III. PANEL 2: THE NEED FOR TIMELINESS AND INDEPENDENCE TO ENSURE FAIRNESS AND THE APPEARANCE OF JUSTICE

*Stephen Bright, Rene Guerra, Mike Heiskell, and Senator Rodney Ellis*

Moderator: Judge Faith Johnson

*Catherine Burnett:*

We are turning now to the issue of the need for timeliness and independence in the process. I am very pleased to be able to introduce our moderator for this session, Judge Faith Johnson. I am pleased to be able to introduce Judge Johnson for a variety of reasons. When our committee first began the idea of this symposium years ago and we were casting about for funding, the first group to step up to the plate and offer financial support and to cosponsor this event was the judicial section of the State Bar of Texas. So, judges, thank you; you are part of the reason we are here today.

As you know from the biography in your packet of materials, Judge Johnson has been the judge of the 363rd in Dallas since 1989. But what you may not realize is that in addition to all the work she has done as chairperson of the indigent defense committee of the State Bar, judicial section, she also served as a prosecutor in the district attorney's office and created the child abuse unit in Dallas. She was a prosecutor for a little over seven years, so she brings two perspectives to this panel. I am pleased to turn the podium over to Judge Johnson, who will introduce the rest of our speakers.

*Judge Faith Johnson:*

Good morning. I too wish to welcome you to this symposium on indigent criminal defense in Texas. I salute the members of this planning committee [and] the State Bar of Texas for their hard work because this is indeed a successful symposium and we really do appreciate your work and your efforts. For the next hour and a half, we plan to discuss the timeliness of appointments and, in essence, who should do the appointing. I think that is what that means by “independence to insure fairness.” We have several distinguished panelists, and I will introduce them a little later. But first we have our keynote speaker, Stephen Bright, who will speak to us for about twenty minutes. Then we will have opening remarks from the panelists. We will have discussion among the panelists. I have about
thirteen to fifteen questions, and I will probably generate other questions as they speak. We will then have an opportunity for the members of the audience to ask questions because we really do want you to participate. I think that this particular topic is very important, as well as the other topics. But I think that we may get a little heated in here [with] regards to this particular topic. And finally we will have closing remarks from our panelists.

Since 1982 our keynote speaker, Stephen Bright, has served as the director for the Southern Center for Human Rights. That is my hometown, Mr. Bright. Born and raised there. This center provides legal representation to persons facing the death penalty and to prisoners challenging unconstitutional conditions in prisons and jails throughout the south.

Since 1979 Mr. Bright has represented persons facing the death penalty at trials, on appeals, and also in post-convictions proceedings. Mr. Bright has been a legal services attorney, and he has also served as an attorney for the public defender's office. He has written numerous articles in the areas of criminal justice, corrections, and judicial independence. Mr. Bright has also received several awards; one in particular was the American Bar Association's Thurgood Marshall Award, the Roger Baldwin Medal of Liberty. Let us welcome Stephen Bright.

Stephen Bright:

Thank you, Judge Johnson, and thank all of you. I want to commend the people who planned this for bringing people in here from other states. We had a similar program to this in Georgia just a month ago, and I know what the temptation is to be somewhat provincial and to say we really do not need for anybody to come in from anywhere else to tell us what to do or how to do it. But the Constitution of the United States and the Sixth Amendment right to counsel, of course, applies everywhere, and it applies in every state, and it applies in every court where someone's life or liberty is at stake. And what we have seen around the country, as you heard from the earlier panel, is that some jurisdictions have made good, [on what] we often say [is] the promise of Gideon v. Wainwright, but it was not a promise. It is a Constitutional requirement of Gideon v. Wainwright that people be represented, and there is an opportunity to learn from what other people are doing.

I want to preface my remarks, first of all, by just responding to one issue that is sort of here. I think denial is a tremendously powerful
thing and very hard to get over. I was reading Arthur Schlesinger, who has written his memoirs, and he talks about, as he looks back over his history as a great historian, how he could not believe that he ignored Jim Crow justice and how he failed to deal with that. I noticed recently the article about the New Jersey state police and the racial profiling there. And one person who reviewed the file said that what was really the most impressive about it was the lack of any sense of urgency about the fact that eighty percent of the people being represented were thirteen percent of the population. And I think here, to suggest for one minute that there is not a crisis in legal representation of poor people in Texas is to try to whistle past the graveyard. The high court of history is not going to look back favorably on us at this time.

When we have cases, where we have a body of law, of whether sleeping during trials violates the right to counsel, when we have a judge, as a judge in Houston said, the Constitution guarantees a right to counsel, but does not guarantee the right to counsel being awake—I do not know of any other profession. I have looked in the reporters, [and] I cannot find cases involving surgeons who sleep. You know, Texas defended the Burdine case by saying you should reverse Judge Hittner and uphold the sleeping lawyer case because a lawyer who sleeps through trial is no different than a lawyer under influence of alcohol, drugs, Alzheimer’s, or having a psychotic break. I thought that was a remarkable argument for a state to make before an appellate court. And I have to say, as a member of the legal profession, I would have been embarrassed if a group of high school kids had come in to watch that argument, because that is a disgrace to the legal profession that that kind of argument would be made, that you can point to cases where lawyers were drunk or under the influence of drugs and so forth, and still have those upheld. Some day we are going to look back and wonder how we tolerated the shameful system that we have.

And I notice with the controversy that went with the report that the Bar could not decide whether to accept or whatever, that one of the comments that was made, one of the judges said he could not sign on to the report because the Canons of Judicial Ethics forbid judges from doing anything that would cause the public to lose confidence in the judicial system. I am going to tell you, the quality of legal representation which poor people get in the courts day in and day out is causing the public to lose confidence in the judicial system. And we just have to face that fact, as hard and as difficult and as troubling as it, is that all of us have some complicity in this, no matter what our
role has been. But we know there is a problem out there and it has to be dealt with. We are never going to get anywhere until we admit that there is a crisis, and we then try to go forward. We are never going to get anywhere until we face the truth that many people do not want adequate indigent defense because it makes it harder to get convictions. I mean, obviously, you can convict a person very easily if the lawyer is asleep over at the other table.

The other thing is that an adversary system is, of course, a costly and, to some extent, ineffective system—just like democracy, just like checks and balances, just like having two houses of the legislature, [and] just like having the veto power in [the] executive. But just like democracy, our thought is, that out of this system, this system of two strong statements on each side of the question, the truth will emerge, and we will convict the guilty, and we will sentence people appropriately and so forth. So I hope that today and tomorrow we can get past the defensiveness and the denial and all of those things and admit that the emperor wears no clothes. And then figure out how to dress our legal system in a way that guarantees equal justice and fairness for all of our citizens.

I have been asked to talk about two things. I did not think the first was very controversial, but I know the second is, and it may be the first is as well. Timeliness of appointment. I was surprised when I read a bill that was proposed by Senator Ellis suggesting that counsel be appointed within twenty days. As Judge Johnson mentioned, as Norm Lefstein mentioned, I came up as a public defender, in a system where, literally, people would be arrested, they would be taken down to the central cell block; they would be processed, taken over to the courthouse, and within a few hours, I would meet my clients and represent them at a bail hearing. This would be within hours of arrest. The idea that somebody would languish in jail! The only people who were in jail longer than a day were those arrested Saturday evening, who did not get processed until Monday morning. But except for that, everybody was brought before a judge, with a lawyer, within hours of their arrest. And, of course, the Supreme Court has held in City of Riverside v. McLaughlin that there has to be a probable cause hearing within forty-eight hours of a person being arrested, at least if they are detained. And many jurisdictions have that bail determination and that presentment at the same time and have it with a lawyer. Other places, [like] New York, run the court at night. You can be arrested in the day, and you can be before a judge with a lawyer that night. In Georgia, North Carolina, a number of other states, seventy-two hours, which I think is too long. I have said in Georgia that seventy-two
hours is too long a time period to wait to appoint counsel. There are
other states, California, Montana, where the provision is "without
unnecessary delay."

