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COMMITTEE ON JUDICIARY  
February 16, 2005  
LB 747, 572, 677, 538, 642, LR 22CA

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 16, 2005, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 747, LB 572, LB 677, LB 538, LB 642, and LR 22CA. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ray Aguilar; Ernie Chambers; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: None.

SENATOR BOURNE: All right, welcome to the Judiciary Committee. This is the 12th day of committee hearings. We have six bills on the agenda today. I'm Pat Bourne from Omaha. To my left is Senator Flood from Norfolk, Senator Friend from Omaha, Senator Aguilar from Hastings (sic). Our committee clerk is Laurie Vollertsen.

SENATOR AGUILAR: Hastings? (Laughter)

SENATOR BOURNE: Grand Island, I'm sorry. It's been a long week already. You can't get away with anything here in this committee. Jeff Beaty is our committee legal counsel. And we have Senator Foley from Lincoln. I'll introduce the other members as they arrive. Please keep in mind that from time to time committee members will be leaving the hearing to introduce bills or conduct other business. If they happen to leave while you're testifying please don't take offense. They're simply conducting other business. If you plan on testifying on a bill I'm going to ask that you sign in and make use of the on-deck chairs, that's these two chairs here in the front. Please sign in, print your information so that it can be easily readable and entered into the permanent record. Following the introduction of each bill I'll ask for a show of hands to see how many people plan to testify on each bill. We'll first hear the introducer of the measure followed by proponent testimony, opponent testimony. We'll have neutral testimony and then if the introducing senator wishes to close he or she will be able to do that. When you come forward to testify please clearly state and spell your name for the transcribers. All of our hearings are transcribed and they would greatly appreciate you spelling your name. Due to the large number of bills heard here in the Judiciary Committee we do utilize the Kermit Brashear memorial lighting system (laughter).

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Senators get five minutes to open and three minutes to close should they choose to close. All other testifiers get three minutes. So all other testifiers get three minutes exclusive of any questions the committee might ask. The blue light will go on at three minutes. The yellow light comes on as a one-minute warning and then when the light turns red we ask that you stop. The rules of the Legislature state that cell phones are not allowed in committee hearings so if you have a cell phone please disable it out of respect for those testifying. Reading someone else's testimony is not allowed. We will allow you to submit written testimony from others but we will not allow you to read that into the record. With that, we will open on LB 747. Senator Synowiecki.

LB 747

SENATOR SYNOWIECKI: (Exhibits 1, 2) Good afternoon, Chairman Bourne and members of the Judiciary Committee. I am John Synowiecki. I represent District 7 in Omaha. Today I bring LB 747 for your consideration, a bill to create the Department of Probation and Parole Services. Our current administrative assignment of probation and parole is not at all reflective of a best practice model for these service deliveries. Having probation and parole under different branches of government and under two entirely different administrative frameworks certainly serves as barriers in providing a continuum of offender services and is not conducive to a seamless community corrections model. There exists no commingling of human, physical, or training resources, no cooperation in equipment purchasing, no sharing of risk assessment tools, and no sharing of information technologies in Nebraska's current probation and parole service delivery systems. Since 1957, the Unicameral has explored options for the placement of probation in the judicial and executive branches on at least four occasions. In 1971, under LB 680, the Legislature elected to house the probation administration within the Supreme Court. LB 680 was innovative in providing a limited form of cross jurisdiction authority for parole officers to supervise probationers. Cross jurisdictional authority was proposed by Senator Terry Carpenter from his recognition that probation and parole officers having strikingly similar duties. A 1977 Nebraska legislative council report

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identified four reasons for potential probation move to the executive branch. I believe these reasons continue to be just as pertinent today and I have provided these excerpts to the committee from the 1977 report. Nationally, 33 states, the District of Columbia, and the Virgin Islands have probation and parole services located under the executive branch. Alabama, South Carolina, and Tennessee have merged probation and parole into an executive branch agency separate from the Department of Corrections as is envisioned under LB 747. Today only 13 states have probation located within the judicial branch and no states have probation and parole merged under the judicial branch. According to researcher, Joan Petersilia in her piece, Reforming Probation and Parole in the 21st century, the trend in adult probation is toward centralization in the executive branch where authority for a state's probation and parole activities are placed in a single statewide administrative body. In 1995 and again in 2000, bills were introduced in the Legislature that explored the idea of merging probation administration with the executive branch. Moreover, in 2003, the Legislature passed LB 46, which provides for the development of community-based programs and facilities for probationers and parolees under the guidance of the Community Corrections Council. In order to promote enhanced opportunities for successful LB 46 outcomes, I believe it is necessary for us to seriously reconsider the concept of unifying our probation and parole resources. I realize that some judges have voiced concern relative to their unique relationship with probation officers. They express concern that if probation officers are moved from the judiciary to the executive branch, private communication between the judge and the probation officer would be forbidden. I believe there is no inherent need for the probation officer to be administratively aligned with the court system. A probation officer does not exercise any judicial powers whatsoever in carrying out their statutorily defined ministerial responsibilities. Their public service function, both in the preparation of the presentence investigation and community supervision is offender focused. The probation department is located under the executive branch of government in 33 states and probation officers in these states perform the same function as our probation officers do under the courts. In an attempt to ease the concerns of these judges, I have offered to this committee in this introduced version of LB 747 a provision which

