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Judiciary Committee
September 07, 2018

[LB370 LR370 LR390 LR406 LR415]

The Committee on Judiciary met at 9:00 a.m. on Friday, September 7, 2018, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR406, LR390, LR415, and LR370. Senators present: Laura Ebke, Chairperson; Patty Pansing Brooks, Vice Chairperson; Roy Baker; Ernie Chambers; Steve Halloran; Matt Hansen; Bob Krist; and Adam Morfeld. Senators absent: None.

SENATOR EBKE: Okay. Well, good morning. Welcome to the Judiciary Committee interim studies. My name is Laura Ebke. I'm from Crete. I represent Legislative District 32 and I chair this committee. I'd like to start off by having the members of the committee who are present introduce themselves, and I believe that at least a couple of them will straggle in as we go, so let's start on my left today.

SENATOR HALLORAN: All right. Good morning everybody. Senator Steve Halloran from District 33 which is Adams County and parts of Hall County.

SENATOR CHAMBERS: Ernie Chambers, District 11 in Omaha, representing everybody in the universe. (Laughter)

SENATOR BAKER: Roy Baker from District 30, Gage County, part of Lancaster County.

SENATOR EBKE: Okay. And assisting the committee today is Laurie Vollertsen, our committee clerk; Dick Clark, our legal counsel. And who...I didn't see who the...our page is.

LAURIE VOLLERTSEN: Grady.

SENATOR EBKE: Grady is our page today. Oh, and there's Senator Pansing Brooks as well. So if you're planning on testifying today, please fill out one of the yellow testifier sheets on the table and hand it to the page when you come up to testify. We will begin testimony with an opening statement by the introducer of each resolution and then we'll hear from others wishing to testify on the resolution. We do have a few planned witnesses so we will have those folks come up first,

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testifiers, and then anybody else who wishes to speak. We'll begin with a...we'll finish with a closing statement by the introducer if he or she wishes to give one. Please begin the testimony by giving us your first and last name and spell them for the record. If you have any handouts, please bring up 12 copies and give them to the page. If you don't have enough copies, the page can help you make some more. As a matter of committee policy, I'd like to remind everybody that the use of cell phones and other electronic devices is not allowed during public hearings, though senators may be using them to take notes or to stay in contact with their staff. At this time I'd ask everyone to just check your cell phones, make sure that they aren't going to make a racket during the course of the hearing. And I would also note that, you know, it's our goal to be done by noon or shortly thereafter. We have four interim studies today so, you know, we'll go longer if we need to, but I am hopeful that we can keep things moving along. So with that, we have LR406, Senator Morfeld. [LR406]

SENATOR MORFELD: (Exhibit 1) Thank you, Chairwoman Ebke. Members of the Judiciary Committee, for the record, my name is Adam Morfeld, A-d-a-m M-o-r-f-e-l-d, representing the "fighting" 46th Legislative District, here today to introduce LR406, a resolution to study and to adopt the American Bar Association standards for defense counsel in death penalty cases. I'll try to make this brief so that we can get done at 12:00. I'm also going on vacation right after this, so I'm headed to the airport, so I may leave a little bit early. [LR406]

SENATOR EBKE: Highly motivated. [LR406]

SENATOR MORFELD: Yeah. Yeah. I'll be coming back as long as I'm not mauled by a bear or fall off a cliff while back-country camping. So in 2016, Nebraska voters reinstated capital punishment in this state. Last month the state carried out its first execution in over 20 years. If we are going to have a death penalty, it is imperative that we ensure the capital defense system is meeting the best practices. We need to simultaneously ensure that the rights of the accused are upheld and minimize liability for counties and the state from ineffective-assistance-of-counsel claims. I introduced LR406 to examine current standards for attorneys who are representing the accused in a capital case. Today you'll hear from two experts who are familiar with the American Bar Association's guidelines for the appointment and performance of defense counsel in death penalty cases. The ABA guidelines were published in 2003 and are accepted nationwide as

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appropriate standards and have been implementing in other states using the death penalty, including Alabama, Arizona, Georgia, Indiana, Kansas, Louisiana, Nevada, Ohio, Oregon, and Texas. Nebraska may be alone in having an active death penalty without statutory or regulatory standards. We currently have the statewide capital defense system in the Nebraska Commission on Public Advocacy which was created in 1995 to relieve counties from crushing financial burden of providing quality representation to capital defendants. But not all capital defendants are represented by the commission. The commission also has been charged with developing standards and guidelines for defense counsel. In 2002 the commission did just that by convening a council of expert stakeholders to construct standards only to face a special session called in response to the budget crisis. In the special session the statutory reimbursement scheme passed by the Legislature lost its funding and became a dead-letter law. The commission did create the initial standards for indigent defense systems which predate the ABA standards and, frankly, are a set of good intentions without the force of law. It is time to review our statutes and regulations to ensure that we are meeting best practices met by many other states. You'll hear today from death penalty experts who will describe the bare-minimum expectations for attorney representing a client who is facing the possibility of a death sentence. If the state wishes to have an active death penalty, the state must be prepared to pass clear written guidelines in state statute or regulation to ensure that justice is being met. For example, most states have statutory guidelines or written court rules that set out the requirements to ensure only experienced attorneys and experts may take on a capital case. The ABA standards require that at least two qualified attorneys, an investigator, and a mitigation specialist. Mitigation specialists are trained to delve into the defendant's background in order to identify mental disorders, a history of childhood abuse, or other factors considered by the court in the sentencing phase. While our sister states have requirements about continuing education for capital defenders, funding of experts and more, Nebraska has lagged behind, perhaps because we weren't using capital punishment for many years. In light of the new reality, it is time that we bring our legal standards up to modern expectations. I welcome questions but two of the testifiers here are particularly well positioned to answer your in-depth questions. Emily Olson-Gault is the director and chief counsel of the ABA Death Penalty Representation Project based in Washington, D.C. Sean O'Brien teaches law at the University of Missouri-Kansas City where he has a clinic that currently represents death penalty defendants in trial, appeal, and postconviction cases. I hope that after hearing from these experts

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Nebraska can find a path forward to consider a statutory scheme that meets the best practices for ensuring justice for all. Thank you. [LR406]

SENATOR EBKE: Thank you, Senator Morfeld. Senator Chambers, a question? [LR406]

SENATOR CHAMBERS: Madam Chair, members of this committee, while Senator Morfeld, the introducer, is here, there is a statement I'm going to make and I want to make it while a senator is in the chair so it won't seem like my remarks are addressed to somebody who testifies or that person would have to respond to them. And, Senator Morfeld, naturally you can respond any way you'd like to. I've been against the death penalty for as long as I knew that there was one. This recent travesty upset me more than any of the other cases where an execution was carried out and in three of them I spent time with the condemned prisoner prior to execution. I accompanied two of them to the execution chamber. I did not watch the killing because that is not what I have an interest in doing. But I wanted to be sure that as they strapped these men into that chair, there was nothing done in the way of inappropriate taunting or torture. And as it turned out, they had one man's elbow with the crazy bone, as they call it, against the post on the back of the chair and he was grimacing and I asked him what was wrong and he told me. I told them, loosen those straps and you're going to do this in the way you're supposed to. So they loosened the straps. And this man was about to die, but he thanked me. This last incident involved a situation where Carey Dean Moore had counsel of record, the Public Advocacy Commission. The Attorney General did not notify the commission of anything that was going on in the way they were required to so the court on its own motion contacted the Attorney General's Office, asked them why they didn't do it, and ordered them to make the notification. The Attorney General's response was snippish, it was insulting, it was demeaning, it was degrading to the court, and the court did not respond to that. But the commission was required to represent Carey Dean Moore. Carey Dean Moore rejected that and wanted to waive representation by counsel. The Nebraska Supreme Court has said in one of the cases that it decided that a defendant is allowed to waive representation if it's done knowingly, willingly, and so forth. In this instance the court went against its own ruling and required Carey Dean Moore to have representation of counsel even though he made it clear he did not want it. When the commission did assume the representation, and head counsel Jeffery Pickens was the lawyer, he asked to be removed from the case because Carey Dean Moore did not want any actions of any kind filed in

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his name. Mr. Pickens made it clear that to be representing a client under these circumstances and not allowed, due to the wishes of the client, to file any papers in his name, anything filed would have to be verified by the...by Carey Dean Moore, which he would not have done. The court refused to allow him to withdraw. My response, my reaction: The court wanted to mandate representation to give the appearance of regularity in this execution that was being done hastily, indecently, and out of order, in my opinion. They compelled an honorable lawyer because they were behaving as a dishonorable court, for which I have no respect whatsoever and I want it a matter of public record. I had written one communication to the Chief Justice, and because several years ago I wrote one and a majority of the court withdrew a death warrant for Carey Dean Moore based on what I had written in that which you could call ex parte communication, the Chief Justice in my opinion was the one who led the effort, adopted a new court rule so that such communications could not be accepted by the court. I would not be allowed to intervene where an inmate, as like Moore, did not want a lawyer to file anything. Be that as it may, I didn't know how that rule would be applied so I did address a communication to the Chief Justice. I received a letter from the clerk stating that the court would not read, the Chief Justice would not nor would any member of the court read any ex parte communication, but that a copy would be sent to the counsel for Moore and the state, which I had done and made notation about. The court was dishonorable. The court engineered a train wreck and then withdrew itself from the damage that would result but made the lawyer stay there. The court, in pretending to create regularity in carrying out the most solemn duty that it would have--which is to issue a death warrant and allow a person to be killed at the hands of the state--did like Pilate, washed its hands but left the mess on the table of the attorney. The attorney was not allowed to behave as an attorney who had been drilled with the knowledge and the information and the requirement that a lawyer represents a client zealously and he could not represent that client at all. The only reason they could execute Carey Dean Moore is because he cooperated and let them. There were several motions that could have been filed that would have kept Carey Dean Moore alive. The death drugs would have expired. There would have been no execution. This that is being offered today is meaningful, it's worthwhile, but it will be no better than the dishonorable court, the majority of whom are Republicans appointed by this Republican Governor who made executions a keystone to everything he was doing. He went so far, and my colleagues who were here at that time, to play the race card. And it was publicized and I have the article where he said anybody who would vote to overturn the death penalty and then to override will be voting with Senator

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Chambers and sending a message to the criminals that you're soft on crime. There were 30 other white people. Why did the Governor mention Senator Chambers? There were white people who had cosigned the bill. There were pending at that time cases dealing with very critical aspects of the death penalty machinery. They had been appealed. The Supreme Court was going to have to rule on those cases. Had the court ruled in the way I thought the court should have--namely, that the protocol was adopted in a way that was illegal--there could not have been an execution carried out. Despite the pendency of those cases, the Supreme Court allowed the execution to be carried out. The court is dishonorable, despicable, worthy of contempt because they prejudge the outcome of those appeals that they're going to hear by allowing the execution. They are not of...they are not in a position to rule any way other than against that pending litigation because were it to rule otherwise, it would be acknowledging that it allowed an execution to be carried out that should not have been carried out. So now that they've gotten their robes in the slime of dishonor, they're now pulling the hems up and tiptoeing, pretending that they're going to behave as a court should. In England judges will put on robes and they'll put on a wig, and it was not to be theatrical but to symbolize for everybody to see the solemnity of what was being done. This was a body of people carrying out the solemn duty of the state. Either they were going to administer the judgment and punishment of the king or they were going to be...extend and bestow the mercy of the queen. The people wearing those robes were not intrinsically more moral, ethical than anybody else, but those accoutrements were designed to project what the court is about and the duties that were being performed. For this dishonorable Republican political-leaning court to allow an execution to have been carried out under these circumstances is inexcusable and there is no way to call them to account. There is nobody who will call them to account. They overlook the slipshod, slapdash way the Attorney General was operating. In prior cases--and I'm wrapping it up now--this Nebraska Supreme Court, with different judges sitting, had instructed the Attorney General before seeking a death warrant to ensure that no stays were in place because former Attorney General Don Stenberg had done such a thing. In chastising him for doing it the court said that you are bound by federal law, there was a federal stay in place; when you swore your oath of office, you swore to uphold the law and Constitution of the United States as well as the state, you're bound by that, and the only reason sanctions will not be imposed is because this is the first time we're ruling directly on this issue. So he escaped. Jon Bruning withheld information from the court about not having drugs to carry out an execution and the court issued an execution warrant. Then it became clear that the drugs were not there, the

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execution couldn't be carried out, and the lawyer for the--I want to say patient--for the prisoner had pointed out that this was a sham execution, it was in the nature of torture, it should not have resulted in a death warrant being issued. The judge looked at the facts and he had some harsh words for the Attorney General's Office and said: Not only did you withhold information from the Supreme Court, you withheld information from the county attorney in Douglas and withheld it from the attorney for the lawyer...for the prisoner, and the only reason I will not impose sanctions, as is being requested, is because the motion filed by the inmate does not allow for that kind of relief, but the Attorney General's Office should be called to account and it was not. This time around, Attorney General Douglas Peterson prevailed on the Supreme Court to issue a death warrant. That was his request. He included documentation from every level of the federal courts that there was no stay pending, no actions filed, so it's all right for the court to do this, and the court trusted them. They did not issue the warrant at that time. The ACLU filed a letter or document that mentioned the existence of a request for clemency by Carey Dean Moore before the Pardons Board. What the law says is that when there is a request for clemency pending, the sentence of death cannot be carried out until that has been acted on. The Attorney General is a member of the Pardons Board. As a lawyer he's required to know what is involved in any case he or she is handling and especially one like this. So there was what would have to be called a statutory stay in place that he did not notify the Supreme Court of when he requested the issuance of the death warrant, and that is working a fraud on the court. The court didn't do anything about that. At least three Attorneys General have shown contempt for the Nebraska Supreme Court and the Supreme Court has rolled over and swallowed spit and behaved in the most craven, partisan, political manner imaginable. So when it became public and even lawyers commented on the existence of this request for clemency, then the Attorney General--about a week later--offered a supplemental filing calling attention to the existence of that request and pointing out that after the Pardons Board had its hearing the court would be notified. He is a member of the Pardons Board. He's a lawyer. He's required to know the responsibilities of the position of being a member of that Pardons Board. He is required to show ordinary diligence, which the Attorney General didn't, and this Supreme Court allowed an execution. You know why I don't mind doing this? A man was killed in a way he should not have been. No other senator said anything that I'm aware of, but I know some were upset about it. It's not my responsibility as a senator to do the things that I do, but it's the responsibility on me as a human being. And this final note on why I will always be against the death penalty: I don't care who the victim is, who

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the perpetrator is, or the methodology by which the crime was carried out, there is a basic fundamental human dignity that attaches to every person, no matter how far or low he or she has fallen, and when the state kills it commits violence against that basic human dignity. I don't mention personal things, but a young man was killed not long ago in Omaha who was my grand-nephew. He was my sister's grandson. People ask how I feel about the death penalty. There should be no death penalty. And I'm going to write a letter to the Chief Justice because a district judge put a million-dollar bond on two women who supposedly had information and didn't want to give it, so he put a bond on them and it's in this case involving the death of my grand-nephew. That bond should not have been offered; it should not have been imposed. It dishonors the court. It disrespects the constitution. That's an excessive bond or bail. It cannot be met. There was no need for it. The judge wanted to send a political message so even where one of my family members is involved, I've got to lay all that aside and still try to maintain the integrity of the court because it ain't much but it's all that black people have. We might be able to get a little justice, so I have to try to keep it behaving in the way that a court should. And the courts in Douglas County do not. So I'm going to say for the record, no judge, no salary increase for a judge will be enacted by the Legislature while I'm in the Legislature, and people can take that to mean whatever it wants to. And I don't have any more to say. I have no questions. I'll make no further comments. But I wanted that on the record because, unlike my colleagues, I don't throw a rock and hide my hand. Everything we say is recorded and transcribed and when this is transcribed, I'm going to make sure every member of the Supreme Court gets one with a cover letter. Thank you, Madam Chair,... [LR406]

SENATOR EBKE: Thank you, Senator Chambers. [LR406]

SENATOR CHAMBERS: ...and the indulgence of my colleagues who couldn't do anything but indulge me anyway. (Laughter) [LR406]

SENATOR EBKE: Senator Morfeld, anything else at this point? [LR406]

SENATOR MORFELD: No. Thank you, Senator Chambers. [LR406]

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SENATOR EBKE: Any questions for Senator Morfeld? Okay. We have two planned witnesses. Emily Olson-Gault, yep. Welcome to Nebraska. [LR406]

EMILY OLSON-GAULT: Thank you. [LR406]

SENATOR EBKE: State your name and spell it for us, please. Thank you. [LR406]

EMILY OLSON-GAULT: (Exhibit 2) Thank you, Chairwoman Ebke. My name is Emily Olson-Gault. That's E-m-i-l-y O-l-s-o-n, hyphen, G-a-u-l-t, and I'm here today on behalf of the American Bar Association where I am director of the ABA's Death Penalty Representation Project. Thank you to Senator Morfeld for the invitation to appear today and for the opportunity to present the views of the ABA. The ABA takes no position for or against the death penalty but instead is committed to ensuring due process in capital cases. The ABA has found that no single factor is more important to ensuring due process than the provision of qualified, adequately resourced defense counsel, and it has adopted policies and standards to promote the availability of such counsel, including the 2003 ABA Guidelines. Since their adoption the ABA guidelines have been broadly recognized by courts and legislatures at every level as embodying the standard of care for capital defense. My written remarks provide some background about the development of the guidelines and their implementation in other jurisdictions. But in my brief remarks today I want to talk about three things that the guidelines are not which I hope will help inform our discussion about what the guidelines are. The first thing the guidelines are not is aspirational in the sense of setting forth the requirements for a perfect defense. Instead, the guidelines are intended to codify the minimum requirements for the defense effort. It is certainly possible to impose more stringent requirements and many jurisdictions have done so. But the guidelines describe the baseline of what is necessary to help ensure fairness and accuracy in capital cases. The second thing the guidelines are not is the invention of the ABA or the defense bar. The 2003 Guidelines were drafted with the input of a broad range of experts in capital punishment that included prosecutors, defense attorneys, and judges. The drafters worked together to reach a consensus about longstanding, well-established professional norms of capital defense practice. Consequently, there's really nothing new or invented in the ABA guidelines, nor are the guidelines limited to the perspective of defense counsel. Instead, the guidelines are a codification of well-established norms and reflect the views of attorneys across the United States and

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throughout the criminal justice system. The final thing the guidelines are not is a rigid set of mandates with limited applicability in real practice. One of the reasons the guidelines have found such widespread acceptance in jurisdictions across the country is that they're based in fundamental principles of capital defense that are flexible enough to be adapted to variations in jurisdictional practice and to leave room for counsel to exercise their individual judgment. I strongly encourage you to do as other jurisdictions have done and use the guidelines as a tool for creating standards that will help ensure constitutional due process and enhance the smooth functioning of Nebraska's death penalty system. I'm grateful to the committee for considering this important issue and I hope that I can be of assistance as you go through this process. I look forward to answering any questions you have. Thank you. [LR406]

SENATOR EBKE: Thank you. Any questions? [LR406]

SENATOR CHAMBERS: I do but I promised not to ask any. [LR406]

SENATOR EBKE: Okay. I see none. [LR406]

SENATOR PANSING BROOKS: One. [LR406]

SENATOR EBKE: Oh. You have a question, Senator Pansing Brooks? [LR406]

SENATOR PANSING BROOKS: Yeah. Would you just summarize some of the highlights of the... [LR406]

EMILY OLSON-GAULT: Sure. [LR406]

SENATOR PANSING BROOKS: Thank you, because we...for some reason I didn't get this ahead of time, so I'm trying to quickly... [LR406]

EMILY OLSON-GAULT: Sure, I'd be... [LR406]

SENATOR PANSING BROOKS: So if you could please highlight some of the... [LR406]

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EMILY OLSON-GAULT: I'd be happy to do that. So there's...the guidelines are split into two basic sections. The first section is...talks more to folks such as yourselves, the people who are creating and administering a system of capital defense, and it talks about the need for qualifications, training, how a team should be structured, and funding and workload, things like that. The second half of the guidelines really speaks to the lawyers and that talks...that tells the lawyers directly this is what you need to do, bare minimum what you need to do in a capital case to provide quality representation, effective representation under the constitutional standard. Some of the highlights of kind of each of those parts, the guidelines emphasize the need for a capital defense team that is comprised at bare minimum of two qualified lawyers--so that's two lawyers that meet all the training and qualification requirements--a fact investigator, and a mitigation specialist, and one of those four members--if it's not one of those four, then you need five--needs to be trained in to screen and identify mental health issues because those are so prevalent in capital cases. So you have a four- or maybe five-member team that is the bare bones what you have to have for every capital case at every stage. And the guidelines really emphasize--this is another big point in the guidelines--that it has to be an integrated defense that they put together. This is the thing that makes capital cases different is that you have a penalty phase and a guilt phase or a guilt phase and a penalty phase--I should talk in chronological order. The guidelines say that you really need to be thinking about both from the very start. From the moment that this becomes your client and that you know the death penalty is a possibility, you need to be working not only on the issues of whether your client is guilty or not but investigating their background, their biological history, their social history, their psychological history, finding their family's background, looking for the things that are going to mitigate against a sentence of death, and you need to integrate that throughout your case at both the guilt and penalty phases. So the guidelines talk about the necessary steps that you have to go through to make sure that you have the right team to accomplish this and all the right investigative steps, the right preparatory steps that you have to go through. The other thing that I will highlight that the guidelines talk about, and that I know is a difficult issue but it's a real one that you have to face, is the need to fund the defense effort. The guidelines, I believe there's a line in there that says, for better or worse, systems get what they pay for when it comes to capital defense, and that's unfortunately true. Defense isn't cheap, counsel isn't cheap, but it's necessary. It's not optional. If states are going to have the death penalty, then they have to be able to pay for the death penalty and big part of that is paying for the defense effort. And the guidelines talk about the need to