I just want to mention a couple of practical reasons this is
important. The first is the bail determination [and] the community
ties. When I would represent somebody at a bail hearing, what my
responsibility would be [was] to interview my client, then get in touch
with the parents, the spouse, the children, whoever it would be, to get
those people to court that afternoon and to convince that judge that
this was a person who could be released on their personal
recognizance or could be released on a ten percent bond, or
something like that. And very often, we were able to do that. Now if
you are county commissioner, one thing you ought to think about that
is, that is saving you a lot of money because you are getting people out
of jail that do not belong there. You are not having people sit in jail
for six months that do not belong there because their release is going
to be set up right from the start and not that they are languishing
there in jail. Also, if you have people that have particular problems,
the mentally retarded, the addicted, the mentally ill, people that have
some special needs, if you have a lawyer who knows how to recognize
those things and deal with them, then there may be some diversion or
something that takes place there immediately, rather than months
after the fact.

But the most critical reason is that the adversary system, in my
view, cannot work very well unless both sides are working on the case
from the start. I remember clients that I would go and interview, and
they would say, "I did not do the crime, and I was home last night, and
if you go talk to my wife, she will tell you," or talk to whoever was
there. And we will literally go straight from the court that afternoon
to the home and talk to those people and verify the information, and,
very often, get the charges dismissed within a day or two. Now there
are two public interests in that. One, we should not be holding
innocent people in our jails. And if you hold somebody for six months
and then appoint a lawyer, the trail is going to be too cold. You go to
the wife then, and she says, "I do not know if it was August the third
or August the fourth." You know the days have all run together by
then. The other thing is, of course, you have the actual culprit still at
large when you have the wrong person arrested. There are a lot of
other reasons, but it seems to me that those two are critical, and
lawyers have to be appointed within hours of the time a person is
arrested.

Let me spend the rest of my time on the more controversial
subject of independence. And I am grateful to Dean Norm Lefstein for already mentioning the American Bar Association's standards with regard to the provision of counsel, which provide that the selection of lawyers for specific cases should not be made by the judiciary or elected officials. Some people, when this debate was going on before, were saying, "Why would you want the county commissioners appointing the lawyers?" And I do not think anybody would suggest that is appropriate either. The ABA standards provide that the appointments should be by the administrators of a defender, assigned counsel, or contract for service program run by a board of trustees.

I think independence is one of the most critical aspects of having an effective indigent defense system. The role of the judge is to preside and be fair and impartial in conducting the proceedings. It is very easy, whether purposely, or subconsciously, or whatever, for other considerations to come into play. Efficiency, docket-control, whatever it may be. The most damning study I have seen is the one that Professor Moore and Dr. Butcher prepared. Forty-six percent of judges in the survey say that a lawyer's reputation for moving cases quickly influences the appointment. And then an even higher percentage, it goes all of the way up to eighty-eight percent, when you say, consistent with quality representation. But the fact of the matter is the lawyer moving cases quickly through the system is not supposed to be a factor for appointing lawyers. I think so often we look at this system and we ask what is most efficient? What is most cost-effective? How do we process these people? This is not McDonald's. We are not talking about how we move people through a system as efficiently through a system for the system's purpose. We are talking about a right of individuals to be adequately represented and to be represented by lawyers.

Regardless of what the truth of the matter is, even the judge who may want Clarence Darrow representing every client, I think there is no question [that] lawyers perceive that if you alienate the judge, you are not going to be appointed to other cases. I think there is no question. I know this fact because I talk to lawyers day in and day out. I spend my time talking to defense lawyers. I know they are hesitant to move to recuse judges, even if there is a valid basis for it, when the judges are appointing them. I know they are often unwilling to ask for continuances because they do not want to go before that judge who is going to appoint them and say, "We are not ready to go to trial next month." I talked to a lawyer in Indianapolis before they ended the practice, before Dean Lefstein brought that to an end, and we were
talking, a lawyer and I, and I was saying [he] ought to file a certain motion. He said, “Well, you do not understand. I cannot file that motion.” I said, “You have all the legal grounds, and you have the factual basis,” and I went through all of that. He said, “No, you do not understand. I will not have my job if I file that motion.” It did not have anything to do with the [merits of the claim].

There is a copy back there, those of you who have not picked it up, [of a] Texas Law Review article that I published this summer about Texas. I quote in there a Houston lawyer who says, describing lawyers in Houston, [that] the mindset of many court-appointed lawyers is to curry favor with the judge by getting a quick guilty plea. Then everybody is happy. The judge has the case off the docket; the prosecutor does not have to mess with it. The defendant is off to prison, and the lawyer has made $150, which is a reasonably decent fee for an hour of time. “It is much more economical for the lawyer, earning a living with court-appointments, to do it this way,” he continues, “than to reset the case, investigate, probably not get paid for the time you spend [in] investigation, and probably aggravate the judge by keeping the case on the docket.” This report that was prepared quotes a lawyer in Galveston saying that some judges there will not appoint lawyers that they think are incompetent. The problem is, that at least for some judges, competence means pleading the case.

This is not unique to Texas. This is true all over the country. Richard Klein’s survey said that judge-imposed pressure on lawyers to dispose of cases quickly is a nationwide phenomenon. And it is widely known among lawyers. I had the district attorney, actually, in one county in Georgia tell me just recently, “I found out very early in my career when I was getting court-appointed cases that if you did not want to take court-appointed cases, all you had to do was provide a zealous defense, [and] you would never get another case.” I talked to somebody recently who said that it is well known in Dallas that if you provide a zealous defense, you will not get capital cases. So if you do not want to have a case, just do one really well.

Whether that is true or not, the fact that judges perceive that to be the case, the fact that lawyers perceive that to be the case, certainly suggests that the public is going to see that to be the case. This is a system riddled with conflicts—judges [caught] between their duty constitutionally to provide adequate representation, and to act efficiently, and the lawyer [caught] between his or her need for business and the need to, or constitutional and ethical requirement to, provide zealous representation. That later, if there is an ineffective assistance claim, there is always this issue. The judge who appointed
the lawyer, who said, "This is a person who is competent," is now the judge who is deciding the ineffective assistance of counsel claim. But beyond that, it is just the question of how well, really when you think about it, this works as a way of operating a system. The judges do not appoint the prosecutors to the cases. How well equipped are judges to do this? In Houston, at least recently, all but one of the sitting judges were former prosecutors. They really do not have a great deal of experience in managing the defense of cases. Great prosecutors can become great judges, but there is just simply no experience there. I, quite frankly, do not think that a judge consistent with the judicial role is going to be able to look into how the defense is going to be handled, doing that.

The other thing that is very important about having indigent defense programs, independent indigent defense programs, is it means someone is at the table. Someone is there in the county commission, at the state legislature, whatever, talking about these concerns that, right now, do not really have a voice. In Florida, right after Gideon was decided, Florida took Gideon very seriously. They created a public defender office in every judicial circuit parallel to the state's attorney office, so that in every judicial circuit in Florida, you have a public defender [and] you have a state's attorney and [they are both] somewhat similarly funded. The reason that Florida has $176 million right now for indigent defense, is because the public defender counsel is there at the legislature every year, just like the state's attorneys are, making sure that legislators know if you are going to have an effectively functioning adversary system. When you give money to the prosecution, when you create a new drug task force, when you set up a new drug court, when you do all these other things, you better also put some money on the defense side or you are going to have a system that is woefully out of balance.

There are models of how that can be done. In Florida, interestingly enough, all the public defenders are elected. I have always been struck by that. I asked my friends down there, how do you run for public defender? What is your platform? That sort of thing. At the same time, I have met people like Bennett Brummer and all of these outstanding public defenders and what every one of them has told me, to a person, is it is a whole lot better than being under the control of the judiciary.