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maintains the courts oversight of probation-related work activities. These provisions identify probation officers as agents of the court and gives the Supreme Court the authority to certify probation and parole officers for performance of probation-related work activities. Again, I have included these provisions for committee consideration in an attempt to ease the concern of some judges. In closing, my goal for this merger is to have a comparatively small agency with a very focused administrative mission of offender investigation and supervision which provides a continuum of offender services while working to reduce recidivism in Nebraska. I know we can build upon our dedicated probation and parole staffs and provide them the administrative focus and tools necessary to achieve their goals. Thank you, Senator Bourne.

SENATOR BOURNE: Thank you. We've been joined by Senator Chambers, Senator Combs, and Senator Pedersen from Omaha. Before taking questions for Senator Synowiecki could I get a show of hands of those here to testify in support? I see four. Those in opposition? I see four. Those neutral? I see none. Questions for Senator Synowiecki? Senator Friend. (See also Exhibit 3)

SENATOR FRIEND: Thank you, Senator Bourne. Senator, can you...give us an idea of how drastic a change this is. I mean, and I guess the thing is, I've heard over the interim and you and I have talked on a couple of occasions about the way we've approached, you know, things in this area for years and years. And I don't, you know, I guess I don't want...you just gave us some, obviously, some pretty compelling reasons in your opening. But tell me how much of a change in environment this will be for a lot of the folks in this room and the people that are dealing with this in our community.

SENATOR SYNOWIECKI: Well, I appreciate that, Senator Friend. I might first note that I provided excerpts of the legislative council report, 1977. I have the full report should any of the committee members want to take a look at that. Senator Friend, I often answer that question with a live living example of what our current system does. And let me offer that for the committee today. If we have an individual that's in our penitentiary system right now and if that person were to be paroled to Falls City, Nebraska,

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which is on the very southeastern tip of our state geographically, the parole officer that would provide the supervision of that offender would be physically officed in Lincoln, Nebraska. That parole officer then to have a face to face communication with that offender in Falls City would get into his or her state car, travel the 101 miles it is from Lincoln to Falls City according to Mapquest and have case management face to face communication with that offender which would include substance abuse referrals, would include career counseling, case management that you do with offenders. And then drive back to Lincoln. Obviously, they probably see other offenders in the area as they proceed back to Lincoln. What is amazing to me is that that is being done while we have a probation officer that is officed in Falls City, has office resources, and does with the offenders on his caseload the same case management. Substance abuse referrals, career counseling, and guidance through an order from the court not from the Parole Board, obviously, but does essentially...essentially the same supervision case management strategies with the probation population that a parole officer does with the parole population. So there's obvious inefficiencies in our current service delivery system and that's what I'm trying to address.

SENATOR BOURNE: Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Senator Synowiecki, I've talked to the probation office in my district in northeast Nebraska in the 7th judicial district. And I have a number of concerns about ex parte communications and I'm pleased that you referenced that in your testimony. One of the chief concerns was, and I've talked to the judges in my district, they like receiving presentence investigations prior to sentencing day. Under your bill, would that current practice be compromised because that communication would be considered ex parte?

SENATOR SYNOWIECKI: In my view, absolutely not. Because a presentence investigation report is something that defense counsel as well as the county attorney has access to and the contents of a presentence investigation, by all means, the defense attorney handling that case has access to so, yes, the court would get the report in advance as well as the defense attorney and county attorney as is the current

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practice in Douglas County that I'm aware of.

SENATOR FLOOD: That's usually filed with the court and then the defense attorney has to go to the court physically and can't remove that report from the district court clerk or county court clerk's office. Would you see that report being sent out to different parties?

SENATOR SYNOWIECKI: That may be the logistics in Norfolk. The logistics for the defense attorney gaining access to that report, for example, in Douglas County the report is kept in the probation office and the defense attorney comes to the probation office to check that report out and to review that report. So I don't think that's...the system that's in place in Norfolk is not statutorily implemented. I think it's up to the individual probation districts and how they just dispense with reports to the parties that have an interest in that case which would be, obviously, the attorney of record for the defendant and the county attorney, the judge, the probation officer. None of that would change under this bill that I'm aware of. Can you see an objection if probation was moved to the executive branch where a defense counsel attorney might object to the judge seeing that report at all until the county attorney, and maybe, possibly force the county attorney, another member of the executive branch of sorts had a chance to present that to the judge? Because in any other criminal case, any member of the executive branch doesn't have that direct communication with the judicial branch where you can actually file a report that's read by the judge before anybody has a chance to look at it. Do you see my concern there?

SENATOR SYNOWIECKI: I would just, you know, in 33 states the probation department is located within the executive branch of government. Those probation officers perform the presentence function just as our probation officers do under the judicial branch. Given the presentence investigation, it's a tool used by the court to assist in sentencing. There is absolutely no reason in the world I could see under an executive branch probation department that the defense attorney, the county attorney will continue to have access to that report in preparation for the sentencing hearing.