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fully fund the defense effort to make sure that you have lawyers being paid for their actual time so you're not getting lawyers who are willing to work for nothing. You need to make sure you're paying lawyers for their experts and their mitigation specialists and any other experts or investigators that they need. So that's part of what the guidelines addresses is that that's the trade-off that you make for having the death penalty is that you have to also have the defense counsel and the defense team to ensure competent representation because if you don't, that's how we see cases going through the system over and over and over again because it's not done right the first time. And it gets up to the appellate courts, it gets tangled in a huge procedural mess, which capital cases are subject to some incredibly complex procedural rules, and eventually it'll get sent back down on a procedural rule, it gets sent back down on a fact issue, it goes through the same issue again, and we see cases lasting 10, 20, 30 years as a result of this. So for even the sake of efficiency, putting in that investment up-front of money and resources is what is necessary to have a functioning death penalty system and that's what the guidelines talk about, how to make that happen. [LR406]

SENATOR EBKE: Senator Baker. [LR406]

SENATOR BAKER: Thank you. On page 6 it's noted in the footnote the Nebraska Supreme Court did address the guidelines once. Can you elaborate on that a little bit if you're able? [LR406]

EMILY OLSON-GAULT: Sure. So the guidelines, one of the things that my project does is track any time the guidelines get mentioned by any court in the United States, which is a pretty overwhelming group of cases that you look at. And when I was preparing for this, I looked at what the Nebraska Supreme Court had said and I found only one time that they had mentioned the guidelines. Part of this has to do with the relatively low number of capital cases that are in Nebraska. But what the court did in that case, they didn't speak out for or against the guidelines. They simply noted that the defendant in that case, Mr. Torres, had said that he didn't have that basic team that I just spoke of, two layers, an investigator, and a mitigation specialist that...and in particular he didn't have a mitigation specialist in his case. And the court didn't really make any...they didn't speak out against the guidelines. It didn't make an affirmative statement that we, therefore, adopt the guidelines, but what the court did do is note that Mr. Torres' postconviction

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team--so his team of lawyers that were bringing the case before the court at the time to challenge the conviction and death sentence--also didn't have a mitigation specialist. And what the law says is that in order to show you received ineffective representation at trial, you have to show both that your counsel's performance fell below prevailing professional norms such as the ABA guidelines, and that if they hadn't, if they had met those prevailing professional norms, that they would have found something that would have made a difference. Well, because his counsel, his postconviction counsel didn't have a mitigation specialist, we still didn't have that second piece. We still didn't know what counsel could have found that would have made a difference. So I thought it was noteworthy that not only did the court mention those guidelines but also noted how there was a continuing failure of counsel to do what they needed to do, that is, have the team that can uncover the evidence, that can provide evidence that will make them even eligible for relief, because without providing that evidence--and you're not going to get that evidence without the right team--you don't even have a hope of getting relief. [LR406]

SENATOR EBKE: Thank you. Senator Pansing Brooks, do you have something or you want me to jump in? [LR406]

SENATOR PANSING BROOKS: If you want to, but I have more (inaudible). [LR406]

SENATOR EBKE: Go, go ahead. No. [LR406]

SENATOR PANSING BROOKS: So I guess part of the quandary is that people will be defensive about the fact that the American Bar Association may be coming in and being critical of whatever happened or whatever specific thing that went on with Mr. Moore with this most recent case, but in actuality we're also talking about the big picture of all cases and best practices by attorneys. Is that correct? And so I'm presuming you're not here to necessarily critique every aspect of what happened just recently because this is so fresh in our minds with Mr. Moore. Is that correct? [LR406]

EMILY OLSON-GAULT: That's absolutely correct. I was actually asked before Mr. Moore was executed to make this presentation to you and it was...really had nothing to do with his case in particular. I understand from listening to the remarks today that there may have been counsel

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issues in that case. I was not directly involved with that. I don't really have any expert knowledge of what happened there. This is about the system. This is about the capital counsel system and the lack of meaningful standards for providing for creating defense teams, for funding defense teams, and then for what those lawyers are supposed to do once they have a client. So this isn't about any particular case at all. [LR406]

SENATOR PANSING BROOKS: And so these things are generally...I would have presumed that they would have been adopted by the Nebraska Bar and that they would be best practices just like our standards of ethics and our disciplinary rules and things like that. But this is something different where the courts have to adopt them and then direct the attorneys that are representing those clients. It's not a direction from the Bar Association itself in Nebraska. [LR406]

EMILY OLSON-GAULT: So actually it's done in a bunch of different ways. The Texas Bar is an example of where a bar association has adopted the guidelines. They basically adopted the guidelines verbatim with slight modifications for Texas practice. But there are also states that have adopted them legislatively. And the way that has been done is where usually you have a legislature authorizing an indigent defense board to promulgate rules and standards and then the indigent defense board will use the guidelines as a model for creating those standards. We just did that this last year in Idaho where the Legislature authorized the Idaho Public Defense Commission to create standards consistent with the ABA guidelines and we worked with the Idaho Public Defense Commission to promulgate rules. Those were put before the state legislature for approval and they went into effect this May. And several other states have done it that way. At that point they have the force of law that can be then enforced by courts. [LR406]

SENATOR PANSING BROOKS: I see. [LR406]

EMILY OLSON-GAULT: The final way is by court rule and there are a few states--Arizona is one of those states, Nevada is another--that have actually had the state supreme court adopt the guidelines in whole or in part by supreme court rule. So that's a possibility but the legislative route is actually the more common. [LR406]

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SENATOR PANSING BROOKS: Okay. Has the Nebraska Bar, have you met with them and are they supportive of this or do we have...has that gone forward? I'm just interested. [LR406]

EMILY OLSON-GAULT: Yeah. I have not met with them. To my knowledge, they have not adopted the guidelines or considered it, but that's, you know, based on my own limited knowledge. I don't know if they have...I know they have not adopted them but I don't know if it's been considered. [LR406]

SENATOR PANSING BROOKS: Okay. Thank you. [LR406]

SENATOR EBKE: Thank you. [LR406]

SENATOR PANSING BROOKS: Thank you for coming. [LR406]

EMILY OLSON-GAULT: You're welcome. [LR406]

SENATOR EBKE: Other questions? I have sort of a theoretical question. [LR406]

EMILY OLSON-GAULT: Sure. [LR406]

SENATOR EBKE: Okay. What do you say to those out there--and we've all, everybody that's sitting at this table has heard this, I think, probably in the last couple of years--what do you say to those who say that, especially with respect to postconviction counsel, that this is just a waste of taxpayers' money, that, you know, someone who has been convicted of a, you know, of a heinous crime, that they've been, you know, tried and found guilty by a jury of their peers, that in Nebraska they have been sentenced by a three-judge panel to the death penalty, you know, what do you say to those folks, you know, that the...why do you explain to them, how do you explain to them that this isn't a waste of taxpayer dollars to make sure that we continue to have counsel postconviction? [LR406]

EMILY OLSON-GAULT: Sure. Well, I would point first to the...I think it's around 150 people now who have been exonerated from death row almost exclusively through postconviction

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proceedings, sometimes after years, decades of postconviction proceedings, multiple rounds of postconviction proceedings before evidence of their innocence came forward. Sometimes these are cases that looked like the person was unquestionably, undeniably guilty at the beginning, and with good lawyering that evidence of guilt has absolutely fallen apart and it turns out they are actually provably innocent. I would also point to, you know, you talk about that this has been before a judge and a jury. If judges and juries don't have the information, they can't make the right decision. And the whole point of postconviction is to say, look, the lawyers didn't do their job at trial, they didn't provide the right information to the judge and jury to make this decision. I think a good example of this was just recently in Ohio, Raymond Tibbetts was granted clemency by Governor Kasich and he was granted clemency after a juror came forward at the very end, after decades of proceedings, after postconviction, all of this, and the lawyers found out that there was this incredible evidence of abuse in Mr. Tibbetts' background that had never been presented to the jury. This is evidence that's relevant at the penalty phase of a capital case. And the juror said, I would not have voted for death if I had known this but no one spoke up. The lawyer...the juror said, Mr. Tibbetts' lawyers didn't present anyone other than a paid expert to speak on his behalf and I thought, well, if no one is willing to speak on his behalf other than a paid expert, I guess I'm going to sentence him to death. Turns out there were dozens of people who would have spoken on his behalf but that didn't come out until postconviction. And that juror came forward at the end and said, look, if I had known this, this would have been different, that this death sentence was wrongly imposed, this was not a fair penalty, because if I'd had all the information, I would have done this differently. And Governor Kasich granted clemency and Mr. Tibbetts is now serving a sentence of life without parole. That sort of information is what comes forward in postconviction. There's an extraordinary number of cases that had been reversed on evidence of either guilt-phase error where they might be actually innocent or penalty-phase error where, yes, the person is guilty but, no, it is not a capital case, it is not a case deserving of the death penalty, and the only way that comes out when you don't have good lawyering at trial is through postconviction lawyering. And it...what I was just talking about where you have to introduce evidence of what could have been presented, the only way you get that is through a new investigation. The guidelines talk about that. You have to reinvestigate the case. It's simply not possible to do that if you are a person on death row without access to the outside, without resources, without expertise, without skill. It is impossible to navigate that on your own so lawyers are absolutely required in postconviction to prevent issues of people being

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wrongfully executed and to ensure that there are not constitutional violations and people being sentenced to death who should not be sentenced to death. [LR406]

SENATOR EBKE: Thank you. Senator Chambers. [LR406]

SENATOR CHAMBERS: The matter is too serious for me to bind myself by that comment I made but here's...and here's why I say if there's a question that I have. Recently a man, he was an inmate, he killed a person who had been put in the cell with him. And this seems like a side issue, but once again the Director of Corrections, whom people in the Legislature and the Governor support, put a nonviolent offender who had a short amount of time to serve before he got out, put him in the cell with a convicted murderer who said he did not want him in his cell with him, something bad would happen. The director had him put there anyway and the inmate killed this other person. Now the director has not been called to account. This inmate who committed the murder did not challenge anything and he was sentenced to death. How would these--and I don't want to go into a whole lot of fact...other things but to try to lay out for you that this is an existing situation---how would these standards come into play where the prisoner just waives everything and there is nothing presented in the prisoner's behalf, there is no trial, no evidence of any kind presented, nothing about mitigation? How would these standards, if they were in place, address something like that, if they do? [LR406]

EMILY OLSON-GAULT: So in that situation, I talked about how the guidelines, they really take effect the first moment that this person becomes your client and is eligible for the death penalty. And I think the issue of waiver is a really complicated one but it's something that isn't just a black or white situation where you either waive or you don't. That person got to the point where they wanted to waive their claim somehow. And it's really important, it's critical, and the guidelines talk about this, about the relationship you have to develop with your client as a capital defense attorney and your duty as an attorney to keep that client whole, to make sure that they are not going to waive their claims out of mental illness or depression or incompetence. And so in a case like that, if we're talking about this case now in the postconviction stage, looking back at what happened, we would have to look and see--and I don't know the details of this case so I'm only speaking hypothetically here in...based on what you've told me--that you would want to look back at what the lawyers did, the relationship they had with that client, did they keep that

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client whole, did they meet with him, did they develop a relationship with him, and was the proper analysis done both by the attorneys and the courts to make sure that that client was competent to waive their rights, because if they are competent the Supreme Court has said that you do have ultimately a right to waive your appeals. But there's a lot of lawyering that goes into...that comes into play before you get to the point of waiver. There's a lot of lawyering in capital defense that has to do with how you relate to your client, how you develop a relationship with your client. And so in this case that you're talking about we would want to know what happened there, what happened with that relationship, how was it built, and what efforts were made to make sure that this person was truly waiving because they as a competent, rational person didn't want to present a defense versus they were depressed or mentally ill or otherwise incompetent and shouldn't have been allowed to do so. [LR406]

SENATOR CHAMBERS: And now I'm going to add another element, not to embarrass you but to get as much on the record as we can even though what you'd do would be maybe speculation because we don't have all the facts. If at the outset the prisoner said, I will not accept representation, period, when the county attorney made it clear that the death penalty would be sought, the inmate had no lawyer and the inmate would refuse counsel, who would there be to have his competency evaluated because there is no representation? [LR406]

EMILY OLSON-GAULT: So in a lot of states courts will appoint standby counsel who are not acting on behalf of the prisoner or the defendant but who are there working up the case as if they were so that they can be there if that person decides they want advice or wants counsel to provide advice to them. In this case I would think that appointing counsel for the limited purpose of establishing competency would be necessary because you need to have a lawyer, you need to have an advocate looking into that issue from on the defendant's behalf so that they may refuse counsel for the purposes of their case, of their homicide charge, but the court still has the power to appoint counsel for the limited purpose of assessing competency and I would think it...in this sort of situation you would want, first of all, standby counsel to be working up the actual case, but separately an attorney represented to...appointed to represent the defendant for the purpose of assessing whether they are competent or not to waive. And I've seen that done in other states as well. [LR406]

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SENATOR CHAMBERS: And what I'm asking, would these standards include what we've just discussed? [LR406]

EMILY OLSON-GAULT: Absolutely. [LR406]

SENATOR CHAMBERS: Okay. Okay. [LR406]

EMILY OLSON-GAULT: They absolutely would because the lawyer who is being appointed to represent the person for the purpose of competency would be bound by these standards and any standby counsel who is supposed to be working up the case to provide advice if the person chooses to seek it would also be bound by these standards. [LR406]

SENATOR CHAMBERS: Thank you. [LR406]

SENATOR EBKE: Any other questions? Okay. Oh, Senator Halloran. [LR406]

SENATOR HALLORAN: Thank you, Chairman Ebke. I...this is somewhat hypothetical but...and I know it can't be the case, but there's no one in between a murderer and the about-to-be victim of a murderer. There's no lawyer that's there that the potential victim that's going to...about to be murdered can appeal to the murderer not to murder them. There's no lawyer there that can seek clemency for the just-about-to-happen murder. All right? So my concern is that we spend...no one wants anyone who is innocent convicted of...to be convicted and sentenced to death. There's no question about that. But every day people are murdered without the intervention of lawyers to protect them from the murderer, to talk them out of it. And this is a concern of mine that we spend an inordinate amount of time and effort to protect someone who is an admitted murderer, admits murder. We protect them but we don't have a means or a sentiment for protecting the victim or the victim's families. I don't expect you to have an answer for that but... [LR406]

EMILY OLSON-GAULT: Okay, well, if I could... [LR406]

SENATOR HALLORAN: Sure. [LR406]

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EMILY OLSON-GAULT: ...just respond briefly, I want to say, I want to reiterate that the ABA is not opposed to the death penalty, that we do not have a position against the death penalty itself, but that where jurisdictions have the death penalty, as Nebraska does, the ABA thinks it's very important that the constitution is upheld, that the constitution is followed. And the U.S. Supreme Court has said, which we are all bound by, that there is a right to counsel and a right to due process. And if you are going to have capital punishment, the Supreme Court has said that it must be narrowed, it must be narrowed not just to any murder but to the worst cases, there has to be meaningful narrowing. That's why the Supreme Court allowed the death penalty to come back in the 1970s was because the states, it was convinced that the states would be able to meaningfully narrow the death penalty. The only way that happens, and the only way that you prevent innocent people from being sentenced to death and executed, is with good lawyers. It simply does not happen without that. So I'm not disagreeing with your hypothetical, but I want to be clear that while I can understand the frustrations that you're speaking of, this is the constitutional system we exist in where we have to have due process, we have to have counsel to uphold these constitutional ideals, and the only way you do that is through good counsel.

[LR406]

SENATOR HALLORAN: I understand and respect that and I respect the constitution and I agree that that has to be done. You mentioned earlier that this potentially, if we adopt these ABA standards, could potentially eliminate mistakes that are happening in the current process and potentially narrow down the...or eliminate the appeal process. Is...do you feel that's factual? Do you think that's a hypothetical or do you think that's really something that would take place, that there would be a lessening of the appeal process or the time frame at least? [LR406]

EMILY OLSON-GAULT: I think that it's...I mean it's a hypothetical at the moment but I think it's certainly a realistic possibility that if you fully implement a functioning counsel system that is going to inherently help with...it's going to reduce the number of mistakes made at trial and it's going to reduce the reasons why a court would send the case back on, you know, being overturned on appeal on various grounds of error. [LR406]

SENATOR HALLORAN: All right. Thank you. Thanks for being here. [LR406]

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EMILY OLSON-GAULT: Thank you. [LR406]

SENATOR EBKE: Other... [LR406]

SENATOR PANSING BROOKS: I have one. [LR406]

SENATOR EBKE: Senator Pansing Brooks. [LR406]

SENATOR PANSING BROOKS: The bar may not have a position on that but I certainly do and we have fought this very strongly. I can't handle any more. And it's been said that senators did not make stands or say things publicly. I have said things publicly, so I do respectfully not agree with that statement. And of course there is nobody more learned in this subject than our colleague Senator Chambers on the issues at hand. But again, our constitution is number one. We have five people who admitted to a murder that were kept in jail for 19.5 years so I understand fully why there are mistakes made. It is not a perfect system. We must protect and when...and have a duty when a state is going to perform the most serious act, that of taking a human life, then we have to be ready to have the best lawyers prepared and the state should not...I totally agree with your statement that if we are going to have to have a death penalty then we have to pay for it. And the people of the state of Nebraska have decided we will pay for it. So I resent the comments or the thought that, you know, we're going to pay for the prosecutorial side of the death penalty and not pay for the defense side. That happens everywhere. It's happening with children in juvenile court. All the way along it's prosecution over defense. All sorts of counties don't have the money to pay for defense. My opinion is close the court. If you don't have enough money to pay for an entire court system, then you close courts because we do not have the luxury of having justice there and you better come to Lincoln or someplace else to figure out where justice can be meted out. So if I sound frustrated, I am. I'm angry about it. I don't like this feeling that we're going to hide behind. We are fighting for transparency in this state every single time we come to this Legislature and instead there was a curtain placed in front of people. There...by law there ought to be six witnesses at that death and there...they put up the curtain at all sorts of points so that the press could not see what was going on, the witnesses could not see what was going on. So should there be standards? Absolutely. Should we be using the best practices possible? Yes. Should we have the lawyers who are the most prepared? Yes. I had hoped we

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were. I had hoped that the Nebraska Bar Association had taken a stand to make sure that the best practices were being implemented. I had hoped and not realized that the Nebraska Supreme Court had been implementing best practices and following what their colleagues across the nation are doing. So if I'm sounding very aggravated, I am. We have the highest duty to protect all of our citizens, those who have made mistakes, those who have done heinous things, and those of us who are moving forward in a positive way. So, yes, we need to go forward and work on transparency. I thank Senator Morfeld for bringing this bill and Senator Chambers for his continued actions and all of us for our passion. We all have passion. Senator Halloran has passion. We all have passion for those who have been hurt and who have been murdered and their families who have had to survive all of this. But we cannot be arbiters of justice and deny the constitution, deny due process. Thank you for coming. [LR406]

EMILY OLSON-GAULT: Thank you. [LR406]

SENATOR PANSING BROOKS: Sorry. [LR406]

SENATOR EBKE: That's okay. Any other questions? Senator Chambers. [LR406]

SENATOR CHAMBERS: Since...and this is not a criticism of Senator Halloran expressing his opinion. That's what we're trying to do here. But once the issue is brought before us, there are comments that should be made. First of all, if Carey Dean Moore had committed the same crime today, he would not have gotten the death penalty. Out in the western part of Nebraska where some of the strongest pro-death penalty people are found, there was a man who got a divorce from his wife. He didn't want the divorce. Now the two cities involved, Grand Island and Kearney, and if I get them out of order the facts are correct. He took a high-powered rifle, lay in ambush, and murdered his wife, first-degree murder, and he was sentenced to life. Well, that wasn't enough for him. He went to the town where the lawyer who represented his wife was--it's a different county--and he lay in ambush outside the lawyer's office and when the lawyer came out, with the same high-powered rifle, shot him in the back and killed him. The county attorney happened to have been a person who represented county attorneys whenever we had a bill against the death penalty who would advocate very strongly for the death penalty. Well, what happened when there was a murder in his county--and he knows the expense of prosecuting a

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death penalty case--he told this man who was serving life for murdering his wife that if he would plead, he would take the death penalty off the table. That's a multiple murder, cold, calculated, with malice aforethought, to use the quaint old language. This county attorney who advocated for the death penalty in other counties didn't want it in his and he subsequently has been appointed to be a judge. But these people who come from the western part of the state have a lot of yow-yow but they don't see what's happening in their state, in their counties. One other example, several men are on death row for murders committed during a bank robbery in Norfolk, Nebraska. Since it was...involved a bank robbery, the federal government would prosecute it. The federal government has a death penalty statute. The local county attorney wanted the publicity so he rejected the federal government handling the case and assuming the expense and he went forward with it. He laid all kind of charges that had nothing to do with the...what happened in the bank, but nothing was done about that in terms of ethics, and he ran up a bill of over a million dollars on the county. So what Senator Halloran might spend more time doing instead of the theoretical possibility of a lawyer intervening to prevent a murder, is trying to keep county attorneys from trying to grandstand and running up million-dollar debts for the county because he wants that publicity instead of letting the federal government handle it. So those problems exist and I have to deal with issues of the kind that Senator Halloran raises when we're talking about these matters. I have to deal with the racism of the Governor who plays to the racism that he knows exists in white people in this state by saying if you vote with this, for this, you're voting for Ernie Chambers. There are senators in the Legislature now who during their campaigns brought up the fact that their opponent had voted with me on certain legislation and the question was, are you going to go with this person or for somebody who voted with Chambers, the black man? When the media, when I was the only senator here who was black, would mention me, they would constantly say either the only African-American or the only black senator. Everybody in Nebraska knew it. It's played no point other than to inject the race card in the discussion. That's what I've had to contend with for 44 years now. So the matter is very complex and my point that I want to make from all of this is if we at least have standards that have been committed to writing, then everybody knows what the basic or minimum rules of the game will have to be and there doesn't have to be theorizing about how I can pose this matter of ineffective counsel. We will have some standards. The lawyers representing death row inmates will know what is required of them. And I think it is a very wholesome action we're involved in but I have to share what my god-daughter has...see, she doesn't mind me saying that publicly.