Tennessee also elects its public defenders. Many other states, a lot of the federal defender programs in many states, Kentucky, Missouri, and others have a board of directors and diffuse nominating commission. Nobody controls this board, not the chief justice, not the
governor, not any one person, but all of those people in the bar and
the defender programs and so forth, all appoint people who hire
public defenders whose responsibility is to make sure that poor people
accused of crimes get a zealous representation. Other people are
worried about docket control. That is a totally appropriate concern.
But that is not the concern of the person responsible for indigent
defense. And I saw the result of that. Last week, last Thursday, I was
in Florida to talk to the public defenders. And I am always struck by
two things: one, the people who have been doing it for twenty, twenty-
five years, trying to make good on what Anthony Lewis wrote in
_Gideon’s Trumpet_. It will be a tremendous challenge to bring to life
the dream of _Gideon v. Wainwright_, a vast country in which each poor
person will be represented by a lawyer who will defend them capably
without resentment of an unfair burden and with the resources
necessary to do the job. And I see these people in Florida, who have
devoted their whole lives to making that constitutional provision come
true. I also see the young lawyers that are taking notes, learning things
about forensic evidence, mental health, drug and alcohol addiction,
and all of these things we deal with. And it used to be, back in the old
days, you could be a defense lawyer if you just were kind of like the
billy goat that slept under the bridge and you just came out and butted
somebody every now and then. I mean, that would often be good
enough.

But today’s world is a much, much more complicated world with
the forensic evidence that we have to deal with—Peter Neufeld will
talk about—with the mental illness and so forth that Ruth Luckasson
and others will talk about. We need lawyers, of course. Everybody
recognizes someone clearly psychotic who is hearing voices or talking
to people who are not there, but there are a lot of people, a vast
number of people, who come to our criminal justice system who have
very subtle mental health problems—fetal alcohol syndrome, brain
damage, imbalance of their brain chemistry, bipolar disorder, and so
forth. If you do not have lawyers who know how to recognize that,
then you are not going to have an effective system.

I would just say, in closing, I think that independence is one of
four essential things here. You have to have independence; you have
to have structure; you have to have some program. That does not
mean you do not have a private bar as well as your public programs.
Obviously, you have to have resources, so the caseloads are not
crushing, and standards, which are often talked about and are very
important, but mean nothing without those three things, because you
can say everybody has to have been a member of the bar five years,
they got to have had so many cases—all of these kind of “standards” do not guarantee you a thing in terms of quality. Whereas, when you have a program that provides supervision of people who are in the courts every day, just like you have in the prosecutors, nothing radical about this proposal. It is exactly the same thing that you have on the prosecution side. Prosecution does not go to the judge and say, “I would like for one of my lawyers to prosecute this case.” The prosecutor may want to try a case, the judge may think that case ought to plead out. May put a lot of pressure, but ultimately, the prosecutor gets to make the decision. “No, we are taking this case to trial; we are not going to accept the plea offer.” And the same thing has to be true on the defense side, if we are going to provide the kind of zealous defense that the Constitution requires. Thank you.

Judge Johnson:

And now we have Senator Rodney Ellis. I had met Mr. Ellis a year and a half ago, and it was a delightful meeting. He has been working closely with the committee from the judicial section that I have chaired for the last two years, and I have been very thankful for the help they have given us.

Senator Ellis is the State Senator from Houston and is currently serving his fifth turn as a Texas State Senator. Senator Ellis is an attorney, an investment banker, and a successful businessman. He currently serves as President Pro Temp of the Texas Senate, and he chairs the Senate Jurisprudence committee. That is why we judges love him so much. He is also a member of the Senate Intergovernmental and Administration Committee.

Also, we have Renee Guerra, who is the District Attorney from Edinburgh, Texas. He served as an assistant district attorney from 1977–1988. In 1982 he was elected a criminal district attorney, and he has been reelected to that office for four terms now. Guerra has served on the board of directors for the Texas District and County Attorneys Association and the State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters.

We also have Michael Heiskell, who is an attorney in private practice. And he has a general practice firm of Johnson, Zahn, and Heiskell in Fort Worth, Texas. He is the immediate past president of the Texas Criminal Defense lawyers association as well as the past president of the Galveston Young Lawyers Association and the Tarrant County Criminal Lawyer Association. Prior to private practice, Mr. Heiskell worked as a Galveston assistant criminal district
attorney, and he also worked as a U.S. Attorney; and I think he has worked there several years, as well as an assistant district attorney.

Let us welcome our panelists. I would first like for Senator Ellis to speak to us for about five minutes. Just give us some opening remarks in regards to some of your ideas in this area of appointment and the independence of this appointment process.

Senator Rodney Ellis:

Stephen Bright, thank you for an outstanding overview of the challenge that we have ahead of us in Texas. I am glad to see so many members of the judiciary who are here, many of whom I have worked with over the years on a number of issues. I do want to thank the judges: Judge Johnson, you and those who have been working with me during this interim. There are a couple of things in that bill I want to point out I was not that proud of. We did put in there twenty days to get a lawyer appointed, and with the adverse reaction that I got to the bill, maybe I should have put it at one day or one hour.

I saw Kramitz in here somewhere, and maybe Rob Kepple is here from the prosecutors’ group, as well, who asked me to go to twenty days, and I think that is one reason they did not oppose the bill. I want to point out they did not necessarily support that bill last session, but they did not oppose it by putting twenty days in; but it certainly was nothing that I was proud of. I think someone ought to have a lawyer within three days.

Another point. That bill did not call for the county commissioners to appoint the lawyers. What it did do was create a rotation wheel, and then the judge could pick any person off of the rotation wheel that they wanted. But if they did not take the next person in line on the rotation, the judge would have had to put a reason into the record for not picking that lawyer. The reason could have been they thought the lawyer slept too much at the last trial—whatever reason the judge wanted to put in. But the county commissioners would have had to vote on whatever system was being used in that county.

Texas is one of a handful of states, I think four states, that do not put any state resources into the indigent defense system on the trial court level. I think we ought to change that, but we cannot go back and rewrite history. Last session is over with. I am glad there was a bill. I hate it was vetoed, but the fact that it was vetoed has put us all in a position now where I think we want to do something. And I am encouraged by a lot of the dialogue that I have had during the interim with judges and with prosecutors, but I am not overly optimistic about
what will happen when we get to the legislature. The advocacy groups are organized. I think that this conference is an indication of the fact that our Bar in Texas, which I am a member of, is also sensitive to the fact that we ought to do something.

I do not think anybody can have read some of those headlines around the country and around the world, a few I have helped generate, I must point out. I do not think anybody could read those news accounts and not be a little embarrassed about what we are doing in Texas. In closing, Judge, I remember when I was in law school here at the University of Texas, and we went through the great civil rights cases. Most of those cases were interesting. They called them civil rights cases because they were all anti-civil rights cases, slaughter house cases, \textit{Plessy v. Ferguson}—but what amazed me, when you read those opinions, was how great, how perfect they were. They were written so nicely, neatly, logically, and orderly until you got to the conclusion, and you saw that the best minds in the country at the time were justifying outright bigotry. And for you and I, as lawyers, to sit back on the sidelines and look at this system and not jump in and get our elbows a little bloody trying to resolve the problem, I think, is an indictment of all of us who happen to be lawyers.

