermore, those lawyers that are appointed as defense counsel "are virtually never specialists in criminal law procedure, and in many instances, [these] counsel have had no training whatsoever in criminal law . . . ." *Id.* ¶ 9 (ARE 866). Moreover, prosecutors are able to employ "full-time private investigators" and are supported by State agencies like the State Crime Laboratory, not to mention the services

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[7] "I am aware of specific cases in which defendants languished in jail for months before even seeing their appointed defense counsel." *Id.* ¶ 6 (ARE 864-65).

[8] "I am aware of numerous specific cases, involving serious felony charges, in which defense counsel could not obtain the services of an investigator. Consequently, those counsels did not obtain potentially vital witness statements and other materials critical to an even minimally adequate defense." *Id.* ¶ 7 (ARE 865).

[9] "In some . . . cases, the expert testimony presented by the prosecution was seriously flawed in ways that would have been illuminated for the court had adequate expert services been available to the defendant." *Id.* ¶ 7 (ARE 865).

[10] "In many . . . cases, defendants were convicted without defense counsel having presented exculpatory evidence . . . ." and "I am also aware of specific cases in which expert testimony was offered by the government at trial, and defense counsel was utterly unable to meet that testimony, either through cross-examination of the prosecution witnesses, or the presentation of an effective defense . . . ." *Id.* ¶ 7 (ARE 865).

of police departments and other public law enforcement agencies, *id.* ¶ 8, while appointed indigent defense counsel have "virtually no access to investigative services." *Id.* ¶ 7. The Fortner affidavit further explains how the lack of defense counsel and of investigative, expert and other resources and training undermines the administration of justice. *Id.* (ARE 865-66). He notes that he has observed defendants being convicted without substantial exculpatory evidence having been presented at trial because of a lack of an adequate investigation. *Id.* ¶ 7 (ARE 865).[11]

The Spangenberg Studies. The record in this case also includes a series of studies conducted by the Spangenberg Group, a nationally known consulting organization, for the Mississippi Bar Association (and subsequently for the Mississippi Public Defender Commission). The Spangenberg Group found that indigent defense in Mississippi is in a perilous state.

After conducting extensive survey research and budget analyses, the Spangenberg studies concluded that funding for indigent defense in the State of Mississippi through the existing funding mechanism is wholly inadequate. Spangenberg Report at 51 (ARE 434).

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[11] In addition to what is presently in the record, Plaintiff intends to present at trial the testimony of Steve Bright, who is a nationally recognized attorney, law professor, and leading expert on indigent defense systems. Professor Bright will testify that the public defender system, as manifested in Quitman County, is constitutionally infirm in that the county-based system of public defense in many instances violates national standards for effective representation, including the National Legal Aid and Defender Association's *Performance Guidelines for Criminal Defense Representation* and the American Bar Association's *Standards for Criminal Justice*. We anticipate that Professor Bright will provide a comprehensive review of the trial and appellate court files of defendants in the County, and will conclude that there is a widespread and pervasive failure to provide effective representation to indigent persons in all aspects of pre-trial, trial, and post-trial/appellate practice.

For example, the Spangenberg report found that Mississippi spends $3.24 per resident on a per capita basis for indigent criminal defense efforts – far less than any other state in the country. Spangenberg 1998 Update at 20 (ARE 551). The studies further found that the State of Mississippi also ranked last among the states surveyed on amount spent per indigent defense case ($128.89). Spangenberg 1997 Update at 14 (ARE 504). The studies also reached a number of other pertinent conclusions about the state of indigent defense in Mississippi.

First, the Spangenberg studies concluded that the lack of adequate resources for indigent defense services results in poor quality services and representation that falls beneath the minimum standards of representation required by the Mississippi Constitution. Not only are the resources that are available prioritized for the most serious cases, leaving "indigents [who] fac[e] misdemeanor or juvenile delinquency charges" without counsel altogether, but the studies found that even in felony cases, resources are not sufficient. Spangenberg Report at 51 (ARE 434). According to the study, "[e]very aspect of defense representation is compromised," with very little "early representation provided, investigation conducted, attorney-client contact, or use of experts." *Id.* at 51-52 (ARE 434-35). Moreover, the absence of statewide oversight of indigent defense leads to a hodgepodge, county-by-county approach to providing defense services. *Id.* at 52. Without statewide oversight, "there is no entity to ensure that . . . even minimal parity in resources between prosecutors and public defenders will be upheld." *Id.* at 53.