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Other white people would be furious. She's even referred to me as "Godfather," not of the godfather type that Trump is being, talking about flipping and things like that. But there are those of us who have to restrain ourselves when we hear nonsensical arguments like "Where is the lawyer to intervene to stop the murder?" I had another nephew who was murdered. They never found the one who killed him. But when people came to me kind of delighted and said how do you feel about the death penalty now, I said I feel the same way. If they ever catch this person, which they won't because my nephew is black--and they didn't--I would speak against a death penalty. So it's not like I come down here for a few years and am going to go back to my plow or my combine or whatever it is I do out there. This is something that is of the warp and woof of who and what I am. I'm not religious like these Christians who are for the death penalty. I have no religion whatsoever. You know what they've said on the floor of the Legislature? That Genesis says he who sheds man's blood, by man shall his blood be shed. But God marked the first murderer so nobody would shed his blood, but they don't deal with that. So when these matters are discussed here, I'm glad they are because they're a matter of record and my colleagues know that I will make use of them when we have debates on the floor of the Legislature. Thank you. [LR406]

SENATOR EBKE: Okay. I don't see anybody else looking for questions. Thank you for being here. [LR406]

EMILY OLSON-GAULT: Thank you. [LR406]

SENATOR EBKE: Our next testifier on this is Professor Sean O'Brien. And I would just like to remind my colleagues that we do have four interim studies this morning, this is the first, so. [LR406]

SENATOR PANSING BROOKS: Oh, there are four? [LR406]

SENATOR EBKE: There are four. [LR406]

SENATOR CHAMBERS: I'm sure the others won't take much time (inaudible). [LR406]

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SENATOR EBKE: Okay (laughter). Go ahead. [LR406]

SEAN O'BRIEN: (Exhibit 3) Thank you, and thank you for inviting me. My name is Sean O'Brien. I'm a professor of law at University of Missouri-Kansas City. In the 1980s I was the chief public defender in Kansas City and it was the responsibility of my office to defend all potentially capital murder cases west of Columbia, Missouri, north of Arkansas, south of Iowa, and so I have substantial experience in capital punishment. And in 1990 and forward I ran an organization funded by the U.S. courts to study and improve standards of representation in death penalty cases, and so I've handled death penalty litigation at every level in every federal circuit in the United States that has the death penalty and I've helped established death penalty offices. And what I've circulated to the committee is an article that I wrote in 2008 explaining the evolution of performance standards in death penalty cases, how they come to be, and where they are today in the defense of death penalty cases. The remarks by Senator Chambers resonate with me in the sense that no judge and no jury can render a decision better than the information presented by the lawyers in the case. And in the postconviction work that I do typically I will find evidence, information about the defendant that the trial lawyers did not discover. And I have taken that information to prosecutors who said, oh, my God, I never would have sought the death penalty had I known this. I have presented it to jurors who have said, oh, my God, I would never have voted for the death penalty, and in cases where the juror said, I never would have found this man guilty if I had known this, and to judges, trial judges who sentenced people to death who said, I would not have sentenced this man to death if I had known this information. So when we look at standards and why are we talking about standards, we have to be aware that the main reason we're having this discussion is that if we are going to have the death penalty, we should be striving for fully informed decision makers on matters of life and death. That is not a Cadillac standard. It's not an impossible standard. It's not a cheap standard but it is a standard that the constitution demands. So the article that I have given you explains the evolution of those standards and why they are important in individual cases. It's 70 pages long. I recommend that you find a period of insomnia and use that to hasten your sleep. It does kind of cover the waterfront in terms of how these standards evolved and what we're trying to accomplish. It's an intersection of the Sixth Amendment right to counsel. You have a right to have not just a person next to you with a law degree and a pulse but a person who has done the work that lawyers are supposed to do. I've looked at your current standards and they basically just say a person has to

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have X number of years' experience and they can handle a capital case. The problem is that we've seen in jurisdictions that there may be lawyers who have never bothered to learn what a capital defense lawyer should do. And it probably does not...your standards probably do not disqualify any person currently appointed to do a capital case anywhere in the U.S., but they probably do disqualify young people fresh out of law school, who I might have educated, who are committed to doing quality work, who are committed to working with a team and discovering everything that they can in order to persuade a decision maker, whether it be the prosecutor, a judge, or a jury, to spare this individual's life. And we do, in the vast majority of cases in every jurisdiction, we do not impose the death sentence on murders. As I was listening to some of the discussion, I couldn't help but think about yesterday I spent all day with a former client named Joe Amrine who spent 27 years in prison, 17 years on death row, and he was convicted and sentenced to death for the murder of a fellow prisoner. His appeals went quite a ways through the system--he was ten years in--before I got involved in his case and he was so in despair of any hope that someone would finally investigate his case that he wanted to give up his appeals. And I was asked to go and counsel him about whether or not he had an appeal and whether he should have an appeal. And after four years of litigation, we convinced the Missouri Supreme Court by clear and convincing evidence that Joe Amrine did not commit that crime. And yet when I encountered him, he was a person who wanted to surrender his appeals and be executed. He spent yesterday with his sister because his sister's grandson had just been murdered. His sister was murdered last summer. And so he feels, you know, all of those things, but he's having a hard time functioning because of the time that he spent on death row because a public defender let him down. And now it's been almost 40 years ago. So when he went to prison there had never been a woman on the Supreme Court, there had never been a black judge in Missouri, a state-of-the-art car stereo system was an eight-track tape player, he had never seen a computer, and now he comes out with this Rip Van Winkle effect because the system failed, because there were not standards in place in 1976 and until 19...in 2003 he comes, finally gets justice, but because lawyers are guided by the American Bar Association standards. What happens in these cases is that we see years later that a judge or jury...sometimes it's innocence. Sometimes it's not innocence but it's something very compelling. Sometimes it is that this person is intellectually disabled--we used to call that mental retardation. Sometimes it is that the person has a serious mental disease. Sometimes we find the crime didn't happen the way we thought it did and it was really more of a manslaughter or self-defense. We find a lot of things like that in

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these cases that judges and juries don't get. And so one of the cases that this article I passed around talks about is the case of a man named "Ronnie" Rompilla in Pennsylvania. He was defended by good lawyers. I know the lawyers who represented him. They are good lawyers but they did not have a mitigation specialist. They had an experienced investigator but they didn't have a mitigation specialist so when they met with Mr. Rompilla he said, I had a normal childhood, I'm really not interested in mitigation, and I didn't do the crime. Well, the evidence was pretty overwhelming that he did do the crime and the lawyers, though, took him at his word and did not investigate his background. When they investigated, when the postconviction lawyers were functioning based on American Bar Association standards, they had a mitigation specialist, they gathered documents, found a social worker's report who had done...come to do a home visit and found "Ronnie" Rompilla and his brother at the age of six locked in a dog kennel filled with excrement by his father. He had told his lawyers that was a normal childhood. They found school records that he was borderline mentally retarded. They found other records that had diagnosed him as paranoid schizophrenic. His mother was a binge drinker when he (sic) was pregnant and it caused a condition we call fetal alcohol syndrome which is a severe form of brain dysfunction and other problems that are created as a result of that and yet a person who was a good artist, had contributed positively to the atmosphere and the security and safety of the housing unit that he'd been assigned to in the prison, all of these things that a person of conscience would want to know before I decide we must kill this person, and yet the jury knew none of it and how was it that it came to be. And so I do recommend that you spend some time looking through this piece of scholarship because it does explain where the standards come from, why they are there, and how they work. One thing I want to emphasize, or two things I want to emphasize. One is that this is not the American Bar Association ramming standards down your throat. The standards come from the Sixth and Eighth Amendments to the U.S. Constitution. I always ask judges to go out in front of the courthouse and tell me what flag is flying up there and if it happens to be an American flag, then that means the Eighth and Sixth Amendment apply to you. And so this is something that applies in every county in America that the Sixth and Eighth Amendment require lawyers facilitate fully informed decision making in matters of life and death. There's no compromise on that standard. That is what we must do. The question is how do we do it because it's such a complicated world that we live in that a person like "Ronnie" Rompilla might not even want his lawyers to know how his parents treated him even when his life depends on it. And so for the justice system to respond with justice to "Ronnie" Rompilla, those lawyers have to bring

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to us a narrative that Mr. Rompilla and his parents don't necessarily want told in a public court of law and how do we do that. And pardon my vernacular, but I got to tell you that lawyers suck at this, they really do. When you think of a person who is...in the law school we talk about tax lawyers and they're people who are interested in arithmetic but don't have the personality to be CPAs. You need someone on your team who can communicate and connect with these issues in the case in a way that allows you to uncover that. And so the postconviction team that did the work in "Ronnie" Rompilla's case used a mitigation specialist to do delicate interviews of Mr. Rompilla to get the documents first so that they knew what was there, they had a clue of what was there, and then to kind of coax the story out of parents and siblings in a way that they then went to the U.S. Supreme Court and convinced a very conservative court that this was not a just death sentence. And then they went back to Allentown, Pennsylvania, and convinced a very aggressive prosecutor that death was not an appropriate sentence in this highly aggravated murder case. That's what this information does. And people who make decisions are thirsty, they're hungry for this information. So I mentioned Joe Amrine yesterday. One of the most troubling interviews I ever had was with the foreman of the jury that sentenced him to death and he said, oh, my God, if I had known this information, I would have found Joe Amrine not guilty. And Joe and Larry Hildebrand, the foreman of his jury, go around and they talk to policymakers and death penalty decision makers about their experience and how each of their lives were forever damaged by the fact that a jury without adequate information sentenced an innocent man to death. It's not always going to be innocence but it does happen. And so the American Bar Association has devised standards, and I've supplemented them with the work I did in 2008. It's the Supplementary Guidelines for the Mitigation Function of Capital Defense Team (sic) and it explains to lawyers and mitigation specialists how they work together to uncover the story. And it's not just...a mitigation specialist is not just an investigator with a card that says "mitigation specialist." It's a person with training in human services, often a social worker, sometimes an anthropologist, sometimes a journalist with excellent research skill, sometimes lawyers, sometimes mental health experts like psychologists, broad variety of backgrounds that qualify people for doing this work. But the cornerstone of capital litigation is what we call the bio-psycho-social history: the biological history of the client, all of the client's relatives, siblings, aunts, uncles, grandparents, going back at least three generations, because you'll see genetic patterns of mental disease and you'll be able to understand what to be looking for in your client's background; the psychological history because you're also interested in the behavioral and

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symptom history of the family; and then the social history because you're interested in the environment in which this person grew--was this person faced with special obstacles in life that interfered with his or her ability to self-actualize, to be a complete person and a full participant in today's society? So the mitigation specialist helps develop that bio-psycho-social history and if you don't have one then you're missing the core elements of capital defense. In my most recent...I know several Nebraska lawyers. I'm good friends with Jerry Soucie. Some of you may know Jerry. In talking with him, it's really clear that capital defense lawyers in the past, when Nebraska didn't really have a death penalty like Texas has a death penalty, they're not doing it. And it, to me, it is the equivalent of being a lawyer who specializes in drunk-driving cases but you've never heard about a breathalyzer, you don't know what one is. It's like an orthopedist maybe who's still looking at x-rays and doesn't understand there's a thing called an MRI out there. The bio-psycho-social history and the mitigation specialist is an essential, indispensable part of capital litigation. And in the cases that I've looked at, the cases I've been involved in, I'm not seeing them here in Nebraska and that's essential because what that tells me is that decisions are being made in life and death matters without the benefit of full information about that. And so I came here to offer my assistance to you as the committee, to the public defender commission, to the Nebraska Bar. I have a lot of expertise in this area. I have qualified as an expert witness in 17 states and the U.S. military on standards of performance for lawyers who are defending people in life and death matters and I think I can help. If Nebraska makes the commitment to moving forward with a functional system of capital punishment, then it should go in with both feet, with equal funding and equal resources for both sides, or you're going to find yourself back having this discussion again in every case. [LR406]

SENATOR EBKE: Thank you, Professor O'Brien. Any questions? Senator Chambers. [LR406]

SENATOR CHAMBERS: This will be brief. [LR406]

SENATOR EBKE: Okay. [LR406]

SENATOR CHAMBERS: And because of your experience in defending people, sometimes prosecutors...now in Nebraska if a...if the death penalty is to be sought, that has to be made clear at the outset. Now even though a county attorney may say, I'm going to seek the death penalty,

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the intent may be to use that as a way to arrest a plea from the person. Now let's say that the murder was committed, that this person did commit the murder--so we're not in any of the gray areas--and the prosecutor is looking to get a plea so he or she lays out all the requirements for seeking a death penalty. Now when the plea is entered, the agreement is that the death penalty will be taken off the table. When that is done, does that mean the person whom the county attorney told the court by its filings is a threat to society, does that make that person less a threat, that this person would be a danger to inmates and employees if not killed? Does the mere fact that he or she pleaded guilty take away the dangerousness? The point that I'm trying to get out, and maybe you can just touch on it briefly, is that many of the things and the stratagems used where death penalty cases arise are not even a frank presentation of what is intended by a prosecutor, but if the person doesn't plead then maybe it'll go forth and an execution might be scheduled. [LR406]

SEAN O'BRIEN: Yeah, that is a deep, deep subject and there are a lot of different things we could say about it. I just participated in a Kansas study looking at the cost of cases and prosecutors used the leverage that the death penalty gives them over plea bargaining as justification for having capital punishment because it saves the cost of a trial. But what Kansas learned is that a plea in a death penalty case to avoid the death penalty that results in a life sentence costs more than a jury trial in a case where the death penalty was never sought because of the need to do...a bio-psycho-social history is not inexpensive. It takes a lot of time and capital defense work takes a lot of time. And so using it as leverage to get a plea doesn't make it cheaper and it does have a distorting effect. One of the cases I was involved in, in Missouri in the 1990s, was a fellow named Johnny Wilson who was mentally retarded and the prosecutor argued and asked for the death penalty and his lawyers convinced him that he should plead guilty to spare his life. And then after he had done that, four years later, the real perpetrator of that crime confessed to the crime in a way that credibly explained physical evidence at the scene of the crime and Johnny Wilson was completely innocent. Governor Carnahan pardoned him. So I'm asking, did those lawyers do the wrong thing? I'm not sure. But the prospect of the death, going to the defendant and saying, you know, you plead guilty, with a gun to the defendant's head, is not what I see as healthy negotiation and reliable dispositions in cases. The death penalty has a distorting effect that...and in other cases. I won a case in the U.S. Supreme Court called Schlup v. Delo and the prosecutor...this is a man who came within six minutes of execution twice and then

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when the prosecutor offered him a sentence that would make him immediately eligible for parole, he took it, but he had to say that he did the crime. So that, you know, it was, you know, a pressure. We'll never...a jury will never hear the case. But it had this distorting effect. It is like negotiating with someone over a contract and you've got a gun pointed at them the whole time. It's difficult. And you end up with...it's not something that is conducive, as you pointed out, to a truth-seeking process or even a reliable disposition. [LR406]

SENATOR CHAMBERS: Thank you. [LR406]

SENATOR EBKE: Other questions? I see none. Thank you for being here today. [LR406]

SEAN O'BRIEN: Thank you for inviting me. [LR406]

SENATOR EBKE: Are there any other test...anybody else who wishes to testify on LR406? And just for everybody's information, since we didn't start it on this hearing we won't do it, but in the next hearings, for the other three we will go to a light system, so. [LR406]

JEFF PICKENS: Good morning. [LR406]

SENATOR EBKE: Good morning. [LR406]

JEFF PICKENS: My name is Jeff Pickens, J-e-f-f P-i-c-k-e-n-s. I'm chief counsel for the Nebraska Commission on Public Advocacy. I wanted to address the standards just briefly. My office did adopt standards back in 2002. I think they've sat in my credenza ever since. I don't think they've been used anywhere outside of our office. But pursuant to statute we did...there was an advisory council that created those standards and then the commission adopted those. If this committee undertakes this study, we'd be more than happy to cooperate in any way. My other reason for testifying is more selfish and it has to do with the financial condition of the Commission on Public Advocacy. As you probably know, we do most of the or much of the death penalty litigation in the state and we've been doing it since 1996. If we are not adequately funded, we're not going to be able to carry out our mission. As you may know, in 1995 we received General Funds. In 2003 we became cash funded and we got \$2.75 from filings in court

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cases. In 2005 it was raised by 25 cents to \$3 per filing. There hasn't been an increase in our filing fee since 2005. Since fiscal year 2008, court filings have gone down every year, so our revenue has gone down every year. In fiscal year 2008-2009, we had \$350,000 more revenue than we presently do, than we had in fiscal year '17-18. What we've been doing the last several years is we've been drawing from our cash fund and we're able to operate by doing that. Our cash...typically in the...over the last few years we have spent around \$100,000 more than our revenue each year and so our cash fund has gone down. It has remained over a million dollars until this last fiscal year and now we are at around \$900,000. But as...if this trend condition...trend continues with the filings going down and if there's not an increase in the filing fee, it's just a matter of time before we will be financially compromised. So if this committee undertakes this study, I would ask you to look at future funding of the Commission on Public Advocacy because I do believe that we are essential to...well, to a capital defense system in Nebraska. I don't think I have any other comments. I'd be glad to take any questions. [LR406]

SENATOR EBKE: Any questions? Senator... [LR406]

SENATOR CHAMBERS: No, go ahead. Did you want... [LR406]

SENATOR EBKE: Senator Morfeld then... [LR406]

SENATOR MORFELD: I'll just make the comment quick. Thank you for your work and I will work with you to make sure that you guys are adequately funded. Thank you for bringing it to our attention. And I'm sure you've done it before, but there's a lot of things that come to us. [LR406]

JEFF PICKENS: Yes. I've brought it to the attention of the Appropriations Committee... [LR406]

SENATOR MORFELD: Yeah, okay. Fair enough. [LR406]

JEFF PICKENS: ...every year for the last few years. [LR406]

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SENATOR MORFELD: I bet you have. Thank you very much for your work. [LR406]

SENATOR EBKE: Senator Pansing Brooks. [LR406]

JEFF PICKENS: Thank you. [LR406]

SENATOR PANSING BROOKS: Thank you for coming, Mr. Pickens. And you've also brought it to the attention of those seeking to make sure that juveniles get counsel across the state. And people say they don't have enough money and that the judges can wear both hats, as counsel and as judge, so I am well aware of the fact that we underfund the Nebraska Public Advocacy Commission and think it's a travesty in our state. I think it's unreasonable that we are so focused on prosecution. And I understand keeping our society safe but in the same instance we have to make sure that we are not wasting funds as we did with the Beatrice Six. And as Mister...as our colleague Senator Baker's communities are now trying to go through the whole mess of paying for their inappropriate actions that occurred because of many different circumstances in those cases about how we egregiously convicted innocent people. And it's an example in the nation for how the justice system can go awry. And I felt that there was an exclamation point on this entire death penalty issue when the day before Mr. Moore was to be executed, a death penalty case, the judge found that there was a mistrial because eight days into the trial a very significant recording all of a sudden appeared regarding what happened at the prison with the inmate that killed another inmate. So again, I felt that was an exclamation point on the fact that our justice system is not perfect and because of that we should all care and be significantly concerned about the fact that we need proper representation, we need to properly fund your commission for all sorts of people because we know that the innocent get caught up for whatever reason into a system that they have very little power over. And so I appreciate your work. When you first spoke you said you have these standards and you placed them in your drawer. Is that because you don't find them effective or is that because you read them and now follow them completely? I didn't understand that statement that you just made. [LR406]

JEFF PICKENS: Pursuant to statute, this council was created and the council is required to create standards and then by statute the Commission on Public Advocacy was responsible for adopting those standards. The statutory scheme, it was one that I think you would appreciate. It

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was to encourage counties to have standards, to have adequate representation for indigent people, and if the counties adopted those standards then they would be entitled to reimbursement. And so the plan was for the commission to have a fund that we could then use to reimburse counties that adopted these standards but the program was never funded. And then in I think 2009 the statute that created the advisory council was repealed so there is no advisory council anymore. Obviously the commission is still here but there's no way to carry out that program. That program is effectively dead. But we did what we were required to do and we adopted those standards and we use those standards in our office to the extent that we can. The times that we don't would be there are times when we probably take more cases than we ought to because we're trying to help the counties who are asking for assistance. So we have the standards. They sit in my desk. Nobody ever calls and asks for them. I don't know if people are aware that we have them, but there was never funding for this program and so the standards, to my understanding, have never been used anywhere. [LR406]

SENATOR PANSING BROOKS: Yeah, and I have one more question. So how...you said that you do most of the death penalty cases. You don't...I thought you handled all of them. [LR406]

JEFF PICKENS: No, we don't handle every death penalty case in Nebraska. [LR406]

SENATOR PANSING BROOKS: Oh, no, I was talking about but once on appeal you... [LR406]

JEFF PICKENS: We do...we do... [LR406]

SENATOR PANSING BROOKS: What percentage? I thought... [LR406]

JEFF PICKENS: We do death penalty cases at trial, on appeal, and in postconviction. We don't do any work in federal court. And of course we are appointed to represent indigent people. [LR406]

SENATOR PANSING BROOKS: Right. [LR406]