I am encouraging and pleading with members of the judiciary, and those lawyers from prominent law firms who do not necessarily deal with criminal justice matters, to take an interest in this issue this session of the legislature. Now, I generally do not like to inject the race card in this issue because you expect me to do that because I am African American. But let me ask you this. If most of the people that we were talking about were white, would it be as difficult as it is to make the public policy argument that the second largest state in the country, one of the wealthiest states in the country, ought to put some of its resources into making sure that poor people have decent legal representation in this adversarial process that all of us aspire to? So I commend you for having this conference, and I thank you for bringing in outside panelists because sometimes you have to bring in people from outside the loop to make us take a good, tough look at ourselves. But it will be an uphill battle to pass meaningful reforms through the legislature if the people in this room, Krampitz, including the prosecutors, do not play some role in this process. And you and I all have a responsibility to realize that in the Lone Star State we can do a hell of a lot better. Thank you very much.
Rene Guerra:

Thank you, Senator. Thank you for the opportunity to address this symposium. I do not speak on behalf of all the D.A.s. I want to make that perfectly clear. I am not here on behalf of county attorneys or D.A.s. I am only one D.A. from South Texas, a border county that is the sixth most populated county in the state, and one of the poorer counties in the state. Now when I began in 1975 as an assistant, it was my duty to verify the court dates that defense counsel spent in court for the judge that I worked for, the 92nd District Court and the 139th, because at that time when I was beginning my law practice in Edinburg in 1975 after graduating from U.T., we were paid, I think, twenty-five or fifty dollars a day for representing defendants. So if you represented four or five defendants in one day, you were paid twenty-five or fifty dollars; I do not recall the rate. Now, I know that some lawyers, including myself, have staggered our pleas of guilty so we would generate the extra twenty-five or fifty dollars because in those days the high-powered lawyers, the drug defense lawyers were making all the money, and the younger individuals coming out of law school were literally starving as far as a law practice. We could not compete with civil law firms, and we could not compete with criminal law firms because they were getting the money cases because of the experience and what have you.

Now, I have never opposed a quick appointment of counsel. And during my eighteen years as a D.A., the last thing I wanted was an incompetent attorney who would cause me to retry a case eight years later because he was attacked by the appeal attorney for being incompetent and the Court of Appeals or the Court of Criminal Appeals agreeing. Now, in 1984 or 1985, somewhere around there, I tried a county court-at-law judge for theft. A visiting judge threw out the case, and I compared that judge to a chimpanzee and got reprimanded by the State Bar. In 1994 I went before the legislature, 1993, somewhere around there, and opposed county court-at-law judges practicing law on the side when I had 15,000 cases pending in those county courts. I got the political courage award, so I do not know if I am a contradiction being up here, being reprimanded and then haled for doing what I thought was my civic duty—bringing better justice to the whole county and the state of Texas.

I was part of this committee that is responsible for the symposium. Recently, I took leave of the committee and resigned and somebody else replaced me, and I hope that he had or she had better ideas. Now, all along, from my being in the criminal justice system
since I came out of law school in 1975, I always looked to the judiciary as the primary moving force for the quality of justice in Texas. D.A.s and county attorneys have a big hand as to the quality of justice in Texas, but the independent judiciary was the one that I looked to when I first came out of law school as the main guard for the quality of justice in Texas. After eighteen years in the practice of criminal law, mainly, I look to the legislature and the State Bar and the judiciary and the D.A.s and defense counsel to bring better quality of justice to Texas.

I am a firm believer that when you have a lot of competing interests for the same dollars, the one that has the most political clout is going to win. And that is being practical. If you look at the recent election, if we gave $1 billion last session back to the voters of Texas to win 525 votes in Florida, I think that sends a message that sometimes we are not going to do the right thing, depending on the competing political interests. I believe that independent appointments should be made. The question here, and I beg to differ with those that want people from the community to hire the defense counsel, is that who is better able to judge a defense lawyer than a sitting judge who sees him or her there every day.

I had to reduce an aggravated robbery case to five years in prison on a repeat offender because the defense counsel argued that a rose was a rose was a rose. And the judge called me into chambers and asked me to plea bargain to five years because he was going to have to retry the case because the defense counsel was incompetent. Now, we have a big problem with the State Bar not looking at situations where some lawyers should not be defense counsel. They should not be lawyers at all. Some people have said the same thing about me as a D.A. They call me incompetent in a one-page ad in the newspaper.

We are in a very subjective game—not game, but real life situation. We are very subjective in our judgements. I know about racial profiling. My mom was profiled in 1954 by the Border Patrol at a checkpoint even though she had a resident card, okay? Now, in Hidalgo County, you say Hidalgo County is a racist county because all the people being put to death are Hispanic, well, I have one Anglo on death row. The rest are Hispanic because we are eighty percent Hispanic. And I have had two white individuals commit capital murder. Now, sometimes those statistics are going to mess up the statistical analysis about racial profiling and who is getting the better quality of justice. I know statistics will easily fool us into believing that everything is bad. I think Texas has a good system. We need to tweak it better.
I have one lawyer per court. I have defendants in jail for more than a year before they go to trial. And I have been prodding the judiciary that that is unconscionable, but they are elected just like I am. And I have to defend myself every four years that I go to bat, and I have had an opponent every time that I have gone to bat because I oppose the county courts-at-law practicing law on the side and maybe said some things that the judiciary did not appreciate my saying. This is a very sensitive political issue. Do we spend more money for criminals who bound and gagged children and killed them; and then you have a court-appointed attorney asking for a bond reduction, and then if, God forbid, the man makes the bond reduction, he has appointed counsel but he can come up with $100,000 on a capital murder bond. Those are the things that we have to go out and argue with the public, saying the system should be better. We should spend more money, yet I have a capital murderer who bound and gagged a three-year-old and just yesterday at noon, I was being called by the news media because the judge reduced the bond from $1,000,000 to $750,000. And they were afraid that he was going to make the bond.

Those are things that I do not know if all of you are dealing with, and I am sure you are dealing with in the bigger counties. I do not oppose the seventy-two-hour appointment of defense counsel, but I do not necessarily agree that in New York where you have the McDonald's approach to appointed counsel and pleas of guilty that you are going to get any better quality of justice than Texas. The quality of justice in Texas comes down to basically all the lawyers in Texas that took an oath that the courts in Texas declared were competent lawyers to go before the bar to represent civil and criminal clients. There are some lawyers that are doing a poor job. There are some, though, that are doing a great job. There are some lawyers that do not care whether they are appointed or retained. I know that those that are retained spend more money because the money is going to demand more time from them. I pity the poor lawyers that are appointed that have to take the collect calls from the county jail and then try to collect the collect calls on the next voucher, especially in a county where you are one of the poor counties.

I am here to answer questions and maybe give you my perspective. I know we have a problem, but I do not think it is the bad problem that some people may want to perceive. I do not know that what works in New York is necessarily going to work in Texas, or what may work in Georgia is going to work in Texas, or what is going to work in Florida is going to work in Texas. I think we have the brains here, and I think we together can work for a better system if we
set our minds to doing it. I do know that if we are going to give money back to the taxpayers—and all of us pay taxes—that sometimes the money is not going to be there. And the people that are going to suffer are going to be both prosecution offices and court-appointed defense counsel systems. That is just a reality that we have to deal with and do the best we can. I appreciate the opportunity to address you. Thank you very much.

Mike Heiskell:

My name is Mike Heiskell. Thanks so much for inviting me to speak, and I want to commend the committee, as well, for bringing outside folks in and giving us their opinions. One of the things I was impressed with Stephen's talk was putting a face on the indigents—the people—the people that we, as criminal defense attorneys, defend. And I know Dr. Moore and Dr. Butcher in their paper indicated that they could not adequately poll those people to get some feel and idea of what they think about the system. But I think we all know how they feel about the system, those people who are incarcerated or poor and who look out among the many faces that may come to see them, whether they be criminal defense attorneys or otherwise. And look at what confidence they have in the system, and their families because it is hardly a week that goes by that I get phone calls from people, a mom, a dad, and say, "You know, I do not want my son or my daughter being represented by their court-appointed lawyer. I want someone to come in who can really fight for my son or my daughter." And then you quote them a fee and you listen to them sob on the phone and say, "Oh, my god, I cannot do that. Thank you for your time," or whatever. And you feel terrible knowing that they come away with a feel that this system is in crisis because of the perceptions out there.

I am representing the criminal defense lawyers up here, and I am going to call on some other folks here shortly to talk as well. We all know that we, the criminal defense attorneys, are looked at by the public, in general, and maybe even by some of the judges, often times, as the pariah, the slime of the system. We are the ones out there representing these people. We are the ones that, often times, in these partisan campaigns, whether they are running for judges or D.A.s, say, "I cannot represent criminals like some of these other people do. And I would not do it because it is anathema to me, and it goes against every fiber and grain in my body." But this is something that we have to do because these are people out there. And these are people who
are accused of these crimes.