Second, the State's lack of involvement in the provision of indigent defense and the inadequate resources available for indigent defense means that constitutional

requirements for the effective assistance of counsel often are not met. The Spangenberg studies concluded, for example:

> The resources provided to contract public defenders are pitiful in comparison with those provided to county attorneys and district attorneys. Contract public defenders are seldom provided with office space, expenses, or support staff. Contract defenders do not have ready access to investigators or other experts. They must motion to the court each time these services are required. Contract defenders must handle any appeals arising from their cases, and do not receive any additional compensation to do so. Contract public defenders simply do not have the necessary tools required of criminal defense attorneys to assure adequate representation for indigent defendants. . . . Contract defenders are allowed to have private criminal practices, which can raise conflicts with their public defender clients.

Id. at 51-52.

Third, and most importantly, the Spangenberg studies found that there were a number of steps that the State of Mississippi could take to address these problems. The studies specifically noted that Arkansas, Louisiana, South Carolina, and Oklahoma all have recently adopted statewide, state-funded public defender systems, leaving Mississippi as one of just a handful of states which provide no state funds for indigent defense. Spangenberg 1998 Update at 4-11 (ARE 516-523). The studies proposed two main solutions to the indigent defense problem in Mississippi. Specifically, the studies propose that "a new statewide system, organized by circuit court district, be created that will be responsible for the delivery of all indigent defense services . . . [in] Mississippi." Spangenberg Report at 60 (ARE 441). In addition, the studies recommend that "the total funding for indigent defense services in Mississippi be increased." *Id.*

Public Defender Testimony. In addition to the testimony that was adduced through experts and expert analyses of Mississippi's indigent defense system, fact discovery in this matter further supports Quitman County's case. The deposition testimony of Thomas Pearson and Alan Shackleford, the two part-time lawyers who were appointed to represent all indigent defendants in Quitman County since 1990, undisputedly confirms the gross disparity of resources and the inadequacy of services provided to indigent defendants. Mr. Pearson characterized the enormous disparity between the extensive resources he enjoyed when he was a county prosecutor and his paltry resources as a public defender as "Like a mountain to a molehill." Pearson Dep. 82 (ARE 1728). He observed that "[A]s a prosecutor, you've got all law enforcement offices and agencies at your disposal; whereas, as a public defender, you have no one at your disposal."[12] *Id.*

Mr. Pearson testified that his indigent clients were not entitled to "the best lawyer in the county." Pearson Dep. 95-96 (ARE 1741-42). Instead, Mr. Pearson believed that his indigent clients were entitled to a "country lawyer," and he stated that he did a

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[12] Mr. Pearson testified that he earned $1350.00 per month as a part-time public defender. Pearson Dep. 74 (ARE 1720). Mr. Pearson's salary was paid out of the general fund of Quitman County, MS. Pearson Dep. Exh. 1. From 1995 to 2000, Mr. Pearson represented indigent defendants in approximately 156 felony cases in Quitman County, MS. Pearson Dep. 54, Pearson Dep. Exh. 3 (ARE 1700). During this time, Mr. Pearson also maintained a private criminal practice. Pearson Dep. 45 (ARE 1691). Mr. Pearson testified that he handled 10 criminal cases per month for a fee. Pearson Dep. 45 (ARE 1691). In his private criminal practice, Mr. Pearson was paid approximately $350.00 per case for misdemeanor cases and $750.00-$15,000.00 per felony case, depending on the severity of the charge. Pearson Dep. 46-47 (ARE 1692-93). He also handles part-time public defender duties in other counties. Pearson Dep. 47-50 (ARE 1693-96).

"country lawyer job for them." *Id.* Mr. Pearson speculated that he may have been terminated for this reason.[13]

The time and resource limitations placed on part-time defenders by the county-based system have hampered the ability of these lawyers to do their job. Mr. Pearson testified that he generally met with several defendants as a group, on the day of their arraignments. Pearson Dep 59 (ARE 1705). He does no background investigation of witnesses called by the State. Pearson Dep. 70-71 (ARE 1716-17). He has never requested court funding to hire an investigator in a noncapital criminal case, and explained that he would not have asked for an investigator in a noncapital criminal case even if he believed that one was needed, because he believed the request would have been denied by the court. Pearson Dep. 92-94 (ARE 1738-40). Mr. Pearson acknowledged, however, that he would make greater use of investigators in his criminal cases if he had the funds. Pearson Dep. 62 (ARE 1708). Specifically, he would use any investigatory assistance that was needed in a case. Pearson Dep. 80 (ARE 1726). Indeed, he admitted that he has been forced to use his personal funds to hire investigators in noncapital criminal cases. *Id.* Mr. Pearson also testified that in the proper case and if the funding was available to him, he would use experts. Pearson Dep. 69-70 (ARE 1715-16). Finally, Mr. Pearson testified that the quantity and quality of representation by part-time public defenders would be improved with more funding. Pearson Dep. 78 (ARE