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JEFF PICKENS: Oftentimes we're used in counties where there is no public defender or the public defender doesn't have the experience or where there's a conflict of interest. Those are the times that we're used. We do most of the important litigation and appellate work in the state. For instance, when the electric chair was declared unconstitutional, that was one of our cases that we worked very hard for a long period of time and spent an awful lot of money on experts to prepare the record that the Nebraska Supreme Court used to find that the electric chair was cruel and unusual punishment. [LR406]

SENATOR PANSING BROOKS: Can you give a percentage of how many cases you probably handle or have something to do with, of the death penalty cases? [LR406]

JEFF PICKENS: We have...I think we have about 20 first-degree murder cases open right now. We have six lawyers. I think we have about 20 open. We have about...I think we have around 50 cases total open. Some of those are sexual assaults, robberies, first-degree assaults, but we were created primarily to do murder cases and death penalty cases. I can't give you a percentage of...I can tell you that of the people on death row we've represented probably...the people who have been on death row since 1996, we've probably represented at least a third of them at some point in their cases. [LR406]

SENATOR PANSING BROOKS: Okay. Thank you, Mr. Pickens, for coming. [LR406]

SENATOR EBKE: Senator Chambers. [LR406]

SENATOR CHAMBERS: My questions will be brief. Mr. Pickens, you and I have had conversations especially with reference to the execution and the circumstances leading up to that. [LR406]

JEFF PICKENS: Yes. [LR406]

SENATOR CHAMBERS: What year was that repeal of that advisory council, did you say? [LR406]

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JEFF PICKENS: I...it was 2009. [LR406]

SENATOR CHAMBERS: And that was the first session that I was out of the Legislature and there were other bad things that happened as soon as I left and the senators said they were going to wait, because some people and some of those who need to hear this have left, but your commission put together that record. When you say the record, just for our record, that means you presented evidence at the trial level where experts gave testimony relative to what electrocution and so forth does. Is that what you mean by compile this record? [LR406]

JEFF PICKENS: Right. We had a hearing. And we're concerned with saving money and being responsible for the money that we have and it turned out to be cheaper for us to travel around the country and take the depositions of experts rather than to bring them to Nebraska. And we also, when we created that record in Mata's case, Raymond Mata's case--we also represented Erick Vela, one of the Norfolk bank murderers, at the time--we used that same record in his case. And so we ended up...at the hearings we had with respect to electrocution, we offered depositions in each of those hearings. And the trial judge in Norfolk issued an order based upon that evidence and a trial judge in Scotts Bluff County issued an order and those, then they...their orders were completely different. But the record in Mata then went to the Nebraska Supreme Court and the Supreme Court found that the electric chair was cruel and unusual punishment. [LR406]

SENATOR CHAMBERS: And now, as Paul Harvey used to say, for the rest of the story,... [LR406]

JEFF PICKENS: Yes. [LR406]

SENATOR CHAMBERS: ...that year I had a bill to abolish the death penalty, we came within one vote of passing it--or two--and it failed. A few days after that, Heavican engineered the issuance of a death warrant for Carey Dean Moore. That was when I wrote my what would now be called...well, anyway, it wouldn't be allowed to be read by the court. And I specifically referred to the fact that there is a case on the Supreme Court's docket with a fully developed record that had never been done before where the electric chair was concerned, not at the state or the federal level, and I pointed out that what the U.S. Supreme Court will do is be...is handling a

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case now but then another one comes along in the pipeline and by putting this one on hold and taking that one that's on the way, it would not only resolve the one that's on the way but the one we're hearing now and all other cases. And the court accepted my argument. You all gave me that argument. I put it in a letter to the Supreme...to the Chief Justice. That was one of the main points that the majority referred to when they said: We have a case on our docket, it would be the worst thing that could happen for us to allow an electrocution and then hear this case which would convince us that the electric chair is unconstitutional. So they agreed to withdraw the death warrant that they had issued for Carey Dean Moore and at that time he did not want a lawyer to file anything and no lawyer could file anything. But being the kind of person that I am, I did it and he was saved that time. This time Heavican and his crew didn't have to read what I presented because Heavican got the "Chambers Rule" in the court's rules so they didn't have to look at it. But here's what I want to get to in saying all that. When a case is presented that your commission deals with, you are offering a defense, but that original law was to help the counties who were under heavy expenses and it was Senator--I forget his name--Vrtiska, it was his county that was going to go broke because I think that's where Ryan had committed a crime. So the Legislature did it to take the heat off the counties because the death penalty was so expensive and yet after that the current Attorney General has said that death penalty cases don't cost very much money so that should never be a consideration and he said that on the record. Mr. Pickens, I had made a comment earlier and you are the lawyer who was involved. The court ordered you to be counsel for Carey Dean Moore. Is that correct? [LR406]

JEFF PICKENS: Yes. [LR406]

SENATOR CHAMBERS: Did Carey Dean Moore say he did not want counsel? [LR406]

JEFF PICKENS: Yes. He also instructed me to file a motion to dismiss counsel for his signature. [LR406]

SENATOR CHAMBERS: And did the court allow Carey Dean Moore's wish to be honored in that regard and you be relieved of being his counsel? [LR406]

JEFF PICKENS: No, his motion was denied. [LR406]

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SENATOR CHAMBERS: Now the court did not say that Carey Dean Moore was mentally incompetent and, therefore, could not intelligently waive counsel. The court never said that, did it? [LR406]

JEFF PICKENS: No. [LR406]

SENATOR CHAMBERS: So we must presume that Moore competently...that he was competent when he asked to waive counsel but the court rejected his wish. [LR406]

JEFF PICKENS: Yes. [LR406]

SENATOR CHAMBERS: Now you, as an honorable lawyer who takes seriously your responsibilities, felt that--and if I'm getting anything wrong, correct me because this is what I said--this honorable lawyer felt that his personal scruples or principles would be violated to have to serve as counsel for prisoner and be not allowed to represent that prisoner in the way he felt he should based on his principles. [LR406]

JEFF PICKENS: Yeah, there are conflicting rules of professional conduct. One rule requires loyalty to the client, essentially following his instructions, and then another rule of professional conduct requires the lawyer to be competent. I couldn't be competent and be loyal to Mr. Moore at the same time. [LR406]

SENATOR CHAMBERS: Now here's where--I'm not trying to put you in the middle but just for confirmation--we have two instances where Carey Dean Moore expressed a wish. In one of those instances the court ignored his wish, but in the other you were required to follow his wish. Now, so it won't sound like a riddle, the court ignored Carey Dean's wish to waive counsel, didn't it? [LR406]

JEFF PICKENS: The court denied his motion. In the first instance are you talking about? [LR406]

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SENATOR CHAMBERS: Yes. They would not allow...once you had been appointed--you know, it had been established that you were the counsel of record--and Moore said, I don't want counsel, the court did not allow his wish to rule. [LR406]

JEFF PICKENS: That's true. [LR406]

SENATOR CHAMBERS: All right. But when Moore said, I don't want you to file anything, the court would have upheld his wish in that instance and you could not file anything without violating your ethics. Isn't that right? [LR406]

JEFF PICKENS: Yes. [LR406]

SENATOR CHAMBERS: So in order to kill the man, the court ignored that man's wish so it would look like everything was like it ought to be, so against the wishes of the prisoner he had to have counsel. But when it came to the lawyer who has principles wanting to ignore Moore's wish not to file anything so that he could behave as an ethical lawyer, the court would not allow that. Then Moore's wish had to be followed and that's why I say an honorable lawyer was dealing with a dishonorable court. You didn't say that. I said it and I'm repeating it for emphasis. That is the impossible position that this dishonorable, political court puts lawyers into. Your ethics require you to zealously represent your client and then the court says, but you cannot, we will not allow that because the client doesn't want you to do it. So then you say, then let me honor my scruples and not be the lawyer of record in the same way you want to give the appearance of regularity so you require representation for him even though he doesn't want it. But they tell you...no, I'm not going to say what they tell you. Did you request to be relieved of the responsibility of representing Moore and gave your reasons for making that request? [LR406]

JEFF PICKENS: Yes. [LR406]

SENATOR CHAMBERS: When you gave that request, did you specify motions that could be made that would derail that execution being carried out as scheduled? [LR406]

JEFF PICKENS: Yes. [LR406]

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SENATOR CHAMBERS: And did you point out that were you free, these are the things that you would have done? [LR406]

JEFF PICKENS: Yes. [LR406]

SENATOR CHAMBERS: Did you make it clear that without it being a verified complaint by Moore...I meant motion by Moore, the filing would be nugatory? [LR406]

JEFF PICKENS: Yes. [LR406]

SENATOR CHAMBERS: So you laid out...see, he was between what's known in classical mythology as Scylla and Charybdis. One, there was a narrow isthmus through which a ship must navigate. On one side was the whirlpool, on the other was a monster: Scylla and Charybdis. If you avoided Scylla, you wound up destroyed by Charybdis; if you avoided Charybdis, you were destroyed by Scylla. That's what the court did to the lawyer. But you know what that hypocritical court did? We're going to look good; we will engineer the train wreck but we're not going to be in it. But the lawyer, trying to be ethical, would perish and the Governor would get the execution that he had been promising all of these years, even when he had to seek illegal drugs to be brought into this country and the present Attorney General advised him to do so. And they continued until the then-U.S. Attorney said you will be in violation of federal law if you should manage to bring them into this country, and then they backed off, yet the court didn't do anything to the Attorney General. But if this man had filed those motions, he would have put himself in jeopardy of being sanctioned for unethical conduct by trying to be an ethical human being. I am disgusted. Mr. Pickens, I didn't do this to embarrass you, but part of it was to make it clear that I was not making up the things that I had said earlier. And I didn't call you by name but since you were here to speak and could contradict anything I said, I wanted that a matter of record because I am going to send this to the court and they cannot touch me. I have a law degree but I don't belong to the Bar Association. They cannot touch me but I can touch them. And that's not a threat. It just means that I'm in a position which I would not be in were I licensed to practice law. In order to do, if I were licensed to practice law, what I intend to do, I would be putting myself in a position to be disbarred, and that's what I know would have happened long before now because of my principles that I could not follow and hold a license to practice law in this state. And I will

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work with you to see whatever we can do to make sure that the commission does what we as a Legislature created that commission to do. [LR406]

JEFF PICKENS: Thank you. [LR406]

SENATOR EBKE: Senator Krist, you had a question? [LR406]

SENATOR KRIST: A question and a comment. Senator Chambers made the point that your original purpose or task in formation statutorily was to take that burden off of the counties in different ways. [LR406]

JEFF PICKENS: The creation of the commission? [LR406]

SENATOR KRIST: Yes. [LR406]

JEFF PICKENS: Yeah, it...the act was called the County Revenue Assistance Act. [LR406]

SENATOR KRIST: Right. [LR406]

SENATOR CHAMBERS: That's right. [LR406]

SENATOR KRIST: And so our..my colleagues that will continue on in the Legislature need to understand that when statutorily something has been put in place and that bubble has been lost, that sometimes we don't follow through with the original intent of the creation of what your commission should be doing. I bring that to your attention because right now...are you...is the commission involved with the proceedings in Tecumseh? [LR406]

JEFF PICKENS: The one murder case that was tried recently, and I don't know if it's concluded yet, we had a conflict of interest because we represented the victim of the murder at the time of the murder so we couldn't represent the alleged killer. We had a conflict of interest with that. [LR406]

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SENATOR KRIST: And this is... [LR406]

JEFF PICKENS: The other case though... [LR406]

SENATOR KRIST: And this is the prisoner. [LR406]

JEFF PICKENS: Right. The other prison murder is...the defendant is Patrick Schroeder.
[LR406]

SENATOR KRIST: Right. [LR406]

JEFF PICKENS: And I think that's the case that Senator Chambers was speaking about earlier and we do represent Patrick Schroeder presently. We were appointed to represent him at the trial level. He didn't want a lawyer either. We were appointed standby. Two of our lawyers were with him every step of the way. He refused to allow the lawyers to file evidence of mitigating circumstances and he was sentenced to death and now he's on an automatic direct appeal to the Nebraska Supreme Court and we represent him there, not as standby but we will take over the case so he won't be writing his...writing and filing his own brief. We'll do that. [LR406]

SENATOR KRIST: So it seems to me in the ten years of hearing different debates on this subject that a county, 1 of our 93 counties, can very well put themselves in a very bad position to declare bankruptcy or find themselves in a position where they can't continue given the financial resources. Your commission was indeed created to try to belay or delay or correct that issue, regardless of the ego involved with some of our prosecutors--for example, Norfolk, that could have been turned over to a federal prosecutor but was not for reasons I think we all know, as is the Beatrice situation potentially--and it would seem to me that if we look at the original concept of the commission, it was indeed to make sure that the most qualified legal presence is there for these proceedings which are not--thank God--are not all that common. But that's why you were there, so in course of actually funding I would remind my colleagues that's important, but to return to the original construct of the commission is also extremely important to give us the kind of representation that we need within the state. And that's my question and comment and you're free to take some time if you'd like to talk to that. [LR406]

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JEFF PICKENS: I would just like to stress that we have not accepted any General Funds since 2000...before 2003. We've been funded exclusively by the filing fee and interest that we earn on our cash fund and we get funds from no other source. [LR406]

SENATOR KRIST: Okay. I just...one last comment. Appropriations Committee is a great place to go but I think the Judiciary Committee would be the committee of jurisdiction and we--we, this committee--in the future should have a good say in how you're funded whether it be General or cash. [LR406]

JEFF PICKENS: Thank you. [LR406]

SENATOR CHAMBERS: And if things go the way I want them to go, we won't have to worry about it being vetoed. (Laughter) [LR406]

SENATOR EBKE: Okay then. Any other questions? I would make note...thank you for being here today, Mr. Pickens. [LR406]

JEFF PICKENS: Thank you. [LR406]

SENATOR EBKE: I would make note that with Senator Krist's arrival, for one brief shining moment the whole Judiciary Committee was here. That's no longer the case but it did happen for a little while. Any other comments, testimony on this LR406? Senator Morfeld. [LR406]

SENATOR MORFELD: Got to catch a flight. Thank you. [LR406]

SENATOR EBKE: You waive? Okay, that closes the hearing on LR406. We are moving to LR390 and we will be going to five-minute lights, not for the introducer but for everybody else. Let me also note--this is great news, folks--we have this room for the whole day if we need it, so hopefully we won't need it. [LR406]

SENATOR PANSING BROOKS: Why did you tell them that? [LR390]

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SENATOR EBKE: Just because, you know, it just seemed like it was just my moment of wry humor. Okay, Senator Bolz. [LR390]

SENATOR BOLZ: (Exhibits 1, 2, 3) Good Morning, Senator Ebke, members of the Judiciary Committee. I'm Senator Kate Bolz; that's K-a-t-e B-o-l-z. I represent Legislative District 29. And if the committee will humor me for one moment, I'll say I've been listening to the previous testimony, made some notes in service to the Appropriations Committee; be happy to work with this committee on further conversations. We have, if memory served, held the commission's cash funds harmless in these difficult budget years. But it is a conversation we need to have together. But my real purpose today is to discuss LR390 which is related to the Office of Violence Prevention. And I imagine that you, like me, have heard from your constituents about violence prevention in your districts as well. One of the reasons that I brought this interim study was because towards the end of the last legislative session, a shooting occurred just blocks from my home in the College View neighborhood, which is typically a very quiet neighborhood, but we lost EJ Union who was the father of five. So this has been on my mind. And I know it's been on your minds as you hear from parents and other constituents with concerns about school shooting, and as we all look at the statistics related to domestic violence and family violence in our homes and communities. So, as the Judiciary Committee, I know you hear a lot about the impacts of violence and discuss the consequences for those who commit violent acts. But today I want to spend some time talking about how to prevent violence. Nebraska's Office of Violence Prevention empowers local governments and organizations to prevent violence in their communities. It's a division of the Crime Commission and it was established in 2009. For the past decade, it has demonstrated success in providing grants to evidence-based programs targeted at preventing gun and gang violence. The structure allows local communities to do the initiatives that they think are most effective. Each year the Office of Violence Prevention conducts a competitive grant process to award \$350,000 to Nebraska programs that have shown a documented history of success or promise in reducing violent crime. Grant recipients must develop performance measures, file a program evaluation, and review measurable results. In 2017, nine organizations received funding for a variety of programs. A couple of quick examples include the Village Basketball Alliance, which serves a hundred children every Monday night and has been shown to increase pro-social behaviors and decrease acceptance of violence among participants. A couple of other examples include the city of Omaha using an Office of Violence

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Prevention grant to fund its Web-based gang database and project analyst which is streamlining hundreds of hours of work and allowing officers to have data-informed anti-gang efforts. The grants are different in scope and methods, but each gets at the heart of the matter that we must find ways to make our community safer. In each year, for the last several years, the Office of Violence Prevention has received grant applications requesting over a million dollars for its \$350,000 in funds. Like many things in life, prevention is cheaper than repair. Currently, the entire budget of the Office of Violence Prevention is less than two-tenths of a percent of the Department of Corrections budget. In fact, the entire Office of Violence Prevention is the same cost as housing ten inmates for a single year at the Nebraska State Penitentiary. For this we help hundreds of kids create bonds with their communities and give law enforcement tools to fight gang activity, among many other things. So I want to talk briefly about some of the things we can do together as a body, both as the Appropriations and Judiciary Committees on violence prevention. The first is that we need to take a hard look at increasing the funds for this program so that we can do more in these communities and do more upstream solutions. Second, I think we can make some thoughtful, strategic changes to the scope of what we accomplish in the Office of Violence Prevention. We don't want to dilute funds or prevent our investments to be targeted in gang and gun violence. But we should include some flexibility to fund more strategies, to fund healthy family development. As research shows, there's a correlation. As you heard from the previous testifier, we need to do a biopsychosocial analysis and fund those interventions that make the most sense. Third, I think we should consider how to increase the impact of the Office of Violence Prevention. Additional staffing could pay a role in research, strategic planning, program support, and marketing to prevent violence and make a deeper statewide impact. And fourth, as you'll hear from some of the testifiers today, thinking about domestic violence, sexual assaults, human trafficking, and child welfare-related initiatives to prevent violence and educate individuals who might be potential victims of violence is our opportunities we can leverage and we can partner with some of the successful work that's already been done on those issues. So I'll wrap it up there. But I would say that I think it's very important that we have conversations about violence prevention. I appreciate the Judiciary Committee's interest in these subject matters. And I do want to apologize that I won't be able to stay, I have an Exec Board hearing at 11:30, but I'll stay for as long as I can. [LR390]

SENATOR EBKE: OK. Questions for Senator Bolz? Senator Krist. [LR390]

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SENATOR KRIST: You mentioned a grant in Douglas County. Are you aware of how many types of grants are out there for these programs? [LR390]

SENATOR BOLZ: Do you mean different...different grants coming from the Office of Violence Prevention, or alternative funding sources? [LR390]

SENATOR KRIST: Well, actually both, now that you've asked the question, yeah, absolutely. [LR390]

SENATOR BOLZ: OK. Yeah, we've got a report and I'd be happy to share it with you. Nine programs are currently being funded, mostly in the Lincoln and Omaha areas because we're targeting gun and gang prevention activities, and so we try to focus there. But the Office of Violence Prevention does require matching funds. So there are state and local and philanthropic resources pulling together to achieve these goals. But I think we're asking an awful lot of the recipients of the Office of Violence Prevention funds, partly because we're requiring evidence-based practice and it can be really hard to pull together the resources that we need to prove in evidence-base; especially when we've got a local community program which I think argues for supporting more of the infrastructure of the Office of Violence Prevention. But I'd be happy to get you some lists of programs that are working in our communities now. [LR390]

SENATOR KRIST: That would be helpful. Thank you. [LR390]

SENATOR BOLZ: Sure. [LR390]

SENATOR EBKE: Other questions? Seeing none. [LR390]

SENATOR BOLZ: Thank you. [LR390]

SENATOR EBKE: OK. We have three invited testifiers. I'll call up first Chris Harris, Director of the Office of Violence Prevention. Doesn't look like Chris Harris, but that's OK. Hi. [LR390]

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DARRELL FISHER: Madam Chair, members of the Judiciary Committee, I am not Chris Harris. [LR390]

SENATOR EBKE: You are not. [LR390]

DARRELL FISHER: Regrettably, Chris, who is the Director of the Office of Violence Prevention, called me this morning and he is ill. He has forgotten more about violence prevention than I will ever know. I am a very poor second for that, it is regrettable. But I wanted to come today and present... [LR390]

SENATOR EBKE: Do you want to go ahead and give us your name for the record. [LR390]

DARRELL FISHER: (Exhibit 4) Yes. My name is Darrell Fisher and I am the Executive Director of the Nebraska Crime Commission. That's D-a-r-r-e-l-l, Fisher is common spelling, F-i-s-h-e-r, and I am the Executive Director of the Nebraska Crime Commission. The Office of Violence Prevention, or OVP, was established in May of 2009 out of LB63, which included amendments from Senator Ashford's LB35. The office is responsible for developing, fostering, promoting, and assessing violence prevention programs. The Office of Violence Prevention aids privately-funded organizations, local government subdivisions, and other community groups in developing prevention, intervention, and enforcement theories and techniques. Through a competitive grant process administered by the Nebraska Crime Commission, the Office of Violence Prevention awards approximately \$350,000 annually to organizations in Nebraska that have shown a history of documented success or new programs which show promise in helping to reduce violent crime in Nebraska. The grant recipients are required to develop goals, objectives, and performance indicators in order to help evaluate the success of the financial distribution. Upon awarding of the funds, grantees are required to submit quarterly activity and cash reports to the Office of Violence Prevention at the Crime Commission. Grantees are also required to provide an evaluation report in which a portion of the grant funds can be used for a professional evaluator if needed. The report must provide a comprehensive review of the program's overall effort, and measurable results during the grant cycle. Priority for funding is given to communities and organizations seeking to implement violence prevention programs which appear to have the greatest benefit to the state and which have goals that can be correlated to the reduction of street