In talking about the confidence in the system and the timeliness of the appointment, I think we have to address that, and we are going to have to spend a bundle of money in trying to do it. I now do a lot of federal work, and I even hate to say this because I hate the federal guidelines and a lot of other things, but one of the things that the federal system ensures, of course, is the timeliness of the appointment of counsel. Now, you may not get paid what you want to get paid. That is trying to be increased right now as we speak. But you still have a process whereby after the arrest, the person is brought before the magistrate. A bail hearing is held, or detention hearing if the government has filed a motion for detention, and you have an inquiry as to the person’s financial status for the appointment of counsel. And here, Stephen, as you well know, that communication begins right off the bat.

And we have to, in some form or fashion, find a way to address our system and to have it similarly situated whereby we can establish that communication because the prime complaint of most people in jail is “My lawyer is not calling me. He does not talk to me. I called him and he does not accept my collect calls. I have not seen him in months.” We have all heard this before. And one of the ways to remedy that is when you have the initial contact, if you will, the relationship, and make sure either by the court or some other person working within the court system ensuring that continued communication, you can help remedy some of the problems because what is going to happen is that you are going to have the writs filed, the complaints filed, the grievances filed against the attorney for the lack of communication. We are going to have to remedy this situation. But this problem is also symptomatic of another problem. It kind of reminds me of that old story that many of you may be familiar with of the person at night who is out under the streetlight searching for his wallet. The stranger comes up, and he says, “What are you doing? Can I help you?” He says, “Well, I lost my wallet a block away, but I am looking for it.” He says, “Well, why are you looking down here instead of down the block.” And he says, “Well, the light is better.”

Well, right now the light is better right here when we talk about the indigent defense system, but down the street we have a problem with what we call partisan judicial elections that we are going to have to address, as well, because this is what can result when we look at bringing partisan politics into the system. Dr. Moore and Dr. Butcher addressed that in their report and their paper, and I commend you to look at that part as well, because we who receive appointments are
often well aware that come election time you are going to have to pony up and give some contributions to the judges who are running. You may or may not have a direct contact concerning the understanding that you are going to have to support that person in order to get future appointments, but that is the mindset of many people in this system. So this is part of the problem, and I am thankful that this has been addressed in this manner whereby we can sensitize everyone to this.

I like the idea of the timeliness part of it and try to do it quickly, as I talked about in the analogy with the federal system. The independence, if you will, part is something that deals with the partisan elections, and I think, too, and Senator Ellis's bill calling for the Commissioners Court to be involved in that appointment process—well everyone kind of threw up their hands at that, but I think you are going to have to have some forum in which the commissioners who hold the purse strings are going to have to be sensitized to that. Whether you have one or two or more people involved in that process, that helps to further sensitize them to the problem of payment, adequate compensation to the attorney and to the experts and to the support people involved.

A little bit later, I am going to call upon Paul Looney who is the chairperson of the Texas Criminal Defense Lawyers Indigent Defense Committee to talk a bit about that and some other issues. But I want to also tell you that we have some good lawyers in here from V. Perini to Bob Bennett to Betty Blackwell, Cynthia Orr, Paul, and Clay Conrad, and others in here, and Larry Moore—I saw him a little earlier—who can tell you first hand about their contacts with people and about putting faces on these people. Because, just as Stephen said, this is not a McDonald's where billions are served daily, or whatever. But we have to deal with those people on an individual basis and understand where they are coming from and try to be able to adequately communicate with them to bring back some confidence, if you will, to restore the confidence. If it has ever been at a low point, it is right now because daily we read these articles about what has happened.

And speaking of articles I want to address before I sit down, I saw something in the Fort Worth paper yesterday or the day before in which the Appleseed Foundation commended Tarrant County, to a certain degree, on its efficiency in getting appointed counsel. Now, I think it was mentioned like twenty-four hours. Well, that is not the case. And I think the Tarrant County people here can tell you that. We have a problem with getting people appointed timely, and I think
the average I just heard even this afternoon, or this morning, is around ten days. Well, that is still too long, folks. We have to address this problem. The timeliness issue is important, but also the independence of counsel. And if you look at the other picture as a whole, hopefully we can raise the level whereby Senator Ellis or some other senator can bring some bills to the forefront that can be passed where the confidence level will be restored. Thank you.

Judge Johnson:

Thank you Senator, Mike, and Rene and Mr. Bright. I have some questions. I think it is important now that we discuss some of these issues. I noted that Mr. Bright was making notes, so I know he has some comments he wants to make also. But first let us start with the question: What is timeliness? And is it really feasible to try to appoint an attorney within twenty-four hours? Should we have a uniform system where the time for appointing an attorney is consistent and uniform throughout the state of Texas? And can we compare what is happening in Florida or Oklahoma or Indiana in terms of the time restraints or timeliness of appointments to Texas? So you have about three or four questions in one. Mr. Bright, I think you may want to speak to that.

Stephen Bright:

Well, I feel like the old fellow back home who was asked if he believed in infant baptism. He said, "I have seen it done." And I can just tell you that in all kinds of jurisdictions all over this country, they are organized in such a way that when people are arrested, they are promptly processed and taken before a judicial officer. It does not necessarily have to be the highest-ranking trial court level judge in that place. It may be a magistrate; it may be a whatever, but that there is somebody on duty who is responsible within a reasonable period of time. And as was pointed out, I mean, this is done in the federal system, which does not deal with nearly the volume of cases. I mean, even I know what the argument is. Well, even in the rural counties we do not arrest that many people, but it is not that much of a burden either, in those places, to have somebody who is available and to advise people of their rights, appoint a lawyer, and so forth.

I think that it is done in rural areas; it is done in metropolitan areas; it is done all over this country, and there is no reason it cannot be done in Texas. I do not think there is—everywhere I go, there is
this “Well, we cannot have one size fits all; we cannot—everybody’s different and every place is different.” But the fact of the matter is, as I said earlier, the Constitution applies everywhere. The Constitution of the United States does not vary from county to county. It is the same everywhere, and I think if the right to counsel means anything, it means that people get a lawyer right off the bat. And part of what we are trying to accomplish here is equal justice. We are trying to make the poor person accused of a crime nearly equal to the person with means. Is a person with means going to wait six months before he or she hires a lawyer? Well, of course not. The family is going to try to have a lawyer the minute they know about the arrest. And that is what we are trying to accomplish here, as well.

Judge Johnson:

Senator, do you think within twenty-four hours is really reasonable, feasible?

Senator Ellis:

I think twenty-four hours is a good goal. Legislatively, if I can pass something, I would put in a minimum of three days. And that does not mean that you could not have some qualifiers in, but because the system has been abused in Texas with 254 counties, 800 trial court judges, some counties, some judges have done a better job than others. But I am told of stories in certain poor counties where people have sat in a county jail for four or five months. I think that is ridiculous. So I think on the state level my preference would be, first of all, if the court can do it, if the Court of Criminal Appeals wants to step up to the line and do it, or the Supreme Court and do it, and if they have the authority, they can do it. But if not, legislatively? I am going to try to run with three days. You know, when I put in twenty days, I thought it was going to get a lot of support from my prosecutor friends and keep the bill on track and keep it from getting vetoed. Since it did not help that much, in my mind, I would try three days. But that is something that I would be willing to negotiate on. Anything would be better than what we have now.

Now, in your court, or in my county, you know everybody is kind of in their own back yard; they assume it is okay. Certain counties, certain courts do a better job than others, but I think it is reasonable to plug in a number statewide.
Judge Johnson:

Rene, can we do that in your county, twenty-four hours?