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[13] Mr. Pearson testified that the Circuit Court judge told him that he was being fired as a part-time public defender because there had been many complaints about him. Mr. Pearson acknowledged that his clients complained to him about his lack of communication with them. Pearson Dep. 87 (ARE 1733). He has responded to such complaints by telling his clients that he did not have time to be their "pen pal." *Id.*

1724). Mr. Pearson stated that if the system was adequately budgeted, he could have spent more time on individual cases and he could have assessed each case more adequately. Pearson Dep. 79, 81 (ARE 1725-27).[14]

At trial, Quitman County will present ample proof that the chronic problems with the county-based indigent defense system as manifested in Quitman County, have resulted in systemic constitutional deficiencies, including the following:

- systemic denials of pre-trial access to counsel *(see Gerstein v. Pugh*, 420 U.S. 103 (1974) (right to a preliminary hearing at which counsel is appointed within 72 hours of incarceration));
- systemic denials of pre-trial investigation (*see, e.g., Triplett v. State*, 666 So. 2d 1356 (Miss. 1995); *Yarborough v. State*, 529 So. 2d 659 (Miss. 1988); *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994); *Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985));
- systemic denials of fourth and fifth amendment rights (*see, e.g., Kimmelman v. Morris*, 477 U.S. 365 (1985); *Triplett*, 666 So. 2d 1356 (Miss. 1996); *Hunyah v. King*, 95 F.3d 1052 (11th Cir. 1996); *Smith v. Dugger*, 911 F.2d 494 (11th Cir. 1990); *Sikes v. State*, 448 S.E.2d 560 (Ga. Ct. App. 1994));
- systemic denials of the right to expert assistance (*see Ake v. Oklahoma*, 470 U.S. 68 (1985), *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985); *Bouchillon v. Collins*, 907 F.2d 589 (5th Cir. 1990); *Profit v. Waldron*, 831 F.2d 1245 (5th Cir. 1987));
- systemic denials of the right to competent representation at trial (*see, e.g., Nixon v. Newsome*, 888 F.2d 112 (11th Cir. 1989));

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[14] Mr. Shackleford provided similar testimony. He was the public defender in approximately 130 cases in Quitman County, from 1995 to 2000. Mr. Shackleford testified that he has never used an investigator or requested funds from the court to hire an investigator. Shackleford Dep. 43-44 (ARE 1580-81). Mr. Shackleford also testified that he has never sought court funding to hire an expert witness. Shackleford Dep. 44 (ARE 1581).

- systemic denials of the right to competent advice in pleas (*see, e.g., Leatherwood v. State*, 539 So. 2d 1378 (Miss. 1989); *Harris v. State*, 875 S.W.2d 662 (Tenn. 1994); *Finch v. Vaughn*, 67 F.3d 909 (11th Cir. 1991)); and

- systemic failure to provide conflict-free counsel (*see, e.g., United States v. Cronic*, 466 U.S. 648 (1984), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Glasser v. United States*, 315 U.S. 60 (1942)).

The evidence catalogued in this section of the brief is only a small part of the proof that will be offered at trial. But it demonstrates serious problems with Mississippi's indigent defense system, and it shows why only a full trial will resolve the contentions in Quitman County's Complaint. The Mississippi Legislature has abdicated its obligation to address this problem – only this Court can afford relief to the 72 counties in Mississippi and their respective citizens.

CONCLUSION

For the foregoing reasons, the order of the Circuit Court should be affirmed, the stay issued by this Court vacated, and the matter returned to the Circuit Court for trial.

Dated: April 11, 2001

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CERTIFICATE OF SERVICE

This is to certify that I, Erica Taylor McKinley, have caused to be mailed on this eleventh day of April, 2001 via first-class postage prepaid, a true and correct copy of the foregoing Brief of Plaintiff-Appellees and Appellee's Record Excerpts to the following:

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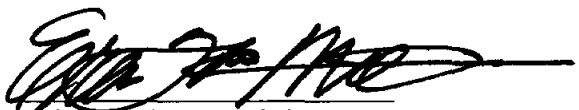

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