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and gang violence and the reduction of homicides and injuries caused by firearms. In March of 2015, the Nebraska Legislature passed LB167 which also included the creation of youth employment opportunities in high-crime areas as an additional priority focus. Fiscal year 2018 grants were awarded May 11, 2018, totaling \$361,000. Recipients of the 2018 awards include: Father Flanagan's Boys Town; the Empowerment Network; NorthStar Foundation; Center for Holistic Development; Police Athletics for Community Engagement; Lancaster County; Youturn; Hope Center for Kids; Banister Leadership Academy; Black Men United; the Indian Center, and GoodWill. The Office of Violence Prevention supports the complete spectrum of programs needed to reduce gang and gun violence in the state of Nebraska which includes prevention, intervention, suppression, and re-entry. In order to have long-term reductions in gang and gun violence, we must ensure that early intervention programs, prevention programs, and law enforcement have the resources and tools available to target a population that would be at risk of activities leading to gang involvement. OVP would also like to see an increase in rehabilitative support in order to successfully rejoin their community and become productive citizens. I thank you all for your time, and I will be glad to answer any questions that I can. [LR390]

SENATOR EBKE: OK. Questions for Mr. Fisher? I see none. Thanks for being here. [LR390]

DARRELL FISHER: Thank you very much. [LR390]

SENATOR HALLORAN: Nice tie. [LR390]

DARRELL FISHER: Sorry, sir. [LR390]

SENATOR HALLORAN: Nice tie. I like that. [LR390]

DARRELL FISHER: I can clean up when my wife lay clothes out for me. [LR390]

SENATOR EBKE: Is Dave Reed here? [LR390]

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DAVID REED: (Exhibit 5) Good morning, Senator Ebke and members of the committee. My name is David Reed, D-a-v-i-d R-e-e-d, and I'm Executive Director for Boys Town in Nebraska. And just a brief observation, I find it ironic and possibly serendipitous that the committee has before it two legislative resolutions that on the exact opposite end of the spectrum when it comes to dealing with the problems in society. I have a plaque on my wall at my office and it says God is at work upstream. And I feel quite fortunate that I work for Boys Town in the fact that we get to work upstream with a lot of these situations that families face. I'm here today as a grantee of the Office of Violence Prevention to share with you how this funding has helped Boys Town positively impact the south Omaha community. As executive director, I oversee all of our community-focused services in Nebraska. Our overarching goal is to empower families and give them the skills, resources, and supports they need so their children can remain safely in their homes, schools, and communities. As Father Flanagan said, just about a hundred years ago, there's no such thing as a bad boy. And we really have expanded that revolutionary idea to say there is no such thing as a bad family. To that end, in 2017, we provided In-Home Family Services to families of over 1,900 children in their homes and communities across Nebraska. Through July of 2018, so this year, we have already provided services to almost 1,400 children from Omaha all the way to Ogallala. Our outcomes are very promising and speak to the impact our services can have for families. And rather than read some statistics to you, I've provided a chart that gives our latest outcomes for this service that I'm talking about. But basically, we measure outcomes on if children are free from abuse and neglect; if they can remain in their home; if they can remain in their school; if they're arrest free; and their families are indicating they have the help and support they need. And for all of those indicators, we're in the high 80's up through 98 percent successful with those outcomes. So it's a very impactful program. In direct relation to the Office of Violence Prevention and the grant we currently receive as our work in the south Omaha community, we've integrated our staff and services into the community and forged a close partnership with Omaha Public Schools and specifically with South High School in the implementation of our...of several of our community focus services. These would include our In-Home Family Services, Boys Town Well Managed Schools, Parenting for School Success classes, and the Boys Town Safe Schools Hotline. So in that office, we've already provided services to over 500 children this year and our partnership with South High has enabled us to work together in improving school climate, addressing student and family needs, and in helping fewer students become victims or perpetrators of violence. I want to give you an example of

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what that partnership looks like in practice and how our services funded by the OVP can impact a community. So as you know, youth tend to hang out in peer groups and those can be either negative or positive. Earlier this year, so it would actually be last school year, we had an opportunity to change a negative peer group into a positive one. Our south Omaha office received three separate referrals for three individual youth, but...and they were both struggling with home...behaviors at home and behaviors in the school. But as we assess each youth and family individually, we discovered that all three youth were involved in the same negative peer group and so they were negatively influencing each other, as well other peers around them. For one of these youth, the problems were significant; and so we recommended placement in a residential family home program on the Omaha campus. So we advocated for the family. We worked...we assisted them through the referral process and the youth was eventually placed in the residential program. And as we worked with the other two youth, we recommended that they continue--we continue to serve them in their own homes. So we connected the families with a variety of community-based services, including intensive out-patient substance abuse treatment, food assistance, Medicaid. We also helped the families directly by talking to teachers, advocate for additional educational supports and teaching the parents more effective monitoring discipline strategies. We also learned...helped the parents learn how to engage more effectively with the school. We helped the youth learn how to be better peers by teaching them pro-social skills and helping them participate in positive activities such as getting a job. We were able to work individually with each family, but then we also collectively empowered them to have a positive impact on their system, or their, quote, unquote, ecology. For one youth, he improved his grades to the point that he was able to join the South High soccer team. Another youth received the substance abuse treatment he needed to be successful. We were also able to connect the South Omaha Police precinct gang prevention services to the families. The families and youth received additional support to prevent further gang involvement and the families were able to share information that enabled law enforcement to address the other influences in the community. So when we worked with the family, they did not only receive our services, they receive a variety of community-based services and were able to positively impact the whole system. I'm happy to answer any questions the committee might have. [LR390]

SENATOR EBKE: Thank you, Mr. Reed. Questions for Mr. Reed? Senator Krist. [LR390]

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SENATOR KRIST: Are you Jerry Davis' replacement? [LR390]

DAVID REED: No, I am not. There is probably no replacement for Jerry. But we do have someone in place for him, it's Lisette Burton, and she is out of our Washington, D.C., office. She's over all of our national... [LR390]

SENATOR KRIST: He will be missed. Thank you. [LR390]

DAVID REED: Yeah, he definitely is missed. [LR390]

SENATOR KRIST: Thanks. [LR390]

SENATOR EBKE: Other questions? I see none. Thank you for being here today. [LR390]

DAVID REED: Thank you for your time. [LR390]

SENATOR EBKE: Jack Cheloha of the city of Omaha. And then if there is anybody else wishing to testify on LR390, if you can kind of move towards the front, that would be great. [LR390]

JACK CHELOHA: Good morning, Senator Ebke, members of the Judiciary Committee. I am Jack Cheloha, that's spelled J-a-c-k, last name is C-h-e-l-o-h-a, and I'm here today to speak on behalf of the city of Omaha. I've been the lobbyist for the city of Omaha for 24 years now, so I remember the bills that created the Office of Violence Prevention back in the 2009 and the Senator Ashford and others that worked on that. And we supported it then and we still support the Office of Violence Prevention now and we're grateful for it. I think as Senator Bolz pointed out, it's important to note, I tried to look up who to attribute that quote of an ounce of prevention is worth a pound of cure, and on the Internet it came up for Ben Franklin, so we've been saying it for quite awhile and I think there is some great truth in it. Three hundred and fifty thousand dollars may not seem like a lot of money, but I think it's a valuable resource that does help with preventing violence within our community. I think about Omaha Police Department, which the city spends well over \$100 million funding every year for their operations and their motto is to protect and to serve, and so that's what we want to do. As was pointed out by Senator Bolz, in

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2017, the city of Omaha did receive a grant for \$57,000, which we utilized to create a Web-based gang database project. We've known, you know, that there's organized crime within the city of Omaha for a long time. Back in the '80s, it really became prevalent when we started identifying certain gangs, you know, then by the colors they wore or the activities they participated in, etcetera. And so in order to help alleviate problems created by gangs, you have to be able to identify them and the numbers that you have and just be aware of what you're working on. So in preparation for this testimony today, I just did a quick snapshot; these are available on the Omaha Police Department's Web site. So, within this grant, what we've created is a separate line item of gang activity. And so I just brought with me some numbers, kind of took a snapshot of the quarter between April and June and it does a comparison for 2018, which we're currently in, and it looks back to 2017. And so I wanted to point out to the committee quick, as the light is still green, we kind of look at crimes and put them in a category of part 1 offenses, and these would be criminal homicides, rape, robbery, aggravated assault, things that are violence, if you will. And so for the snapshot for that quarter, we had 65 last year and the number has gone down for '18, we're at 56 for this year, down 14 percent. The arrests made for those same offenses in 2017 was 86 and there were 67 arrests for the current year, so that's down 22 percent. Another category that we keep are possession with intent to deliver narcotics and firearms, and that number is down dramatically from 64 in 2017 to 22 this quarter in 2018. And we also keep records relative to domestic violence within gangs, and we specifically keep track of those. That number for the quarter is down from 70 to 66, so 4 less. And then one last thing that I thought the committee might find interesting to note is these numbers have varied a little bit, but in terms of suspected gang members within the Omaha community, we currently have a listing of 2,677, which is up 4 percent from that quarter a year ago. And then in terms of the number identifiable gangs that we have recognized, there's 86 total within the Omaha community, a city of, roughly, 475,000. So, we think this program is important. We think the assist that the city of Omaha and our police department have had relative to gangs is important and valuable. And if, indeed, there would somehow be the ability to provide more funding, I think we would be able to apply for some other grants and continue to help our partners in the community to try to prevent violence. And I'll stop there. Thank you. [LR390]

SENATOR EBKE: Thank you. Senator Krist. [LR390]

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SENATOR KRIST: With each one of these grants, I'm assuming that there's a report due to where the grant money comes from. [LR390]

JACK CHELOHA: Right. [LR390]

SENATOR KRIST: Just a comment, I think that everything I see here in traveling around the state, they're experiencing in other parts of the state, is there a library or collection or repository of the results for these grants and how they work and how they don't work? Because I think it would be useful for, potentially, smaller communities to see what these programs actually do to see if they can get involved. And by saying that, I also know that my home, Omaha and the Omaha area, as well as Lincoln, has obviously more resources to look at and apply for those grants. So it's a dual comment: one, can they...is there a repository that these other small communities can gather information; and two, does it have to be just one grant writer for Omaha as opposed to all over the state? [LR390]

JACK CHELOHA: I know that there are requirements from us, Senator. In order to qualify, we had to put up matching funds. We have to submit reports, and they go through the Office of Violence Prevention, which is under the...as you heard, by the earlier witness, our Office of... [LR390]

SENATOR KRIST: Crime Commission. [LR390]

JACK CHELOHA: You're right, Crime Commission. And I would assume they would have...be the records and they would be available publicly. [LR390]

SENATOR KRIST: OK. Thank you. [LR390]

SENATOR EBKE: Other questions? I see none. Thank you for being here. [LR390]

JACK CHELOHA: Thank you. [LR390]

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SENATOR EBKE: Anybody else wishing to testify on LR390? I believe Senator Bolz had to leave, so we will call a conclusion to LR390 interim study. And we will move on to Senator Hansen and LR415. [LR390]

SENATOR HANSEN: All right. Good morning, Chair Ebke and fellow members of the Judiciary Committee. My name is Matt Hansen, for the record, M-a-t-t H-a-n-s-e-n, and I represent District 26 in northeast Lincoln. I'm here to introduce LR415 which is an interim study to examine money bonds for misdemeanors and city ordinance violations and to bring a discussion on shifting more towards...towards more effective alternatives. County jails, particularly in Douglas, Sarpy, and Lancaster, are filled with pretrial detainees. These people are presumed innocent and have not been convicted but are too poor to post the money bonds set by judges so they sit in jail awaiting trial. Many of these pretrial detainees are held for low-level misdemeanor offenses. This is troubling from a constitutional and public policy standpoint. These practices also come with devastating human cost for low-income Nebraskans, sometimes costing their jobs and their families. In 2017 the Legislature passed and the Governor signed LB259, which was my personal priority bill. Part of that bill required the court prior to setting a money bond in a case to consider the financial ability to pay...to consider the financial ability of the defendant to post the requested bond. The intent of the bill was to provide that if money bonds are set in cases, they're set at an amount that an individual defendant can post, rather than creating a system of our jails housing pretrial detainees who simply do not have the means to post bail. I appreciate that the changes enacted in LB259 may take some time to fully implement; however, the problem of jail overcrowding cannot wait. Douglas County is working to head off an overcrowding crisis with some promising new initiatives while it struggles for space, staff, and to provide adequate medical care. Sarpy County is actively exploring constructing a new jail. And the relatively new Lancaster Jail has hovered near capacity the last two years. Corrections are an ever cost-increased burden to Nebraska taxpayers, including at the county level. In response to this problem there has been some innovative suggestions, including the creation of a community bail fund by the ACLU of Nebraska, an amnesty warrant week done by the Lincoln City Attorney and the Lancaster County Attorney, but the problem of housing pretrial detainees persists. In many respects, reconsidering money bond system for certain offenses expands the idea of first considering a pretrial detainee's ability to pay in relation to the seriousness of the

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alleged offense. With that, I'd conclude my introduction and look forward to the testimony we have here today. [LR415]

SENATOR EBKE: Thank you, Senator Hansen. Do we have any questions initially? I see none. Okay. [LR415]

SENATOR HANSEN: Thank you. [LR415]

SENATOR EBKE: We don't have any invited testifiers, so let's just come on up if you're interested in testifying on this. [LR415]

JOE NIGRO: Good morning. [LR415]

SENATOR EBKE: Morning. [LR415]

JOE NIGRO: Senator Ebke, members of the committee, I'm Joe Nigro; that's J-o-e N-i-g-r-o. I'm the Lancaster County Public Defender and I appear on behalf of the Nebraska Criminal Defense Attorneys Association. In 2017 the Legislature passed LB259 which amended the bond statute to include a factor of the defendant's financial ability to pay in setting bonds. The purpose of this was to get judges to tailor the bond to a defendant's individual financial circumstances instead of setting the same bond for offenses. But we now see judges stating that they are taking the defendant's financial ability to pay into consideration and then still setting the bond requested by the prosecutor. Research has shown that posting money for bond has no relationship to whether or not people come back to court or whether they constitute a risk to the community. Money bond only guarantees that people who don't have it stay in jail. Over 60 percent of the people in the Lancaster County Jail are pretrial detainees. They are presumed innocent. One night in jail can mean the loss of a job, which can lead to loss of a place to live and the placement of your children in the foster care system. Being held in jail coerces people to plead to resolve their cases even when they have a defense. Money bond means that we essentially have debtors prisons and if any prosecutors are going to say that we need to have money bond to be safe, it's just not accurate, but it will certainly make them work harder to convict people. This study particularly focuses on bond in misdemeanor cases. I have become convinced that the money bond system

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must end and not just for misdemeanor cases but for all cases. California passed legislation ending money bond last week. They've moved to a system of using evidence-based risk assessments to determine who should be released and a level of supervision. The District of Columbia has had such a system for years. Ninety percent of those charged there have been released and 90 percent of those released have returned to court without committing additional offenses and when they have, when there have been additional offenses, it's generally been nonviolent. If it can work in a place like Washington, D.C., which certainly has lots of serious crime, it can work anywhere. Across the country states are moving away from reliance on money bond. From Alaska to New Jersey, there's been successful litigation against money bond in multiple places, including Houston and New Orleans. We should take action before there is successful litigation here. Lancaster County has a successful pretrial release program but it is underutilized. People come back to court and they rarely reoffend. We must ensure that using a risk-assessment system does not discriminate against the poor or people of color. But we already know that the current system discriminates against the poor and people of color. The money bond system is wrong and we must end it. Thank you. I'm happy to take any questions. [LR415]

SENATOR EBKE: Thank you, Mr. Nigro. Any questions? I see none. Thanks. [LR415]

JOE NIGRO: Thank you. [LR415]

SENATOR EBKE: Next testifier. [LR415]

MATT KUHSE: Good morning. My name is Matt Kuhse; that's M-a-t-t K-u-h-s-e. I am the city prosecutor for the city of Omaha and I want to provide a snapshot of Douglas County, as Mr. Nigro kind of did for Lancaster County. In Douglas County, there...we have a bit of a hybrid up there. The city prosecutor's office is tasked with prosecuting all misdemeanors that occur in the county pursuant to an agreement that we have with the county attorney's office, except crimes of domestic violence. Those are handled exclusively by the Douglas County Attorney. I contacted our Department of Corrections and got a snapshot from them from a couple of days ago. Currently there is 999 people currently in custody at the Douglas County Correctional Center on a pretrial bond. Of that number, 121 of those are being held on a misdemeanor bond. Of that misdemeanor bond, there...80 of them are in there because of failing to appear...or, excuse me,

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80 of them are in there on a domestic violence case and 35 of them are in there for failing to appear. The remaining amount, which constitutes other six people, are just being in there on bonds. In Douglas County the major law enforcement entities--that being the Omaha Police Department and the Douglas County Sheriff's Office--have a cite-and-release policy, that meaning that, absent a few factors, you are going to get cited and you will be released on your own recognizance for offenses that occur, the only exceptions being if you're not local to the Omaha area, if you have a warrant out for your arrest, if you're also being arrested for a felony in addition to the misdemeanor, and the less likely one is if you refuse to sign your citation. The majority of people that enter the Douglas County Correctional Center from being arrested are being arrested on a warrant, meaning they were given a ticket for whatever their offense, being that it could be from speeding all the way up to the more serious misdemeanor offenses of driving under the influence, child abuse, and assaults, but they did not appear for whatever reason. That's when the warrant gets issued and they enter into court. It was alluded by Mister...Senator Hansen about how the Douglas County Correctional Center has now instituted a new pretrial release program. This was done at the behest of the former Department of Corrections Director, Dr. Foxall, to help with the jail overcrowding issue. It's only been in use for a couple of months. I can say that for many months the prosecutors' offices, myself, and the county attorney, the Douglas County Public Defender's Office, and the courts, along with Department of Corrections, worked on how this would operate. They are using your risk-assessment tool. I wish I could remember the name of it, but it is a well-established risk-assessment tool that is used across the country. They are now implementing that so that people with low-level offenses, including low-level felony offenses, are being released to pretrial release. Our former pretrial release system constituted of basically a person would have to call in every day to a number. It wasn't very effective and it lacked a lot of credibility. There was also issues in that it required a land line to be used and in 2018. Speaking only for myself, nobody really has land lines anymore. This new system will work with people responding to the Department of Corrections and the Department of Corrections making a risk assessment. I think they use a color-coding system, if I remember correctly, to determine what level you're at. Red is the highest level of supervision, green is the least amount of supervision, and within those color ranges people who are out on bond are required to do numerous things. It could range from something simply as reporting on certain days, alcohol testing, and also wearing GPS monitors. So I present this information. I don't stand in opposition or in support of this in any way, shape,

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or form, because I simply wanted to provide the committee with this information so that going forward, if any legislation is proposed, that you would consider these things that we're doing in Douglas County to try and alleviate the system of jail overcrowding. And I'd be happy to take any questions from the committee. [LR415]

SENATOR EBKE: Thank you, Mr. Kuhse. Any questions? Senator Hansen. [LR415]

SENATOR HANSEN: Thank you, Senator Ebke, and thank you for coming down, Mr. Kuhse. I appreciate you sharing. I know different people treat their interim studies different ways. I like to just...you know, I didn't have invited testimony. I like just opening it for the people who are experts in the field or concerned about the field to come down and present their perspective, so I really appreciate you coming down. You mentioned your cite-and-release kind of policy in Douglas County. Do you have any statistics on how many people who are cited and released actually do come back and are cooperative through their court process? [LR415]

MATT KUHSE: In terms of numbers, I can give two answers. [LR415]

SENATOR HANSEN: Sure. [LR415]

MATT KUHSE: In terms of numbers, the city prosecutor's office filed and prosecuted over 102,000 cases; sounds big, but I want to bear in mind that does include traffic offenses as well. Out of those 102,000 cases, in my looking at it, from 90 to about 95 percent were cited and released. In terms of people coming to court and warrants being issued, I don't have exact figures. I can base it on what I anecdotally see in the courtroom. I would say the majority of people charged with offenses and receive citation come to court and by majority I would be saying 60, 65, maybe even 70 percent come to court. It's the 30 percent who don't come to court and have the warrant issued for their arrest. Out of that number--again, anecdotally--out of that number of people who don't come to court, they eventually come to court most of the time, honestly, on their own, though our clerk's office has a system whereby you are informed basically either by a letter, a phone call--I think there's a text messaging option as well--like, Dear Mr. Kuhse, you have a warrant out for your arrest. And there's a mechanism in order to have that warrant canceled by the judge. So the amount of people actually being arrested on

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warrants for failing to appear is a very small fraction of the numbers of people we prosecute in the city of Omaha. [LR415]

SENATOR HANSEN: Thank you very much. [LR415]

MATT KUHSE: Thank you. [LR415]

SENATOR EBKE: Senator Krist and then Senator Chambers. [LR415]

SENATOR KRIST: How old is the program? Is it...did he...did Foxall put it in as a pilot project or is it accepted? Go ahead. [LR415]

MATT KUHSE: He...we started working on it earlier this year, 2018, and I believe they began implementing it across the board in June of this year. So it's barely even...it's not even six months old yet but it is being used widespread by the court. [LR415]

SENATOR KRIST: I'm sure Senator Hansen would love to see the data as it starts to accumulate, just the metrics of how it's working. You know, we love to use blueprints and spread them around because if they work, they work. So I don't know, maybe... [LR415]

MATT KUHSE: I know Dr. Foxall has hired...before he left, the Department of Corrections hired a specific person whose job was, is based...I don't know what his title is, but is to be the pretrial release coordinator/supervisor. He's the one doing the assessments. They haven't hired anybody else to assist him. But he's the one doing the assessments and he's the one presenting the assessment recommendations to the court when they're being placed on this program. [LR415]