Rene Guerra:

We have a federal order that we have to appoint counsel within fifteen days on felonies, no, misdemeanors, and, I think, thirty days on felonies. The problem that I have in our county, I have nine J.P.s, and I have nine elected district courts and four county courts-at-law. A lot of people run for office, and they promise all sorts of stuff, but when the job needs to be done, some people are not willing to do it because they have other competing interests, as far as doing their oath undertaking. Now, I think we could appoint counsel, depending if a judge was available, within seventy-two hours and what have you. Even if you appoint counsel within seventy-two hours, a court-appointed attorney may not come to the office for many days on that case even though he goes to the county jail to talk to his client. That does not necessarily mean that he is going to go and file a writ of habeas corpus for a lower bond. It is a combination. I have seen lawyers who are appointed that never go and talk to their defendant, and they languish in jail. The courts allow it. My staff, even though they may try to move it, or unsuccessfully move those cases, because some cases are not as important as other cases, I suspect.

It is a combination. I cannot fault the judiciary or the prosecutors. Defense counsel has a big share of that responsibility; there are some that are not doing their jobs. I have seen people sent to hospitals who stayed in jail for more than a year. The sheriff was asleep; my prosecutors were asleep; the defense attorney who got him committed to a mental hospital never bothered to follow up if his client was sent off to the hospital. And we had to pay a judgment for abusing that individual’s rights. Okay?

To be honest with you, you can legislate, and we will get the court-appointed lawyer, but that does not necessarily mean he is going to go out and feverishly work for his client.

Senator Ellis:

So, Rene, would you be making the argument that we should not mandate that someone get a lawyer in three days because the lawyer may not do their job? Would not that shift the responsibility on that lawyer? Would not that be a way to weed out an incompetent lawyer, if the lawyer was appointed then just left the person languishing for
three months? That would be a way to get rid of that law license, would not you think?

Rene Guerra:

Well, it would make it easier. Again, to legislate three days or ten days or fifteen days still does not get to quality defense work or quality justice.

Senator Ellis:

Okay. Do not let me get out of line, Judge. But if you cannot legislate it, I mean, what do you do? Do you just take the attitude, "Well, shit happens."

Rene Guerra:

No. No, I have never heard—well, I did not know that prosecutors did not support your bill. We are under a fifteen-day mandate through a federal defense decree. Now, I know that some lawyers may not be appointed within the fifteen days if we go checking, but the people that are staying in jail are, if you go back and look at it, has to do—do you want me to really get political?—if you do not separate civil courts from criminal courts, you will never get at the root of the problem. And you will never be able to hold anybody responsible. Everybody is going to wash their hands. "My docket is too crowded; I cannot take care of that jail case. I am going to take care of that jail case because my friend the civil lawyer is not ready, he needs a continuance so I am going to that burglary case out of the jail and try that case." It is political.

Senator Ellis:

Would it help a small county like yours if the state gave you the ability for smaller counties to pool their resources to address the indigent defense system? I mean, some of the people that you are having to deal with come from other counties, I assume.

Rene Guerra:

A lot of my people come from Mexico. I am a border county. I do not know about pooling. I know that there are some poor counties in this state that cannot afford the defense bill. Go look at what you have been asking the defendants to pay. They contribute to the crime
stoppers; they contribute to the Crime Victims Compensation. There are all sorts of tack-on little things on defense counsel; maybe you could get some money for the criminal defense system in Texas if you said $10 is going to go a state mandated criminal defense fund. I do not know, especially for the capital murder.

Senator Ellis:

So you think the state ought to put some money in?

Rene Guerra:

Oh, the state definitely has to put some money in. Now, you require us to pay ten percent of our budget to indigent health. You go back into our county, a lot of people from Mexico are indigent, and in my county several million dollars are going to doctors and hospitals and what have you. Again, that is politically sensitive, okay?

Judge Johnson:

That is why I asked the question: Can we really create a uniform system throughout the state of Texas? I have heard judges from smaller counties indicate that it is totally impossible to try to appoint an attorney within twenty-four hours or seventy-two hours because of the set-up. So is that feasible? Can we force them to do that? Can we make that happen?

Senator Ellis:

I would say [yes], Judge, if we did some minimal standards and if a county came in and could make a compelling argument. If the state did not put money in, and I hope the state does, but if the state did not put any money in and a county could come in and make a compelling argument, you could draft the legislation whether we did it or the court did it, with support from the court, so that if there was a hardship provision for a county, you would work that in. But clearly, if you have minimum standards, I would hope that if the bill I got through the legislature would pass, I would hope that Harris County did not go from the three days to twenty. I mean that was because I was trying to come up with some minimal standard that would get through the legislature, and really I had rural legislators concerned about what would happen in the smaller, poorer counties. But, so in terms some minimal standards, it does not mean you could not put a
hardship provision in.

*Stephen Bright:*

Are they not able in some of these counties to get before judges for warrants? I mean, are the D.A.s’ offices and the police are not able to get before judges for thirty days, or whatever, to get a warrant signed for an arrest or a search?

*Judge Johnson:*

In some of the counties, that is exactly what the judges are saying. They are not able to do that because of the circuit they have with maybe two or three counties. That they are riding that circuit and they do not have the funds for—

*Stephen Bright:*

Part of that is why the judges should be taken out of the picture and there should be an indigent defense administrator there who is responsible for being in touch with all the law enforcement people and knowing that when someone gets arrested in one of those counties, a lawyer has to be appointed within a matter of hours.

*Judge Johnson:*

They do not [have] the money in those counties to hire that person.

*Stephen Bright:*

Well, that is why obviously you have to have money.

*Mike Heiskell:*

You are going to have to have that money to go to magistrates and other associate judges to aid in that quest. I like the idea of Senator Ellis to put some three-day or seventy-two hour minimum, if you will, on that, and then have those qualifiers, whether it is a hardship or some other type of qualifying situation, such as at least in the federal system, the Speedy Trial Act. If you have some exceptions that the courts recognize, then certainly, let us go for it. Paul, can I ask you, for a couple of minutes, to talk about some of the things you have addressed from the criminal defense lawyers’ stand point?
Paul Looney:

Paul Looney from Houston. We have been working on this pretty diligently, and first of all, I would like to acknowledge what you mentioned about attorneys not contacting their clients. That is a valid concern and a real problem. It does happen in this state. That has to be addressed, too. We do not have standards for fundamental issues in Texas for indigent defense. For fundamental issues, we do not have standards. We are not going to cure it with one or two things, but we have to keep focused on the cure. And the cure is creating standards. Our committee is committed to the idea that we are going to have to have some type of a statewide system that will establish standards, monitor the standards, monitor the needs of appointed counsel, secure state funding for redistribution that counties can participate in or not participate in depending upon whether or not they want to acknowledge the standards.

But there are also standards that can be done really quickly if the Court of Criminal Appeals justices will get together with the Supreme Court justices. We have no ethical standards that govern the relationship between appointed attorneys and judges. But we can do that really fast, and we can address standards with remedies enforceable by the Judicial Conduct Commission, which is a very serious body. Some of us have circulated a two-page proposed ethical considerations governing the appointment of counsel and indigent criminal defendants. Take a look at those. Those are not chiseled in granite; they can be tinkered with, but they can be implemented so quickly. And we can have some standards with cures. Is there any reason why we cannot have an appointed attorney within seventy-two hours anywhere in the state of Texas? No, there is not. We just do not have a standard that requires it, so nobody has had to conform. It can be done by fax; it can be done by telephone. But we need a corresponding requirement on the appointed counsel to make contact with the defendant within a similar time period after receiving the appointment. If they are in trial, they may can do that by writing a letter, but we have to have some standards on these issues. Some of it is going to have to be done through a committee that can operate statewide, but a large amount of this can be done surgically and swiftly through ethical considerations.

Judge Johnson:

Moving to another concern, is it a matter of trust? Should we
trust judges to make the appropriate appointment decision? Or should we trust elected county commissioners to make that decision?

*Senator Ellis:*

Let me make sure that is clear on that point. The bill did not require the county commissioners appoint lawyers. Right now you have 800 trial court judges. Each judge determines how you handle indigent representation in their courtroom—800 judges. So all I wanted to do was say, let us let the 254 county commissioners courts ask the question, “What do you do; how do you do it? Does this work well; does this not work well?” They do pay for it instead of each judge having total independence, whatever they charge, whatever they do in their courtrooms, with nobody asking the question. The bill also said each judge—county commissioners could not get away from that—each judge—the bill required it, just go back and read it—it says one thing when you want to get the bill vetoed. When I make a decision that I want to kill a bill? If I figured I was not going to go back to the legislature, then I would say whatever it took to get the bill killed. But knowing I will see my colleagues again, if I say something that is not true, the next time around, they will question it. So—not you, Judge—I am saying once the decision was made, “We want to kill this bill,” most judges were not reading it. They were reading the fax that they got saying, “Call the governor’s office and say a, b, c, d.” But the bill did not require that.

But to answer your question, I think there is an inherent conflict when the judge is appointing the lawyer for the poor person. If I were that judge and I wanted one of those cases, there is at least one member of the legislature who used to do criminal defense work who told me he got a young person off early on in his career and thought the judge would be happy. And the judge said, “You will not get another one,” because he went in and did a vigorous defense and got the person off. So I am saying there is an inherent conflict there. I thought it was a reasonable compromise to just do the rotation wheel so you take that conflict off that judge, in my mind. Now, the rotation wheel would not be the only way to give independence. There are other ways you could do it. If we were going to keep the patchwork system that we have now, you could decide this judge appoints the lawyer for indigent persons in your courtroom. Now, hopefully the judges would not sit down over coffee and say, “Do not appoint that one again,” unless it was for good cause. But the notion to me is how you have an adversarial relationship. How is the lawyer independent?
Because I am sure even if, Judge, you do not mean to intimidate that lawyer, if that lawyer wants another one of those cases, when they are trying to decide on whether or not to ask a certain question, or the tone they use when they ask the question. If you are sitting there on the bench, let me tell you, you are awesome anyway. And when you put that black robe on, you know, I would like to think being in the Senate is a nice prestigious deal, but I do not want to end up in front of one of your courtrooms any time soon while some of you are a little angry with me. I mean, it is just the respect and the awesome power that a judge has, I think, that creates that conflict, which is why I think it would be better if the person were independent.

Judge Johnson:

But are those really exceptions, or is that really the general rule? Michael, what do you think?

Mike Heiskell:

The perception is there. Like Senator Ellis talked about attorneys going before certain courts and trying to curry favor with that particular court in order to get future appointments. I think, one of the ways to remedy that, perhaps, is to have a combination of the courts and, maybe, the Commissioners Court, a couple of county commissioners, excuse me. And some other independent third parties to take that process of reviewing the level of competence of counsel and the resumes or whatever, and the application. And then going through a supposedly objective criteria and making that selection. And maybe as you stated, Senator Ellis, having some other court participate, making sure that he or she will appoint for another court. But I think it is inherent just in the authority of the court that if the court controls who appears in that particular court, there is an inherent problem with the conflict and the trust factor. You mentioned, or someone mentioned, earlier about even being fearful of filing recusal motions or some other challenge to the court’s authority. Vigorous, competent defense counsel find themselves, often times, in that predicament. And you have to make that choice. Well, do I go in, really mealy mouthed, and say, “Well, Judge, I am going to have to do this, and hey, do not get mad at me,” or whatever. Or do you go in and be forceful in your representation and present such a motion to make sure that you adequately and effectively represent your client? So I think we are going to have to find some remedy there, of some
sort.

Judge Johnson:

But are we going to create the same threat in other areas. I mean, we took an oath as judges, so whether or not we are appointing attorneys or not, do you trust the oath that we took? Can you not trust that oath?

Stephen Bright:

One part of the oath that the judges take, though, is to appear—to avoid the appearance of impropriety. To avoid anything that will cause a reasonable person looking at what is going on to worry about the fairness and legitimacy. So you do not have to actually get to the point of, how often is this happening? Although, I must say, the anecdotal evidence here is overwhelming. I mean, everybody that talks about it, talks about lawyers knowing they have to give money in the campaign, knowing that you are not going to get appointed again if you do a good job, being chilled when you represent. So it appears that is there. But it seems to me that the most important aspect of the oath, I mean, even the example that my colleague here gave about the judge who called him back and made him plea bargain the case because the lawyer said, “A rose is a rose is a rose.” That is not what the judge should have done. The judge was not to take over the case at that point and browbeat the prosecutor. He should have appointed the person a competent lawyer. People are supposed to be represented by competent lawyers. It is not supposed to be the system, sort of “Oh, God, this guy has a bad lawyer so we are going to go in the back room and work something out for him.” It is that they have to be adequately represented.

Now, the judges, I think, are in an impossible situation because the state does not provide the funds to attract the lawyers that are going to do the work. I mean, the lawyers who soon become competent at this are going to go off and take the drug cases and pornography cases and the other cases that have personal injury or whatever, that have money. And so the pool is not very good to choose from. But if you are looking at what the solution to the problem is, it is for the state to set up a system that is going to determine, just like the prosecutor’s office. If you know that one of your assistants is not capable of handling a felony case, you do not give them that case. Or you make sure they get training. You make
sure they get supervision. You make sure that other people are watching their performance as they are brought up, and at first they are doing low-level cases, and then more serious cases. And you do not give them a capital murder case until they have been around for a while and tried some other serious homicide cases.

Rene Guerra:

My view is that the judges should continue to appoint defense counsel because they know who are competent lawyers and who are not competent lawyers for criminal defense work. Now, if they continue appointing counsel that is incompetent or inadequate, then the sin is on them. I am very satisfied with my judges in Hidalgo County who are accused around the state of being some of the most political judges in the state. Now, the one that pays the money sometimes for the campaigns are not the criminal court-appointed counsel in my county, I do not think. It is the big, old civil law firms and the other people that receive maybe some of the ad litem fees. Now, I trust the quality of our appointed counsel if the judiciary does its job. Now we are embarrassed because the defense lawyer sleeps through a capital murder case. The embarrassment should be on that judge, who allowed that lawyer to sleep as defense counsel. I am not embarrassed by that. The judge who allowed that should be embarrassed. He should have halted the trial, but then again some judges are accused of sleeping on the bench, so I do not know. I would say giving the appearance of—I know they’re listening with their eyes closed.

Stephen Bright:

What about you said a moment ago, that one of the problems in your circuit was that lawyers appointed and then did not see their clients for long periods of time?

Rene Guerra:

And this is where the judge needs to sanction that lawyer and—

Stephen Bright:

But they are not doing that, are they?
Rene Guerra:

Some are, some are—

Stephen Bright:

I mean, it sounds like this is average. Some are, but some are not.

Rene Guerra:

I think the lazy lawyer is not going to get a court-appointed case, should not get a court-appointed case, Because he is not representing his client.

Senator Ellis:

I would say, Judge, do not go overboard with the oath business because if you use the argument—and I disagree with Mike; I am not talking about the county commissioners having a role in the appointment. We just disagree on that point. But if you were just going to base it on the oath, well, they took an oath. I took one. So if all it takes is an oath, I will take one in January. Just let me appoint them, then. Some judges do a better job than others, but to remove the perception there ought to be some middle ground. It does not necessarily have to be a rotation wheel, but there ought to be something that gives that independence. And then we ought to be holding hands going to the legislature making the argument together about the broader issue: the need for money. I mean if there is no money in the system, I understand it is difficult to appoint people. You generally get for what you pay for.