SENATOR KRIST: Perfect. Thank you. [LR415]

SENATOR EBKE: Senator Chambers. [LR415]

SENATOR CHAMBERS: Do you ever talk to judges? [LR415]

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MATT KUHSE: Yes. [LR415]

SENATOR CHAMBERS: Okay. I'm not going to ask you which ones or anything. What is the rationale for a \$1 million bond? [LR415]

MATT KUHSE: It's hard for me to answer that particular question. Only to be clear, in my former life as a deputy county attorney that would be something I'd be more involved in. In my current position it's not really something I'm involved in, so I hear these things, you know, about bonds getting set at amounts--\$1 million, \$2 million, whatever the high number might be--but I don't really engage in conversation about it. Anything I would say would just be speculation or my own, I guess, personal insights. Sorry. [LR415]

SENATOR CHAMBERS: Okay. Thank you. [LR415]

SENATOR EBKE: Other questions? Thanks for coming today. [LR415]

MATT KUHSE: Thank you. [LR415]

SPIKE EICKHOLT: It's a nicer room. The chair sits down so much lower. [LR415]

SENATOR EBKE: Okay. (Laugh) [LR415]

SPIKE EICKHOLT: (Exhibits 1 and 2) Good morning, Madam Chair, members of the committee. My name is Spike Eickholt, S-p-i-k-e, last name is E-i-c-k-h-o-l-t, appearing on behalf of the ACLU of Nebraska. I'm not going to repeat Mr. Nigro's testimony...or maybe I will just a bit, I guess, but Senator Hansen mentioned LB229 was passed in 2017 and the hope--at least our hope--when seeing that bill pass was that the judges would consider when they set bonds the individual defendant's financial ability to post a bond. There has been some, as Mr. Nigro explained, some changes in the way that judges set bonds, particularly at the county court level, and I'm really primarily speaking about Lancaster County. But despite what the 29-901 requires, judges will still typically set a standard bond amount, so for a certain type of offense it'll be a \$2,400-2,500 percentage bond or a \$5,000 percentage bond. The judges will sometimes

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inquire as to what the individual defendant can pay, and this is for all kinds of offenses, misdemeanors, and felonies. And even if the defendant articulates that he or she cannot post whatever bond amount they're talking about, the judges will still set that amount. And as Senator Hansen indicated before, the jail populations in the three largest counties still are...still continues to rise. People cannot make their bond and many of the people who are in jails are pretrial detainees. And frankly, in Lancaster County most of them are pretrial detainees, not convicted of anything, simply charged but unable to post the money bond that's requested. We have watched...done some court watching, the ACLU of Nebraska has, and if you look on page 2 of the...my written testimony, we actually give a snapshot of January 23, 2018, of what was done in Lancaster County and what the Lancaster County jail population looked like. And that's just an example of what one day typically would look like as far as the number of people who are in custody, who are not convicted, and who cannot make their bond. One thing that I observe anecdotally when I'm in court, and I've...we've also noticed in court watching, is, and it happens in Lancaster County, it might not happen in Douglas County, but the situation where a court will not appoint an attorney to represent someone on a misdemeanor charge, a city ordinance violation because the city or the state is not requesting jail. You have a right to have a lawyer if you cannot afford one and the state is requesting jail, even one day of jail, as a punishment. And what you will see, though, even though the state is not requesting jail in those situations, the court will still set a money bond; in other words, a person does not have a lawyer, they're not going to get anything more than a fine even if they're found guilty, yet the court will set a percentage bond and require they post some money to get out. And that is frustrating because many times those people, if they do not have a lawyer, don't know how to request a bond review, they don't know how to get to court before the trial date, and I think on an earlier hearing last session Mr. Nigro gave the example of someone who sat in jail for over 30 days and ended up finally getting to court on their trial date. They were transported to court and pled guilty and got a minimal fine. And you see instances like that happening. As Mr. Nigro explained, other jurisdictions are getting away from the money bond system. Really, some of the examples that Mr. Kuhse explained of what Douglas County is doing is what other jurisdictions are doing. They're moving away from a risk-assessment process where people are actually sort of evaluated as to the likelihood to come back to court. They do have text reminders and court-reminder systems in other jurisdictions. As Mister...I think Mister...oh, Senator Hansen explained before we did develop a community bond fund here in Lancaster County. We did have a donor provide

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some money for us to create a revolving bond program and the way it works is that we will identify people who are being held on low bond amounts. We're trying to help as many people as we can so we do place a priority on lower bond amounts. We bond them out, they agree to return the money back to the fund so that we can bond people out in the future, and then they come back to court, at least the hope is they come back to court. In some of the materials in the blue folders, we've modeled our program after the Brooklyn Bail Fund, which is really the most comprehensive, maybe the first bail fund in the country. And one of the things that they noticed about the Brooklyn Bail Fund when they posted people's bond is that they had a very high appearance rate, 95 percent-plus, and the reasons for people not missing...or not appearing in court before had little to do with the amount of money they invested but really just the intimidation they have in the court system, childcare responsibilities, transportation difficulties, and little to do with the premise of the money bond. And what I mean by premise of the money bond is that the idea is, is that you're charged with a crime, they're going to let you out of jail, but they want to make sure you invest in the case, that you have skin in the game, so to speak. And if people are coming to court when they have no self-interest financially--someone else is posting their bond and they're coming to court--then that strikes a blow to that presumption or that premise of the money bond system because it does work against people who cannot afford it. We see the money bond...or the community bond system as a short-term solution. And I'll take any questions that the committee has. [LR415]

SENATOR EBKE: Questions for Mr. Eickholt? Senator Chambers. [LR415]

SENATOR CHAMBERS: Just a comment. My complexion will explain why I say a lot of the things that I say. But people of my complexion are held in disrepute everywhere in this society. If I were freed by the Thirteenth Amendment, I wouldn't still be facing discrimination, segregation, and all the negative things that happen. So when they sing the national anthem, "land of the free and the home of the brave," that doesn't apply to black people. Then for these white people, especially the President, to refer to...President referring to black football players as sons of bitches, that's the President's language, not mine. I'm not a Christian. I don't talk like that. I don't call anybody things like that. That's what he says. It is not a land of the free and it is not a land where people are brave because they come in mobs after somebody like us. And the flag salute, "with liberty and justice for all," not black people. I see what happens in these vicious, white-run

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courts. These judges will know that the charge brought against this black person is not going to carry any significant jail time, so by posting a high bond they can hold that person in jail for a longer period of time than the crime would carry if he or she were convicted of it. So when they put things in these law books, they don't mean anything to black people. Then I listen to people in this Legislature talking some of the kind of mess that they talk, "did the crime, did the time." White people don't face it. I saw something idiotic put in the paper by Senator Erdman, and I'll have a chance to talk about that on the floor of the Legislature. He's worried about what's going to happen to white Christian conservatives and they control everything right now. He and his ilk could not survive in the way that I do. They are cowardly, they are whiners, they are crybabies. Nobody put a hand on any white Christian conservative person at the university. Cops and others put violent hands on us all the time and get away with it. So if there can be some kind of change in the way they handle these cash bonds, it will be to the good. But in the back of the minds of all these people will be: But this is the way we can discriminate against black people without it being called that. So I'm in favor of these kinds of programs, and I'm glad it was brought by my white colleague. They cannot say what they'd say if I brought it as the white racist Governor says: If Chambers is for it, it's giving a message to criminals that you're soft on crime. Then the senators who are cowards will back away from it. I've dealt with it all these years and I still function at a higher rate, with all due respect to everybody in the Legislature, a higher rate than anybody in this Legislature. I'm down here every day when we're not in session. I'm down here Saturdays, Sundays, holidays, because I take seriously the work that I'm trying to do. I'm not in the majority like these white senators are all the time. And if I don't push hard for the issues that relate to us, it's different from white senators. White people have interests they parallel, they interconnect, so if one senator or ten white senators say I don't feel up to it today, I'm going to take a break, they got 30-some-odd others...well, fewer than 30 if 10 of them, because there are only 49--I can do arithmetic. They've got plenty of other white senators who are going to carry the ball for them. If I don't speak for us, who speaks? Not just black people, poor white people, gay people, lesbian people, the ones who are rejected. What some of these white racists in this Legislature would like to do is to put a law in place like existed in the biblical days where if somebody had leprosy they'd have to holler, "Unclean! Unclean!" That's what they want but they can't get away with it, but I see the attitude all the time. And when this legislation comes up, we're going to have the opportunity to see where these Christians stand. And as I told somebody out in the hall this morning, I ought to become a Christian, then I can lower my standards, I can

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have a sliding scale of morality like the Governor. Before the Pope made his flat declaration that the death penalty is inadmissible in all cases, I've got the statement from the Governor where he said that he studied it, he meditated and he prayed, and the church, his faith says that in certain circumstances there can be a death penalty, so his faith is why he supported the death penalty. Now that the Pope said that's not the faith anymore, his faith is out the window. He's a hypocrite in addition to being a racist. And you all don't want me to call these racists what they are? Well, you don't face it. Then I see these white senators whining and crying about what happens to white conservative Christian men in the university, pleading for these white men. What kind of cowards are they? I'm one man. I don't carry a gun. I don't have a permit to carry a gun. I don't run around here afraid, needing a bodyguard, fleeing when no man pursues, hear a crackling leaf and I say a lion is in the streets. These white men show me what cowards they are. All of them want to carry guns, and all those white men at the university, and Senator Erdman has to write something about defending these white Christian conservative men? Not men, mice, white mice, and nobody is going to put their hands on them. You know what he's worried about? He said, well, if this white conservative man says that marriage is before two women, then what he says will be scrutinized. Scrutinized? That's all he's worried about, somebody scrutinizing him, somebody looking at him, the coward? They ought to put diapers on him. They ought to dress him in Pampers and feed him Pablum and give him a pacifier and let him show what he is on that campus. You all don't realize what you say about your white men with the things that you do. And when stuff is brought up on this in our hearings about a lawyer intervening to keep a person from being murdered, that's the most asinine thing I've heard. Then I'm going to say what I've got to say, too, and it won't be as asinine as that. I will base what I say on what white people say first. When I condemn them on the floor of the Legislature, it's not by my high standard, it's by their low Christian standard that their Jesus gave them, the one that they say they believe in, and that's what I put on them. You said this is what you believe; your Jesus said take care of the poor; your Jesus said take care of the orphans; your Jesus said feed the hungry; your Jesus said feed...visit those in prison. That's what your Jesus said and then you pray to your Jesus every morning in the name of the Father, the Son, and the Holy Ghost. Well, they got the wrong ghost in that Legislature. And if Jesus and God were like what I was taught as a child they were, they would have been struck dead by lightning. God would have fixed them. And if I sound irritated and upset, I am. And you know why? If we were just people sitting around here talking, it's like people sitting around in the tavern arguing. I don't get in arguments like that. We are people with

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the power to do things to bring about justice. We can change things. These hypocrites don't have to pray for anything on the floor of that Legislature. I have yet to hear these hypocrites pray for something that cannot be provided for by us in the Legislature. We can create a just system. We can see that those who are mentally challenged are treated with compassion and programs can be put in place to help them. All these hypocrites would pose that...I think it was an arrogant, I think it was an impertinent, I think it was a dangerous question for the murderer to put to God. God supposedly said, Cain, where is thy brother? And Cain got a smirk on his face and looked at God--although you can't see God--looked at the direction the voice was coming from because the "Bible" said the voice of God walked in the garden. That's what your "Bible" says. I read it. I want to know what it is that my enemy uses as his guide. And Cain asked, am I my brother's keeper? And the "Bible" doesn't give the answer because the "Bible" is full of all those pronouncements telling you Christians, Jews, and others who believe in what they call the Judeo-Christian system, leaves it to you to give the answer, and all of the answers in however many varieties you need them will be right there for you. And the way that I answer the question, and it's not even put to me because I'd never be anybody's keeper in the sense of white people want--that means they're a slave master--I look at it differently. Am I the keeper of my brother and my sister's welfare? And my answer, unlike that of a Christian, is yes. Their "Bible" says: For God hath made of one blood all nations of men for to dwell upon the face of the earth everywhere. One blood means one family. So if we're all brothers and sisters, the answer to the question that Cain put to God is obvious. Yes, we are our brother's and our sister's keeper. That's why you hear me and not some of these white hypocrites advocating for the least, the last, and the lost. And there are more of their kind than my kind in this state. They ought to put me to shame. They are the superiors. White racists, white supremacists, why, they are detrimental to the cause of white supremacy. I'm saying it on what we're talking about here because the worst thing you can do to a poor person is to deprive that person of his or her freedom. And when you can throw them in a cage like an animal, not having been convicted of anything, and if they go to trial, found innocent, but the shame, the humiliation, the losses that attend such treatment have already been exacted. You have paid a price for something you did not do. You were punished for a crime you did not commit. There's a song: We're little black sheep who have lost our way. And it talks about they scorned us for being what we are, not what we did. So I applaud all of those white people who can see the injustice that is being carried out in the courts that have the words attached to them "of justice" and will try to do something to eradicate it. And as quiet as it's kept,

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as they say on the street, these are the white people who show me that not all white people are the same, not all of them would be in the lynch mob, not all of them would be carrying the American flag when they come to burn a black person's house. I praise Nike for what they did. I applaud them. And I see as a hero Colin Kaepernick. These white racist cowards have senators standing up for them so that they won't be looked at with a frown. And here's a black man who has people who were shot down in broad daylight by police and nothing is done. They showed the other day two 11-year-old black kids on their knees with their hands cuffed behind their back and the cop referred to him as "Bud": You know why I'm doing this, Bud? And his mother had to watch and couldn't do anything. And then, like these cops can say now, well, somebody called and said they saw a black kid carrying a gun. He's got no gun but he's black and that's what...where the problem is in this country. And I'm supposed to salute a flag? The flag is a rag. It is the symbol of my oppression. Wherever I see an American flag, I expect racism--when I see it on the jackets of these people on motorcycles, when I see it on the side of the fire truck. I see it as the patch on the cop's arm. Do you know that the cops who arrested and took Rosa Parks for booking wore patches of the American flag? And you're supposed to fall down and worship this rag? The flag has not been anything for black people. And these white people are going to be outraged because a black man won't stand up and put his hand on his heart when that rag, a song is sung. You all don't even, some of you, know the words to the song. And when they show white people trying to sing along with it in the audience, they get the words wrong and then they mouth it and then they stop because they don't even know the words. And I'm going to tell you this, then I'm through with it. A fellow named Francis Scott Key wrote what is called "The Star-Spangled Banner." He's the one who wrote it and that says, "o'er the land of the free." America was a slave country. That tells me what you think of me. We are enslaved and it's called the land of the free. That Declaration of Independence says all men are created equal, so we're not men because we were being held as slaves by Thomas Jefferson who did most of the rewriting, and much of that is copied from what Europeans had written. And we're supposed to look at it like white people? You all honor the flag and you have bikinis and shorts made with flags and that's how you respect the flag? You put stamps on envelopes to be canceled, the American flag. That's how you honor the flag? But when it comes to a black person, all of a sudden it's supposed to mean something to us. Then we see how outraged you are. But you're not outraged when you hear about all the little children who have no shoes on their feet, the hungry people who have nothing to eat, the homeless people with no place to sleep. You're not outraged by that at all. You

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walk on the other side of the street. You won't see them. Draw not nigh unto me for I am holier than thou. Then you hypocrites every morning will say it, go up in that Chamber. You know the only reason I won't go up there and sit when they say the flag salute? Because it's beneath me. Showing sitting wouldn't show the contempt that I have. And they show more contempt than I feel because your conduct would be different if it meant anything to you. If American principles meant anything to you, if your constitution meant anything to you, if your Declaration of Independence and all of your laws meant anything to you, you would behave differently. I'm not a Christian, I don't believe in Judaism, and I'd match my personal morality against anybody who ever wore shoe leather or walked around without shoe leather. I don't abuse women. I don't abuse children. I don't pick on those who are weak. Those are the ones that I defend. I just got a letter the other day. The complaint I filed against that judge...I meant that doctor, making these women when he's giving them...supposed to be checking them for a hernia, make them lie flat on their back--and if you got to go somewhere, go, there's no lock on the door--put their feet flat, open their legs, and he does a visual of their vaginas and their anuses. And I filed a complaint, said it violated doctor ethics. It took them a year, about, but I finally got a letter where they dismissed it and the Attorney General was right there with them. That hypocrite is talking about sex trafficking, and would he want his wife dealt with like that by a doctor? And there were doctors who publicly condemned the way this guy was supposedly examining these women. But the Attorney General directed that the complaint be dismissed because I brought it, and it happened to be a white woman and white women who were being handled, mishandled in this way, and white men didn't say anything about it. But I was outraged when I saw it. HHS, the doctors, and the Attorney General said no. But you know what your Attorney General will do? He tailgates on any action by attorneys general anywhere. If they are suing a big company, might get some money, he will join. If he wants to seem like a righteous guy in Nebraska and somebody is suing Colorado because they have medical cannabis or recreational cannabis, he tailgates on that. He tailgated on a lawsuit that would be against transgender people being treated fairly and your Attorney General tailgated on that. But then when it comes to white women in Nebraska, he says that a practice that was condemned publicly by other doctors, there's nothing wrong with it. And I'm going to deal with it and I'm going to talk about it on the floor of the Legislature. Where are the standards? Sex trafficking? And these women who wanted to get jobs with the State Patrol had to be subjected to this kind of sexual--I call it assaultive--behavior? And your Attorney General, the white Christian hypocrite, and now you know what his latest act of hypocrisy is?

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When I was talking on the floor down through the years about Catholic priests abusing children, not only was I condemned, Mike Foley said that I was vile, and some Catholic outfit in New York said that I ought to be censured. And now that an Attorney General in Philadelphia took action against these Catholic priests and got the evidence that was undeniable and that I had talked about, now here comes your Attorney General, now he is telling people we need to look into all of these things, we want the records. And I wish they'd stop saying "diocese" when they mean plural. I pay attention to religious things. It's "dioceses." It's not "diocese." That's not plural. "Dioceses" is plural. So all of the dioceses should have to give their records. But why does he have to go way out there and mess with the Catholic priests when he is a part of the overseership of how doctors behave? So I'm going to write him a letter. I'm asking if his wife was on the table with her legs spread and a doctor is examining her vagina, that okay with you? If you've got a daughter, is that okay for your daughter? He's the one, a white Christian, but thank goodness there are some non-Christians who are white and there are some people who call themselves Christians who, despite that, are trying to do the right thing. And I'm saying all of that so that you can know that when I'm at my angriest--this isn't my angriest, you haven't seen anything--I can still see that not everybody of that complexion is evil. Now I think all white people have racism in them because they were raised with that. They see a black man and they see a black man because they're brought up. How can they be otherwise? But they don't have to behave as those who are racists behave toward the black man. I'm 81 years old. We were supposed to have been freed with the Thirteenth Amendment being passed. I'm not free in Lincoln, in Omaha. Anywhere I go, I'm treated differently if I allow it. Even something so ordinary as being in line at the deli counter, I'm standing there, you know they see me, but then white people come after I do and they go toward the white person. And I don't get outrageous. All I do is say, hey, let's be fair. And then the white person who is going to accept it says, oh, yeah, he was here before me. Then: Oh, oh, I'm sorry. They can't say they didn't see me. I'm the only thing they see when I'm in a store. They don't see other white people. They're a part of the white background that they're used to seeing. But when I come, I'm the discordant element. They see me not because I'm Senator Chambers but because I'm black. [LR415]

SENATOR EBKE: Thank you, Senator Chambers. There any questions? Okay. [LR415]

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SENATOR CHAMBERS: My question is this: If legislation like this is presented, ACLU will be willing to work with and support in any way they can that legislation? [LR415]

SPIKE EICKHOLT: Of course. [LR415]

SENATOR CHAMBERS: Thank you. [LR415]

SENATOR EBKE: Thank you. Thanks for being here today. Are there any other testifiers on this one? Okay, do you want to close? Okay, you're going to waive closure on LR415. I'm going to...we've been here for three hours and 15 minutes. I'm going to give everybody about five minutes so that staff can get up and move around. The rest of us have been able to, but...and then we'll come back at about 5:00. We'll make it as close to five minutes as we can. [LR415]

BREAK

SENATOR EBKE: Okay. We didn't go too much past seven minutes I don't think or eight. So let's get moving on LR370. This is our last LR for the day so, Senator Hansen. [LR370]

SENATOR HANSEN: Good afternoon, Chairwoman Ebke and members of the Judiciary Committee. My name is Matt Hansen, M-a-t-t H-a-n-s-e-n, and I represent Legislative District 26 in northeast Lincoln. I'm here to introduce LR370 which is an interim study to examine possible ways to address the lack of mental health services for those in county jails. A troubling characteristic of our jail populations is that a significant percentage of the inmates suffer from mental health problems. A particular problem exists for inmates-- for inmates is for those who have been determined to be not competent to stand trial. These are people who have not been convicted yet but must be housed in our jails while they wait placement at the Lincoln Regional Center to receive treatment for the mental illness to be restored to competency to face trial. In particular, I'm looking for ways to shorten the long wait times for those pretrial detainees who have not been found guilty of a crime yet but have also been determined not to be competent. Last fall the Lincoln Journal Star reported that dozens of people in the past year spent weeks or months in the county jail waiting for a bed at the Lincoln Regional Center after a judge ruled they were incompetent to stand trial. At that time, those at the Regional Center who had