Now I would not make the argument that we put as much money on the indigent representation side as we put on the side for the prosecutor’s office because that is not going to happen. I am enough of a political realist to know that. But, now, you take Georgia that puts in $9 million a year [of] state money. A state that is one-fifth the size of Texas, and it comes to a total that $42 million a year with local money. In Texas the locals put up about $82 million a year—no state money, just their money. In a state that is as big as ours, with as many cases as we have coming on board. So I think that is where the focus ought to be. You mentioned something about the health care area, I think, earlier. It is a federal lawsuit that forced us in the legislature to step up to the line and start addressing those needs. And in so many areas in state government, because we meet 140 days, we pack up and
go home. And this issue is difficult to get on the radar screen, unless you got a federal judge out there ready to slap us across the head to get us to do what we know we ought to do anyway. So that is why I am encouraging some collaborative effort and quick. Because we will be doing this in June, but then I will be telling them they better run and do some press conferences over in front a Federal Courthouse as opposed to in front of a Statehouse.

_Stephen Bright:_

And can I just add one thing on going to the legislature and all that, and the role that I think the prosecutors play? One thing was said earlier that may not have really been meant, but I just want to address it before we run out of time. Do we spend money for criminals who bind and kill children? Or recently, I noticed one of the prosecutors in the state was quoted as [saying], “These scumbags may have rights, but it is not my responsibility to enforce the rights of these scumbags.” If the issue is framed that way, we are not going anywhere.

The fact of the matter is there is a presumption of innocence. People who are accused of crimes are still accused, and the idea of the system is that we are going to have an adversary system that resolves these questions, not that these people are presumed guilty and they are not worth fooling with. I think that, historically, has been the view. But one of the groups that has to provide leadership here, and Anthony Lewis describes this so well in _Gideon's Trumpet_, about how when Florida was trying to get the other states to come on board and say there was not a right to counsel, to file an amicus brief on Florida's side and agree with Florida that Clarence Gideon and other people did not have the right to a lawyer at all. Twenty-four states came in on Gideon's side and said we cannot have a fair system unless people are given lawyers. That is leadership. Attorneys general—this would never happen today—but attorneys general of a number of states came forward. There were only two states that backed Florida. All the rest said, “If we are going to have an adversary system, we have to provide people with counsel.”

And I would suggest that members of the prosecution have to go and say to the legislature, “If we are going to have an adversary system, the state has to play a role; it has to provide some money; and we have to set up a system that has the independence that we as prosecutors have, so that we can have a fair system that reaches just results,” not just on guilt or innocence, but also on sentencing. When we are deciding these great questions about, do we put these people
on probation or in jail? Do we give them death or do we give them life? All those kinds of questions—that the courts are informed about that because we have adequate representation of poor people.

*Judge Johnson:*

I had about ten more questions, but I really do want you to have an opportunity to ask questions, and we only have about ten more minutes. And I do want each panelist to have one minute to summarize any comments, to make any comments they want to make. So if you will state your name and ask your question.

*Jerry Wesevich:*

Hi, I am Jerry Wesevich. I am a member of the State Bar. This is really a question for you, Judge Johnson, or any of the other judges who are here today. At some point we have to get to the core issue of why judges have historically been so anxious to hold on to this hot potato of indigent defense. We can all agree on three underlined facts. One, it is a tremendous administrative burden for judges to appoint counsel under their current assigned counsel system, so much so that many of them have their court administrators do it or their court reporters do it, and they are not actually doing it themselves. The second fact is that a firestorm of criticism is possible. It has proved itself over the past year within the state over indigent defense. And if judges are taking the responsibility for the system, they open themselves to that criticism. The third, when the system fails, they essentially vouch for the quality of the system in Texas. And the third fact that I think we can agree on is that other states and the federal government and local government have all proved that other people can appoint counsel. It can be other lawyers who are familiar with the criminal bar in the jurisdiction. Judges, by their training and qualifications to be judges—simply because they wear a black robe does not make them more uniquely suited to be the ones to choose which lawyers represent indigent defendants. So if it is an administrative burden, and if it opens them to criticism, and there are other people who can do the job, we need to have a public discussion about why judges want this responsibility.

*Judge Johnson:*

Judge Aboussie, would you address that? We have talked about that.
Justice Aboussie:

I am not used to being called on. I am usually the one asking the questions. And I am quietly sitting over here listening to all of this and very interested in what is going on. So my answer is, I am not sure that I will. But I will tell you that much of the discussion that has gone on, which is that from the judiciary's perspective, the reason we got into this at all is that we saw some serious problems with the bill. We love Senator Ellis, and he carries half of our bills that have to do with the judiciary. And this was never an attack on the Senator because he is smart and good and a real lawyer.

Senator Ellis:

And I clerked for her court.

Justice Aboussie:

And he clerked for our court. And I think that it really opened the doors to some wonderful serious discussions about the issue. The judiciary spent a whole conference on this in May—a two-day conference in El Paso. We spent a great deal of time on it at our annual conference in September. And many within the judiciary, of course, do not even handle criminal cases. Many do. I was a district judge with general jurisdiction for several years before I was on the Court of Appeals and Chief Justice now. But I just—to maybe throw in a few matters that have not really been mentioned, and one of them would be in response to that. The judiciary felt very strongly that the bill did turn over to the very people who controlled the money too much. I mean, those, if we ask the county commissioners how much of a budget should be spent on indigent criminal defense, we did not anticipate that dollar figure would be increased. Okay? If you understand what I am saying. The judiciary believes—and that is okay because they have everything to worry about in the county. The judiciary felt—and I think the tenor of the conversation among judges is that only the judge has the constitutional obligation in the situation to guarantee that an indigent defendant is entitled to—not only recognizes that the indigent criminal defendant is entitled to competent legal defense counsel—has the constitutional obligation to guarantee that counsel and has the ability to guarantee that that counsel will be paid an appropriate amount of compensation.

Now I am not here to defend that what are doing always accomplishes that goal, but that only the judge has the authority to
guarantee that and to do it, despite all the arguments against doing that and all the political pressures that might come to bear to keep that from happening. So, in answer to your question, that is not because—I mean, excuse me—but, I do not think appointed counsel generally even contribute to judicial campaigns, much less, you know, twenty-five or fifty dollars is not going to buy too many people I know. So that is just kind of a real rough answer to why the judiciary felt it was important. Now, at the same time, we feel it is important. We are here sponsoring this today because it is important for the conversation to take place; it is important for the examination to take place; and it is important for us to try to find some common ground where we can improve the system because, again, we certainly recognize that there are some issues that need to be addressed. I want to mention one thing, Senator, that has not also been mentioned—well, two things, quickly. One was that there are counties in Texas that do not even have lawyers. There are counties, there are judges in Texas who ride a circuit of several hundred miles, and they do not go to those counties maybe even once a month. So the judiciary’s resolution, I think that ninety percent of us thought seventy-two hours had a real good ring to it. But we were trying to be sure that we also take in to account those judges and counties that do have really geographic problems where you are trying a case in one county, and you cannot get to that other county. Yes, probably there are ways we can fix that, like faxes and so on, which now we hope we can do, as long as those counties and those judges have that equipment available even.

Then, a third thing that has not been mentioned at all, and is probably not even known to most people here, is that the judiciary is under a great deal of pressure from the legislature with respect to performance standards and funding issues. We do. We publish a huge book every year that reports the number of cases we dispose of, when they were filed, how long it took from filing to disposition, and from submission to disposition on the appellate court. All of those kinds of pressures, and they come to bear every time we go to the legislature on funding issues. And Senator Ellis served on the finance committee, so he is well familiar with those. There is a lot of pressure for speed, and I spent a whole afternoon yesterday in a committee discussing the fact that quantitative versus qualitative justice that, you know, the numbers do not always say everything. Speed is not the only thing that we should be trying to accomplish. On the other hand, you know, justice delayed is justice denied, so speed does have a factor.

Those are some issues that affect the judiciary’s view point of
some of this, and I just want to commend our committee, the State Bar committee, and everybody who is here today struggling with this, and I think we all are. We want to be part of the solution, and we are here to help that. I just finished my year as chair of the State Judiciary. Lamar McCorkle is here; he is the incoming chair as of the end of September. So let us—we are here to help, and we want to.