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previously been at the jail had waited an average of 68 days and half had been in jail for more than 80 days. The county jail is simply not the right place for those suffering from mental health issues to wait, especially for weeks and months at a time. Not only is it a huge cost burden to the counties who have little resources to house those with mental illness, but professionals have indicated that the jail setting can also exacerbate the symptoms. Current law requires that competency restoration must be done on an inpatient basis at the Regional Center program even if they are otherwise eligible for bail and pose no risk to public safety. One possible solution discussed so far is to allow some use of outpatient treatment programs to restore competency, freeing up beds for those suffering more severe mental health issues and shortening their wait at the county jail. Last session I introduced LB1010 which looked at giving the court the opportunity to order a defendant to be committed to the least restrictive treatment alternative when found to be mentally incompetent to stand trial. This would have included commitment for treatment at an outpatient treatment provider in some cases. Unfortunately in part due to it being a short session last year, the bill did not advance for debate. Nonetheless, the problem still remains. I appreciate all the discussion so far with interested parties, including Brad Johnson at Lancaster County Corrections, other Lancaster County officials, including the public defender's office as well as the ACLU and mental health advocates and look forward to the hearing today and their testimony today and continuing to work with them as we work with others on this issue. With that, I would conclude my opening on LB370. [LR370]

SENATOR EBKE: Thank you, Senator Hansen. Any questions? Okay. Let's see who wants to talk to us. So we have no preordained testifiers so just come on up and first come, first serve. [LR370]

KIM ETHERTON: (Exhibit 1) Good morning, Senator Ebke and members of the Judiciary Committee. My name is Kim Etherton, spelled K-i-m E-t-h-e-r-t-o-n. I'm a licensed independent mental health practitioner and the director of Lancaster County Community Corrections. My agency works closely with the Lancaster County jail, the Lancaster County and Lincoln City Attorney's Offices, the Public Defender's Office, and the county and district courts providing alternatives to incarceration. Prior to being the director of Community Corrections, I was the mental health center's crisis center program manager. I'm here today at the request of Senator Hansen's office to testify on LR370 and offer information about issues this jurisdiction faces

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when the mental health and criminal justice systems interface. I would like to express my appreciation for this committee's interest in this issue and the effort you're making to better understand the needs of the system and the resource gaps. The criminal justice system historically has encountered barriers to accessing behavioral health services for individuals in the system and individuals leaving the system. Over the past ten years, however, I have seen a slow shift and watched as policymakers and community leaders have gained a better understanding of what keeps individuals in the criminal justice system and what perpetuates recidivism. This new understanding has led to the acknowledgment that substance use and mental health issues must be addressed if our goal to reduce the number of individuals in our jails and prisons, improve quality of life, and maintain the safety of our communities is to be realized. As a result, we have seen establishment of problem-solving courts and the creation and expansion of diversion programs. While treating substance use and mental health, including complex trauma disorders, is an agreed upon approach in addressing criminal justice involvement and reducing recidivism, the resources needed to accomplish this work are limited and at times unavailable. LB605 is an example of enlightened efforts to reduce cost and improve outcomes. However, I do not believe there was an appreciation for the behavioral health needs that would manifest from the implementation of LB605. In Lancaster County, mental health and substance use treatment services were under pressure prior to LB605. Many individuals coming out of prison and back into the community under reentry programming are being referred to the community for behavioral health services. And it appears the behavioral health system is under an unsustainable pressure to accommodate the demand. Specifically at the local level, my agency administers the adult drug court, felony pretrial release, and multiple diversion programs, including veterans and mental health diversion. It is the rule, not the exception, for my staff to report there's a waiting list for inpatient substance use treatment, medication management; and it is unlikely we would ever be able to access residential rehabilitation for an individual with a known severe mental illness. Individuals with severe mental health symptoms generally require long-term initial stabilization followed by intensive ongoing case management. In my conversations with local providers who administer programs to stabilize and support these individuals, they disclose that the population being referred is increasing in number and symptom severity and that service is at capacity. Untreated, these individuals often come into contact with law enforcement and then the criminal justice system and the local jail. Once in jail, many individuals don't receive the type of treatment they need and they stay longer than their counterparts without mental illness. They are

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at risk of victimization and often their mental health conditions worsen. Prosecution cannot proceed against a defendant believed to be incompetent, and they will remain in the jail until they can be transferred to the state hospital to restore competency. Two weeks ago following the Lincoln-Lancaster Justice Council meeting, I was informed by a Region V behavioral health provider that their medication management program will be at capacity by the end of August and they will be placing referrals on a waiting list. She disclosed that the capacity issue was not because they did not have staff or the time to see the individuals, but it is based on their projection that they will be at a maximum for units of reimbursement. I made a phone call to a second Region V provider who disclosed their medication management services were at capacity and they're likely not taking new clients but they could make a referral to another agency in town. When I questioned to whom they would refer, they referenced the Region V behavior health provider who had just informed me they would be at capacity by the end of August. For those of us trying to connect individuals to services, this is frustrating. In our efforts to avert individuals from the criminal justice system, move them out of the system, or assist them as they reenter our community, agencies and clients need immediate and then ongoing behavioral health resources. Immediate access to behavioral health services is crucial to stabilization and positive outcomes, and ongoing access to these services is key to maintaining stability and averting individuals and/or repeated contacts with the criminal justice system. Again, thank you for your interest in this issue and I'm happy to answer any questions. [LR370]

SENATOR EBKE: Senator Chambers. [LR370]

SENATOR CHAMBERS: When the word "reimbursement" appears, from whom would the reimbursement come? [LR370]

KIM ETHERTON: The behavioral health system, region-- the region-- in Lancaster County, our region is Region V and they're the ones that reimburse for those things. [LR370]

SENATOR CHAMBERS: Does the state do any reimbursing? [LR370]

KIM ETHERTON: If the client has Medicaid, they could ask for reimbursement from Medicaid first. [LR370]

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SENATOR CHAMBERS: But there is no state program that the state, apart from Medicaid, provides that would give assistance in these situations that you're describing? [LR370]

KIM ETHERTON: Not that I'm aware of. [LR370]

SENATOR CHAMBERS: I'm going to say like I said on the other one, I'm appreciative of the fact that there are people who care about vulnerable individuals. But this is one of those areas I was touching on also where instead of us saying empty, meaningless prayers we know that there is a problem. These are our brothers and sisters. And now forgetting the racial element of it, these are our people. In this state, I hear politicians talk about the Nebraska way, that Nebraskans are compassionate people. Well, the ones who represent the Nebraska way and this supposed compassion are in the Legislature. And to be aware that these kind of problems exist, that there are people being victimized and mistreated because of situations beyond their control, this is where is Senator Halloran meant what he said we as senators could intervene. And we would not be between the person who is going to be killed and the one who is going to do the killing. We can intervene and help those who are facing identifiable needs that can be at least ameliorated or lessened if we would intervene. So this gives Senator Halloran, myself, and others who are in the Legislature an opportunity to do the things I condemn us for not doing. So I'm going to make use of your letter and I probably will be referring to it when we come into session because I've been around here a long time. And the problems that are being mentioned now have been with us all of that time. And I don't see any state movement toward alleviating these problems. And when we know that there are people who are treated by the criminal justice system as criminals, that's the only thing they know to do, they're not doctors, they're not mental health practitioners running the jails. And those people are not even trained to address the kind of problems that you're discussing. So here's the question that I would put to you after I said all that so you will know you don't have to persuade me of anything. If the state were to do anything, what direction might the state take? And then forgetting about Medicaid, but I meant the state as far as programming or anything else that might help. [LR370]

KIM ETHERTON: Well, we need to have services available so expanding the programs that we currently have. Much of what we currently have is effective when we have enough of it. But there's not enough. And, you know, Lancaster County recently closed its-- the mental health

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center. And all of that was privatized to local providers through the Region. And that's just a-- anytime we deinstitutionalize and anytime we try to reduce services, it just has a huge effect on the population that we think we're helping. [LR370]

SENATOR CHAMBERS: So money would be what would-- [LR370]

KIM ETHERTON: Well, yes. [LR370]

SENATOR CHAMBERS: --be help. [LR370]

KIM ETHERTON: Right, absolutely. [LR370]

SENATOR CHAMBERS: Okay. [LR370]

KIM ETHERTON: I mean, there are lots of things that are, I mean, medication management is a huge issue. Residential rehabilitation for severely mentally ill is another service that's not accessible to most of us in this community. So those are things that if we're going to expand services those would be the places I would put the biggest emphasis. [LR370]

SENATOR CHAMBERS: Thank you. [LR370]

SENATOR EBKE: Senator Krist. [LR370]

SENATOR KRIST: Is there anybody here from Behavioral Mental Health in Department of Health and Human Services? Is there anyone here from the Corrections Department, be it someone in behavioral related or assistance? [LR370]

BRAD JOHNSON: I'm the director of Lancaster County. I'll be coming up next. []

SENATOR KRIST: Okay, but not the state. [LR370]

BRAD JOHNSON: Not the state. [LR370]

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SENATOR KRIST: Yeah, well, for the record it shows that the emphasis that our Department of Corrections and our Department of Health and Human Services puts on these services that are critical to reducing the prison population in Corrections as well as making sure that we do indeed make good on past senators' promises when we destroyed the behavioral health centers across the state of Nebraska. And a lot of that fell to the counties to do. I'll make a statement about the regional-- the regions themselves. If you are lucky enough to be in a region that is taking some of this seriously and the state is giving the region money to execute these programs, I don't want to correct you or correct Senator Chambers, but there is money that we are giving in General Funds to the behavior to the regions. And some of them are doing real well and some of them not so well. So frustration means watching something for ten years and hearing the same thing over and over and over again. Frustration is when you see a young woman or a young man locked up in an orange jumpsuit for 30 or 45 days waiting for a psychological evaluation before they can be adjudicated one way or another. Frustration is when you watch a budget that continually provided services for juvenile justice, which is the pipeline in the system, and all of a sudden we're hacking away at some of that in order to make ends meet and cutting continuously. I think if the Department of Corrections and the Department of Health and Human Services were serious, they'd be sitting out in those maroon chairs. [LR370]

SENATOR EBKE: Questions? Senator Halloran. [LR370]

SENATOR HALLORAN: I would like your opinion on this. This problem has been around, to Senator Krist's point, it's more than ten years. At some level, and I've spoken from the Judiciary Committee about this before, but it first had its birth when we closed down regional hospitals or the concept of regional hospitals. It's an imperfect system. It was flawed. It had plenty of problems. But its focus was to work directly with people with chronic mental illness. And we closed those down. It was under Johanns, but I would guess it was probably a budgetary issue at the time and so, you know, that was an easy target I guess. I don't know. But bottom line is we closed those down and in its place we established what I consider to be a failed social policy of community house-- community-based housing for people that were otherwise housed, or not housed, but were treated in regional mental hospitals or should be treated in regional mental hospitals. So it's, you know, if I were emperor for a day, I would take \$100 million out of one of the top three budget holders' budget and I would reestablish regional mental hospitals. But as a

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body, I don't think we have the intestinal fortitude to go after any one of those three top budget holders to pull that \$100 million to do that. So it does rest on our shoulders. We haven't shown a willingness to do it. We talked about it. There's a lot of lip service. But, you know, and I'm part of that lip service. I understand that. But we need to just settle down and appropriate money to reestablish regional hospitals. I understand there was a Supreme Court ruling that said you can't-- it's a very indicting word-- you can't warehouse people, but that's not what regional hospitals in my estimation should be doing. They should be treating people instead of ending up in prison where they're beat up, bullied, sometimes killed. That's-- and no treatment at all. But until we recognize or are willing to say community-based housing for these people with chronic conditions has failed, we're not going to end up doing anything about it. We're just going to keep kicking that can down the road unfortunately. And a lot of communities don't have the wherewithal to have those kind of services locally to treat. [LR370]

KIM ETHERTON: That's true. [LR370]

SENATOR HALLORAN: Right? I mean you may in Lincoln and Omaha. Hastings has some; Grand Island has some; Kearney probably has some. But a huge part of the number of regions that we're talking about have none or have to go a great distance impractically to get those treatments. Anyway, I guess my question is would you see any value in reestablishing a regional mental hospital system? [LR370]

KIM ETHERTON: I see a value in having some inpatient hospitalization, more inpatient hospitalization available. I also see a value in making sure that once those individuals are released back to the community that the resources are there to keep them stable and kind of maintain their competency and maintain their ability to function day to day. So it's a double edge, I mean, it's both sides. We do need inpatient hospital beds. We need to be able to get them to a safe environment where they can be stabilized and assisted and helped. And then we need to make sure that once they're released they have the resources available so they can maintain. [LR370]

SENATOR EBKE: Senator Pansing Brooks. [LR370]

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SENATOR PANSING BROOKS: Thank you. Well, I agree with a bunch of what my colleague, Senator Halloran, just said. And there-- it was in the '80s when I think it was the movie One Flew Over the Cuckoo's Nest that really got the nation looking at our institutions and seeing what was happening. And as you look back historically in Nebraska, I believe that what happened-- to just broaden a little bit of what you said, Senator,-- is that we decided to close those hospitals but used the funding because people came forward and showed it was much more efficient to have providers in the community who are doing that work to be able to go forward and do that work for us and to take funding from the state and help pay the providers in the community to do it. Since then and since we've had lots-- various governors and various legislators, those funds have just unceremoniously been cut and cut and cut and cut. And we've done it ourselves during the four years that I've been here. And there is a huge portion of why, you know, where I stop in my agreement is saying that communities have not worked. I think they could work if they were properly funded as intended. But to cut and stop and close the mental institutions and then also cut and basically close all the community providers, gee, what a surprise that we're in this mess that we're in. I mean, we've done this to ourselves. We've watched it happen. We've heard the providers coming to hearings ad infinitum, those of the professionals in the community who work for the state and the county to say we need more, we need more money, we're not dealing with this. And we're all-- everybody throws their hands in the air and says, well, gee, how in the world did we get here? And it has to do with cuts and it has to do with funding and it has to do with the fact that people, you know, want to deal with and protect their own. And they don't want to look at funding or paying additional taxes for those who are truly in need in our community. And that deals with we have to make hard decisions. I agree with you, Senator Halloran. We have to make some decisions that will affect the safety of our community, it affects our brothers and sisters who aren't as fortunate in some instances as we are. And I really appreciate you coming to speak to all of this. And thank you for bringing this, Senator Hansen. [LR370]

SENATOR EBKE: Okay. So let me just try to wrap it up and ask a question. Do you think it's fair to say that we need well-funded inpatient, some well-funded inpatient care? [LR370]

KIM ETHERTON: The capacity [INAUDIBLE]. [LR370]

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SENATOR EBKE: To increase the capacity. But that there's still a place for well-funded community-based care, including perhaps some group home or whatever kind of situations. So we don't necessarily want to put people in the Cuckoo's Nest, right? You know, we don't necessarily want to put people in the forever and ever, but for some people that may be necessary. But we want to have a way out for them as well. So I think that we all kind of agree about pieces. But is that-- [LR370]

KIM ETHERTON: Absolutely. [LR370]

SENATOR EBKE: --capacity is necessary, right? [LR370]

KIM ETHERTON: Capacity [INAUDIBLE]. [LR370]

SENATOR EBKE: That's the big problem. And our lack of capacity for the regional centers has trickled down to the counties and put a hardship on the county issue. [LR370]

KIM ETHERTON: And it's put pressure on the jails. [LR370]

SENATOR EBKE: And the jail. [LR370]

KIM ETHERTON: The jails, local law enforcement-- [LR370]

SENATOR EBKE: Sure. [LR370]

KIM ETHERTON: --are seeing the result of it. [LR370]

SENATOR EBKE: And our prisons are all. Yeah. Okay. [LR370]

SENATOR PANSING BROOKS: Thank you. [LR370]

SENATOR EBKE: Thank you. [LR370]

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KIM ETHERTON: You're welcome. [LR370]

SENATOR EBKE: Okay. Next testifier. [LR370]

BRAD JOHNSON: (Exhibit 2) Good morning. My name is Brad Johnson, B-r-a-d J-o-h-n-s-o-n. Good morning, Senator Ebke and members of the Judiciary Committee. My name is Brad Johnson. I'm the director of Lancaster County Department of Corrections. I'm here to testify on LR370. First, let me thank Senator Hansen and this committee for your interest in this area. I've been a member of the department for over 26 years, much of it working the front lines directly interacting with our population. It is my professional experience that the percentage of mentally ill detainees compared to our overall population has significantly increased in the last 10 to 15 years. Furthermore, the severity of their illnesses has also increased. We recognized this trend during the planning phase of our current facility and designed it with a specialized housing area for those individuals who are not able to function in general population area but can manage in a smaller group with a lower staff to detainee ratio. We also designed an infirmary area for those individuals who need more closer supervision by correctional staff as well as medical and mental health professionals. In fact, Senator Hansen viewed both of these areas on a tour last year. My focus for today is to share with you our experiences with those individuals who have been found not competent to stand trial and ordered to the Lincoln Regional Center by courts in an effort to restore their competency. I have dedicated my career to the corrections field and believe in our mission of serving the community to secure legal and compassionate adult detention. We are fulfilling the first two elements of our mission when it comes to this population, and we provide the most compassionate care we can, considering our facility design and environment. However, we are very limited in the level of therapeutic treatment options we can use during their incarceration. The most severe cases are housed in our infirmary area as all other less restrictive options have been exhausted. We regularly care for individuals in this situation who do not understand where they are at or why they are in custody. We have experienced individuals who believe we are pumping gas into their cell, placing poison in their food, or trying to kill them in some other way. It is my strong belief that these detainees should not be housed in a correctional facility any longer than necessary. The current waiting period is very unreasonable in my opinion. Now that I have explained some of our experiences, I would like to answer Senator Hansen's questions. First, how long are individuals housed at our facility after being found not

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competent and ordered to the Regional Center? The best way to answer that question is to provide average length of stay. During any given period, we can have between 8 and 15 individuals being housed at the Regional Center on a competency order. The averages I am providing are waiting periods in days from the point the court ordered them transferred to the date that they were accepted at the Regional Center. In November of 2017, the average waiting period was 68.9 days; February 2018, 61.5 days; May, 72.8 days; and July, 87 days. It is worthy of note that we currently have 11 individuals housed in our facility who have been ordered to the Regional Center; on average they have waited 50.8 days thus far. Second question, the cost to your department or county to house those individuals? This is a difficulty question to answer precisely. However, I can highlight some of this expense by calculating the difference in staffing levels for unique housing statuses. I broke down our population by five housing statuses: minimum security, general population, special needs, special management, and the infirmary. Each of these housing groups require a differing level of staff to inmate ratio. For example, minimum security takes 23 correctional officers on a daily basis to operate. I then calculated the cost of employing those officers per day and divided that by the average daily population of minimum security housing. It averages about \$16 a day per minimum security detainee. The remaining corrections budget cannot be broken down by housing status. I have no way of determining how much time our medical department spends caring for the differing housing statuses. This is true for administrative costs, building maintenance, program staff, and so on. I can divide those costs by our overall average daily population and spread it out evenly amongst the five housing statuses. The result of those calculations are the following average costs per day: minimum security is \$66; general population is \$75; special management, \$91; special needs, \$106; infirmary, \$172. [LR370]

SENATOR EBKE: Keep going. [LR370]

BRAD JOHNSON: I'm almost done. [LR370]

SENATOR EBKE: That's fine. []

BRAD JOHNSON: Keep in mind these are educated estimates. If I had the ability to more accurately break out the actual resources committed to each of these housing statuses, I am

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confident the specialized units' average daily cost would be considerably higher compared to minimum security and general population. The third question, any correlation between seriousness of charge and length of stay? I have provided a spreadsheet that provides the booking dates, charges, commitment order dates, Regional Center transfer dates, and release dates. Trying to establish any correlation would be difficult as there are so many variables that can affect length of stay. Thank you for your time. If I can be of further assistance, please don't hesitate to contact me. And I'll answer any questions I can. [LB370]

SENATOR EBKE: Thank you, Mr. Johnson. Any questions? I have a couple of questions. You talked about length of stay before transfer. How often does somebody leave the system without actually getting any treatment? Does the judge ever pull the plug on commitment because they've been there so long? [LR370]

BRAD JOHNSON: No. I mean, the county attorney could withdraw the charges, but I don't recollect that happening. [LR370]

SENATOR EBKE: Senator Pansing Brooks. [LR370]

SENATOR PANSING BROOKS: Thank you for coming today, appreciate it. And thank you also for trying to figure out these costs. We know they're estimated, but that's a lot of work to help us-- [LR370]

BRAD JOHNSON: Sure. [LR370]

SENATOR PANSING BROOKS: --grapple with and understand better. And, of course, you know, the aggravation I have, my voice, and these are emotional issues for us because we all know people who are hurting and who have to deal with these issues on a daily basis. And you're dealing with them even more fully than the rest of us often are, and I want to thank you for that as well, appreciate it. [LR370]

BRAD JOHNSON: Thank you. [LR370]

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SENATOR EBKE: Do you have questions? Senator Hansen. [LR370]

SENATOR HANSEN: More of a statement, but thank you for coming and sharing your testimony. I know I've worked with you both in past bills and this issue before. And as you mentioned, I had the opportunity to see your facility and get your perspective. And this has really helped me keep key on these issues, including kind of seeing what it looks like in your infirmary and what the level of care and the level of the situation you have to deal with there. So thank you. [LR370]

BRAD JOHNSON: You're welcome. [LR370]

SENATOR EBKE: Senator Chambers. [LR370]

SENATOR CHAMBERS: I think I've encountered somebody who knows what it means to be our brother and sister's keeper. I'm glad you came. [LR370]

BRAD JOHNSON: Thank you, Senator. [LR370]

SENATOR EBKE: Anybody else? Okay, thanks for being here. [LR370]

BRAD JOHNSON: Thank you. [LR370]

SENATOR EBKE: Thank you for waiting today. [LR370]

COLENE HINCHEY: Yes, no problem. Good morning. Here we go with my belt again. These are not meant for cops. Sorry. I'm Colene Hinchey. I'm captain of southwest precinct in Omaha, Nebraska. I'm with Omaha Police Department. I've been on for 22 years and out of that 22 years the last 17 I've done my normal duties but also along with that I've done the mental health liaison position for the department. [LR370]

SENATOR EBKE: Can you spell your name for the record? [LR370]

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COLENE HINCHEY: Sure. It's Colene, C-o-l-e-n-e, Hinchey, H-i-n-c-h-e-y. [LR370]

SENATOR EBKE: Thank you. [LR370]

COLENE HINCHEY: Um-hum. I'm going to give you a current snapshot as far as what is facing Douglas County that we have going on right now, and these numbers come from our Region VI. And currently, and this is as of last week, there are 48 people waiting to get on the Lasting Home or I'm sorry, Lincoln Regional Center's waiting list. And 42 of the 48 are from court orders. The other ones are for board of mental health. The average, let's see, the average wait time to get in to the Regional Center for court-ordered people for the last fiscal year was 59 days. And for the average wait for the board of mental health is 23 to 30 days. What that means for you guys is that 59 days people who have sat in jail who have been deemed or have been ordered to stay in competency sit in jail with no force meds or anything like that and decompensating further. For the board of mental health people, that means that they're on the street for another 23 to 30 days in crisis and possibly committing more crimes and flooding the system even more. The average stay for board of mental health clients is 2.1 years. I do not know for the correctional end. I do not have that data. Let's see. There are 180 total beds at the Regional Center, and we as a county we get 90 beds for board of mental health. And out of that, 160. So 90 board of mental health beds and 70 court-ordered beds. Currently though, we have 68 consumers who are under board of mental health and 92 under court order which means we're taking floating those board of mental health beds and filling them with correctional beds that are ordered by the court. So for us, 90 beds total for board of mental health; the region's has 30 of those beds. So the other 60 are divided amongst the state beds. So what we see and how that affects us as a community need in Omaha is that I agree with Senator Brooks's assessment earlier that back in 1982 or '80s-- and by the way, the longest person in the Regional Center has currently been housed there since 1982. Think about that. So currently what happened is we deinstitutionalized our institutions. We pushed those people down in the communities. The communities were promised money. We did not get the funding we needed for it, which then means the step-down units and lower level of care are no longer there. Omaha, we do not have a step-down locked unit. IntelliCare left due to funding and could not make money. So right now the closest locked facility is the Lincoln Regional Center. We had a board of mental health hearing yesterday on a gentleman who was so delusional he started stalking a woman. He thought-- he's in fear of his life by this woman; this

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woman has not done anything to him. But he's so delusional that we for her safety fear for her. He's been ordered to go down to the Lincoln Regional Center for assessment due to the escalating threat to the poor innocent woman. But at the same time, he has not done anything so egregious that he needs to be locked up in jail. So hence he sits in jail waiting for competency and probably getting worse for it. So it's a trickle-down effect that while you may not think that having beds in the Lincoln Regional Center doesn't affect the community, absolutely does because those who then can't have an inpatient bed somewhere else because they're waiting for something else for somebody else to move down the charts, it clogs the system and people are going undertreated, which then incurs more charges which incurs more problems for the correctional center, which then now try to get more people in the Lincoln Regional and it's just a wait time and it's a vicious cycle. That's where we're at currently. [LR370]

SENATOR EBKE: Well, thank you. Questions? Appreciate your perspective. Thank you. [LR370]

COLENE HINCHEY: No problem. [LR370]

JOE NIGRO: Senator Ebke, members of the committee, I'm Joe Nigro, J-o-e N-i-g-r-o. I'm the Lancaster County Public Defender, and I appear on behalf of the Nebraska Criminal Defense Attorneys Association. Regarding competency, when any party has concerns that a defendant may be incompetent to stand trial, they can ask the court to order a competency evaluation. The court then has a psychiatrist or clinical psychologist evaluate the defendant. After the evaluation has been completed, the court decides whether the person is competent to stand trial. Until the defendant is competent, the proceedings are placed on hold. In addition to determining competency, the court must also determine if the defendant is incompetent, whether they are likely to become competent within the foreseeable future. If the defendant is found to be incompetent and is unlikely to become competent within the foreseeable future, then the prosecutor must dismiss but can seek a civil commitment. If the defendant is found to be incompetent and likely to become competent within the foreseeable future, then the defendant must go to the Lincoln Regional Center till they've been restored to competency. For most of my career, defendants found incompetent were immediately taken to the Regional Center. The combination of the reduction of inpatient beds and inadequate community services has led to

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people waiting three months for a bed at the Regional Center. People are waiting in jail and people are waiting while out on bond. And we're seeing people on minor charges now who have been released on bond and they're coming to court over and over waiting for-- and then they have to go to the Regional Center to be restored. So it winds up disrupting their lives. Now LB1010 last session would have allowed people to be restored to competency on an outpatient basis. That was a narrow targeted bill. I urge you to consider legislation that would apply to the entire state. Outpatient restoration isn't likely to be widely used, but it would help reduce the wait time for a bed at the Regional Center. When someone goes to the Regional Center to be restored to competency, they will usually be there for months. If someone is okay being released on bond, why not let them be restored to competency on an outpatient basis and minimize the disruption to their lives? Outpatient restoration will help a little with people with mental health issues in the criminal justice system. It's not going to have a huge impact, but it will help some. I chair the Supreme Court committee to establish mental health courts. These courts will help reduce the large number of people with mental health issues in the system. And I hope as soon as we can finish our standards then we'll be coming to the Legislature asking for funding, and I hope that you will fund these courts because I think that it will help with-- reduce the number of people who are caught in this revolving door of the mental health system and the criminal justice system. Ultimately, the answer to dramatically reducing the large number of people with mental health issues caught up in the criminal justice system is to increase funding for both outpatient and inpatient mental health services in this state. Senator Halloran is right-- we need more inpatient beds. Those inpatient beds were reduced and we never created adequate community programming. It was a mistake to close the adolescent unit at the Regional Center. I think it was a mistake to close the Hastings Regional Center. So now we don't have enough beds, we can't get people in, and we don't have enough community programming. And part of the reason people get stuck at the Regional Center is because there aren't adequate programs in the community to release them to. We need more case managers. People need more access-- better access to medication. Medicaid expansion would actually allow thousands of people to have access to medication. That would help in that. I think we particularly need structured residential programs. There are people who once they've improved at the Regional Center they're going to have a hard time in the community going to just an apartment or group home where there's no supervision. Having structured residential programs would fill a big void that we have. We have a program here in the community, but I think it only has 15 beds and we really need more. And obviously

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many parts of the state don't have any services at all. Sixty years ago we used to warehouse people in mental hospitals. We moved to treat them more humanely by deinstitutionalizing, but we never created the community programs. Now we don't have enough of anything so we wind up warehousing these people in jails. Our jails across the country are our largest mental health providers. The Cook County jail had a clinical psychiatrist-- psychologist appointed as their jail director because they're the largest mental health provider in the United States. I mean what we're doing is wasting money and it's cruel. Ultimately more funding will save money and it will be more humane and more effective. Thank you and I'm happy to take questions. [LR370]

SENATOR EBKE: Thank you, Mr. Nigro. Any questions? Senator Halloran. [LR370]

SENATOR HALLORAN: Thank you, Mr. Nigro. A phrase I hear quite often is "return to competency." [LR370]

JOE NIGRO: Yes. [LR370]

SENATOR HALLORAN: Is there a clinic, I'm sure there is, a clinical definition of what that would be? [LR370]

JOE NIGRO: Well-- [LR370]

SENATOR HALLORAN: Everyone is an individual case I understand. [LR370]

JOE NIGRO: Yeah. Regarding competency, and that's kind of a specific thing that happens in the context of a criminal case, is there are about 20 criteria. And so when an evaluation is ordered, the psychologist or psychiatrist has to evaluate the defendant according to those 20 criteria. And there are things such as do you understand the role of the judge? Do you understand the role of the defense attorney? Would this person be able to assist in their defense? Would they break down under the stress of a trial? And so if that expert thinks that this person doesn't meet those criteria, then they're going to write a report to the judge and then the judge makes the determination that they're not competent. When they go to the Regional Center, they're continually evaluating those people on those criteria. And when they think they've been restored

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to competency, then they're going to write a report to the court saying we think that this person now meets these criteria and the case can proceed. Now a person could deteriorate and become incompetent again. Most people are restorable. It's not that often that people are not restorable. But every once in a while it does happen. Sometimes that has to do-- I mean sometimes there are people who are just so ill they're not going to be restorable. I would say it happens more frequently due to lower intellectual functioning or something like that that's just-- it's not treatable. But that's-- when you're talking about restore to competency, that's kind of the context is these criteria that the expert is looking at the individual on. And what's happened is as we've reduced the number of beds is that the Regional Center is giving priority to those people, those pending cases, but they can't even get those people in now. And it means that the people who are coming from civil commitments, they can't even get to the Regional Center. And I know-- I did the commitments for years here in Lancaster County. We probably had one or two people a week who went to the Regional Center. And even though my job was trying to protect their liberty interests, there were a lot of people that if you asked me, well, does this person really need inpatient hospitalization, I would say, yes. And now, they're not going to the Regional Center. We contract with Mary Lanning and they come out to Hastings. Well, Mary Lanning then only sends the most ill people to the Regional Center. Most of those people come back here in a short period of time. So they're not getting the-- in my opinion, they're not getting the level of care that they need and they wind up back in the system. They either get EPCed, emergency protective custody, at the Crisis Center, or they get arrested. And so I just think we completely need to overhaul the system and we really do need to look at spending resources. Because people can say, well, we can't afford it, but hospitalizing people in our local hospitals or housing them in the jail is far more expensive and it's not effective. And so spending the money on services, more inpatient beds, better community programming, will ultimately save us money. Because as Brad said, I mean, it's horribly expensive to handle mentally ill people in jails. And it-- I mean, I can tell you as a defense attorney these kinds of cases take far more time. So everybody in the system is tied up because we didn't do the easy thing, which was make sure these people have access to medication and try and take care of them in the community. And for those who need to go to inpatient, have a bed for them. [LR370]

SENATOR HALLORAN: Okay. Just a side note. I'm on LR296, Senator Walz's bill dealing with nursing home, assisted living, and a few instances where there are homes that exclusively house

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or home folks with mental issues. But these people that are outside of the court system that are unable to make it to the Regional Center because they don't have the bed space for it, competition is high for it, end up in nursing homes and assisted living. And some of them are, you know, at some level, I mean an extreme level case would be chronic schizophrenia and they're in a nursing home right next to grandma in the next room. [LR370]

JOE NIGRO: Right. [LR370]

SENATOR HALLORAN: Well, grandma, my grandma could probably, you know, take care of herself. But it's not the right environment for that mix. Right? So we're intermingling people because it's bed space. Nursing home isn't geared to necessarily handle therapeutically the issue for that person, but that's where they end up because there's bed space. So it cascades down into all of our-- all of the systems that we deal with for people dealing with age. We end up housing them together. And it's-- and a little caveat here or a little disclaimer. I don't care where we put a regional hospital. I know Hastings had one. They still have a program for young boys rehabbing for alcohol and drug abuse. I don't care where it's at. It doesn't have to be in Hastings. So I'm not just-- so people understand. I'm not suggesting we need to go down that path of reestablishing regional hospitals. It doesn't have to be in Hastings, you know. [LR370]

JOE NIGRO: Yeah. [LR370]

SENATOR HALLORAN: But we do need to reestablish bed space in the regional hospital. [LR370]

JOE NIGRO: Well, and the example you give about nursing homes is why I really think that a big void in this system is structured residential placements for the people who don't need to be at the Regional Center any longer. But if you put them in the setting you describe, they're not going to function well. If you put them in their own apartment, they're not going to function well. There are certain people that the level of illness is severe enough that they're going to need more than maybe a case manager. And so trying to use the dollars we have smartly on where are the gaps. I mean, clearly we need more beds, but there's some things we could do in the community that would help those people who are in the community function well. And we're not even

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talking about people in the criminal justice system. But the more we could do for these folks in the community, the fewer of them will come into the criminal justice system. [LR370]

SENATOR EBKE: Any other questions? Thank you for being here today. [LR370]

JOE NIGRO: Thank you. [LR370]

SENATOR EBKE: Okay. Mr. Eickholt. And if anybody else is going to talk on this, please move your way up. [LR370]

_____: Two more. [LR370]

SENATOR EBKE: Two more? Okay. [LR370]

SPIKE EICKHOLT: (Exhibits 3, 4) Good afternoon, Madam Chair, members of the committee. My name is Spike Eickholt, S-p-i-k-e E-i-c-k-h-o-l-t, appearing on behalf of the ACLU of Nebraska. You've got a copy of my written testimony. You're also being provided with a copy of the report that the ACLU of California did recently talking about problems and the issues relating to mental health illness and people in jail and prison as well as substance abuse sufferers and population of prisons and jails in California. And I think this really highlights some of the issues that you've already heard about. I mentioned that you've got a copy of my written testimony so I'm not going to read it to you. I just-- I don't want to echo what other people have said, particularly what Mr. Nigro has said. But I think this committee is appreciative of this issue. And now I think since we all sort of agree and acknowledge what the problem might be, what are the responses? I think one thing that this committee does not really have jurisdiction over and that is the funding. That's something that needs to be done. But there are some things that, at least one thing that can be done and some things that have been done by this committee and Senator Hansen. One deals with the issue of competency. And Mr. Nigro explained it, but maybe I'll just explain it even less legally. Here's typically how a competency action happens. A person is arrested, and it can be for a minor charge, maybe look at the information that Director Johnson gave you. Some of those charges where people who are sitting in jail waiting competency restoration are for relatively minor charges. It could be a trespass or person suffering from

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schizophrenia. They're down at the campus all the time muttering to themselves, disturbing people's peace, and they finally get arrested. They're lodged in the jail. Of course, a money bond is set and the court appoints me to represent that person. I go see them a day or two later. I can't even communicate with that person. That person is delusional. Sometimes they just are catatonic. They will not respond. I realize this person is not competent to stand trial. I have an obligation to represent this person, however. So what I will do is I will file a motion with the court asking that the judge order a psychiatrist to go to the jail to talk to this person and evaluate that person. LB259 made that process a lot simpler. It used to be you'd have to file a motion in district court no matter the level of the charge. But Senator Hansen introduced LB259, this committee advanced it that said you can file it in the county court. I can get into county court the next day if I e-file by 2:00 in the afternoon so that's helped some. The issue is now when a psychiatrist evaluates this person, this person in the psychiatrist's opinion is I think this person is not competent. I could not communicate with him either. I can see from their file they've got a history of, say, something like schizophrenia and I suspect the person is not taking medication. I think that he can be restored if he can just take his medication. As Director Johnson indicated, he's not really in a position to have his staff forcibly medicate people or even administer that kind of meds on a 24-hour or whatever kind of basis to be done. So the hope is that person goes to the Regional Center and can be somehow restored to competency once they get back on their medication regimen or some similar thing. That's the wait time from when the judge makes a finding after the psychiatrist sees that person until they can get moved to the Regional Center. LB1010 would have amended 29-1823, Section 29-1823 of the Nebraska statutes. And I would suggest that this committee, if the bill comes back next year, look at that favorably because that requires that restoration can only be done at a Regional Center in an inpatient hospital setting. And it may not be that many people. As Mr. Nigro explained, when a person begins to get back on their meds, they may be in a position where they can be released on bond or stepped down from complete inpatient treatment at the Regional Center. It may not be that many. It may just be five or ten beds a spot, but that's what we're talking about; and it is a step in the right direction. And it's something that I would suggest this committee can do. I don't know what the consequences or inadvertent consequences might be by amending that statute. I don't really see a lot of them because as Mr. Nigro says, sometimes when they come back from the Regional Center in the jail they are just literally a completely different person. And that would be something to free up the juggernaut, if you will, of people who are sort of sitting in custody in

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our jails because the reality is the jails are becoming the default mental health care option. And that's not really what they're designed for. There's been some talk in some circles that somehow provide for the jails to provide for competence restoration. That idea I think is something that we would simply oppose. The jails are not here to provide mental health treatment. And the criminal justice system should not be sort of the backdoor way or a shortcut way of providing for mental health commitments or mental health treatment. So I'd urge the committee to consider a bill similar to LB1010 if it's introduced next year. I think that was a-- is something that this committee can do. I'll answer any questions. [LR370]

SENATOR EBKE: Thank you, Mr. Eickholt. Any questions? I see none. Thanks. [LR370]

KEITH WILLIAMSON: (Exhibit 5) Good afternoon. My name is Keith Williamson, K-e-i-t-h W-i-l-l-i-a-m-s-o-n. I'm a sergeant with the Dawson County Sheriff's Office. I work mostly-- right now I'm in charge of the transport of inmates and prisoners and also the court security. I've got close to 28 years of experience both on the street and in the jail facility. What we have dealt with in the last year is we've had six cases that have-- of individuals that have come in front of or come into our jail that were arrested on various offenses ranging from low misdemeanors all the way up to someone who is arrested for first-degree murder. They were put into the court system and at various points during the court system they-- their attorneys were working very hard for them and they could see that these individuals did not have the capacity to understand why they were even in jail. The average time from their arrest to when they were finally able to go to the Lincoln Regional Center for restoration of competency was three to four months. We had an individual in our jail for over six months before he was able-- we were able to get him into the Lincoln Regional Center. That individual, as it turns out, was arrested for a very small misdemeanor which would have been at the most a day in jail. He was in our facility for six months waiting to go to the Regional Center. He was in the Regional Center for almost a year before they were able-- before they made a determination that he was not ever going to be or his competency was never going to be restored. He's been in the system for almost two years now. He is in-- his case is one of those in the packet that I handed out. It's, in my mind, it's egregious that these individuals are not being cared for in our jails. Our jails are not by their structure, and this is the entire state, even the entire country, jails are not by their structure built to-- the people that are in them are not built to deal with someone with severe mental issues. And so we're

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housing these people and we're trying to keep them safe from sometimes themselves or else we're trying to keep them safe from other inmates. And we're a small jail. We have a 126-bed facility. When we have one person in our jail who is unable to-- can I keep going? [LR370]

_____ : Please. [LR370]

KEITH WILLIAMSON: When we have one person in our jail who's unable to understand why they're even there because of mental incapacity or mental illness, it puts a large strain on our staff. It puts a large strain on our sheriff's department. A lot of times these individuals are being victimized by other inmates if they're in population with others. Or they are exhibiting assaultive behavior towards staff, towards other inmates. So we're having to put them into individual or our detention cells which are one-person cells that are-- [LR370]

SENATOR EBKE: Keep going. It's okay. [LR370]

KEITH WILLIAMSON: Okay. --one-person cells. In our case, it's in our booking area. There is no-- they don't have access to TV. They don't have access to any sort of anything other than sitting on their bunk in their cell, and these cells are very small. So they don't even have access to exercise within their cell. We try to get them out as much as we possibly can, but it-- a lot of cases that we've seen lately we're unable to because they-- they're assaultive towards us. And to prevent that, we have to try to isolate them. And that is about all I have. Does anyone have any questions of me? [LR370]

SENATOR EBKE: Thanks, Sergeant Williamson. Senator Hansen. [LR370]

SENATOR HANSEN: Thank you, Chair Ebke, and thank you for coming down. I appreciate you sharing-- hearing your perspective. I really appreciate, you know, my focus as a Lincoln senator, obviously, is with my county. This really illustrates how statewide of an issue it is. My question is can you give me a snapshot of kind of the size of your jail and how many staff you have just to kind of put these numbers in perspective? [LR370]

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KEITH WILLIAMSON: We have-- our jail at capacity is 126 beds. We have had at certain points about 150 inmates at one time in our jail. That is our-- we have eight housing units and the largest housing unit is 30 inmates. It's a dorm unit. There's another dorm unit that is 26 inmates and it goes on down by how they're classified as when they're in our jail how-- from minimum to maximum security. In our booking area, we have one large detention cell; we have two other two-person cells; and we have two isolation cells. And those are detention cells in those. When we're using those cells for the people that are-- have mental issues, mental illnesses, we have no place else to put the people that are there for-- that we have to bring into those detention areas who have violated policy in the jail or have assaulted another inmate or have brought contraband into the jail, things like that. So we are-- we don't have the capacity in our jail such as some of these larger jails. I heard Brad talking about with the numbers. If we have two people with severe mental illness in our jail at one time, we're overloaded. Our staff is 40 inmates or not inmates, I'm sorry, 40 individuals that work in the jail. That includes our command structure as well. [LR370]

SENATOR HANSEN: Thank you. I appreciate that. [LR370]

SENATOR EBKE: Other questions? Thank you for coming a long way. Can you just tell me, I'm curious, what kind of mental health treatment is available? What kind of programming do you have that comes into the jails short term or otherwise? Do you have a psychologist or psychiatrist who is available? [LR370]

KEITH WILLIAMSON: Our health provider is also trained in-- I'm not sure what exact her-- if she has a doctorate. She doesn't have a doctorate, she's-- but what capacity she is as a psychologist. We have relied upon her in classifying our people coming in that are exhibiting the things that a normal person could see with their mental capacity or their mental illness. She's helping us out with diagnosing or not diagnosing or counselor to where we can work with the Region II mental health. More times than not Region II is not, they don't have the people or the resources to help us with someone who comes in that's arrested. We rely mostly on them with our emergency protective custody cases, which are civil commitments. [LR370]

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SENATOR EBKE: Sure. Thank you. Other questions? I see none. Thank you for coming out and drive carefully going back. [LR370]

KEITH WILLIAMSON: Thank you. [LR370]

SENATOR EBKE: Is there anybody else wishing to testify on LR370? Senator Hansen. Senator Hansen waives. That closes our interim studies hearing for today. Thank you very much for coming. [LR370]