SENATOR FLOOD: I guess I would like it to in a criminal

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case the police officer calling up the judge before sentencing to say, this guy really needs to go away. That's kind of what happens inside the judicial branch when probation is in line with the judge. It's kind of like in a criminal case the police officer calling the judge at home at night, saying, hey, this guy really needs to go away. He's a bad actor. That's a member of, you know, the executive branch contacting a judicial branch official. I wonder if this bill would compromise that whole...you know, I understand 33 states do it but it seems to me there's a constitutional line that's crossed when you move probation from the judicial to the executive branch. And I'm interested to see how we could individually treat like PSIs. And it's my understanding you're a former probation officer. How often did you rely on the ex parte contact with the judicial branch?

SENATOR SYNOWIECKI: In Douglas County is not a practice. I think it's inherently unfair to the defendant for a probation officer to have conversations with the court separate from the defense and the defense attorney, I think is inherently unfair to the defendant. And these reports, Senator Flood, the presentence reports would be presented to the court and then unaltered, would go to the defense attorney and to the county attorney should they want to review it. Now, the practice in Douglas County, it was not typical for the county attorney to review every presentence report and it was just because of the volume of cases involved. But if you're asking me my personal opinion, I did not participate in ex parte communication. It is not a practice in Douglas County and I think it's inherently unfair to a defendant in a criminal case to have the probation officer which provides official recommendations to that court to have communication that is absent from the defense bar. That's my personal opinion.

SENATOR FLOOD: Does that happen a lot, that kind of communication, in your opinion?

SENATOR SYNOWIECKI: I can't speak for the entire system. The judges will follow me that have some problems with my bill based upon their concerns with ex parte communication. It is my understanding, Senator Flood, that ex parte communication is a huge issue outside of Douglas County for some reasons and I don't understand that. But I

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specifically, in an attempt to appease some of them concerns, you'll notice in my bill I went to some great lengths in labeling probation officers, agents of the court and given them certification powers and so forth, the court over the probation officers in an attempt to appease that situation. But nevertheless, even though I did that, I continue to have some strong reservations relative to ex parte communication on its face.

SENATOR FLOOD: Thank you very much.

SENATOR SYNOWIECKI: You bet.

SENATOR BOURNE: Thank you. Further questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Senator Synowiecki, the conversation, the dialogue you were having with Senator Flood, Douglas County, as you said, they do share the PSIs, presentence investigations with defense, is that right?

SENATOR SYNOWIECKI: Yes.

SENATOR Dw. PEDERSEN: But are you aware that that's not the law? I mean, they don't have to.

SENATOR SYNOWIECKI: No, I'm not aware one way or the other, I guess.

SENATOR Dw. PEDERSEN: See, there's some counties that do not and I will have a bill in this committee later on in this session that will say they have to share it with defense attorneys also.

SENATOR SYNOWIECKI: So, let me get...Senator Pedersen, there's counties in the state of Nebraska where the defense attorney does not have access to the presentence report?

SENATOR Dw. PEDERSEN: Yes, there is.

SENATOR SYNOWIECKI: Okay. I...

SENATOR Dw. PEDERSEN: But it's...

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SENATOR SYNOWIECKI: ...that is not the case in Douglas County where I practice as a probation officer...

SENATOR Dw. PEDERSEN: And I agree with you. That's the way it should be. That's the way it should be.

SENATOR SYNOWIECKI: Yeah, yeah.

SENATOR Dw. PEDERSEN: I'm bringing in for a constituent whose kid was sentenced when the defense attorney was not allowed to see the PSI until sentencing time.

SENATOR SYNOWIECKI: Well, essentially, the presentence report is a report that the court looks at in their determining the sentence. So I think it's an entirely appropriate the defense attorney have some degree of access to that report. And the report will contain such things as the prior record, the family, background, employment background, substance abuse background and so forth so I think it's entirely appropriate that all parties involved in the sentencing hearing have access to that report.

SENATOR Dw. PEDERSEN: And I agree with you and Douglas County has been very good about that.

SENATOR SYNOWIECKI: And to kind of get back to the bill, there's nothing in my bill that I believe would diminish the defense bar's participation in taking a look at that presentence report.

SENATOR Dw. PEDERSEN: I would agree with that. One more question. Knowing that there's an introduction of a bill coming up later on this afternoon, I probably won't be here for it by Senator Brashear which moves parole out from the Department of Corrections and puts it with probation under the courts. Could you give me just a little bit or give this committee a little bit of how you see your bill as being better serving to the people and including the people who work in them departments compared to that bill?

SENATOR SYNOWIECKI: Well, obviously Senator Brashear can speak quite eloquently on behalf of his bill. His bill essentially does what mine does but does it under the venue of the Supreme Court. How is my bill better? Well, I think having it in an executive branch form or venue, I think it

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enhances the transparency of the system. I think when you have operations under the Supreme Court, it's my impression that the public is not that well connected, if you will, to the operations of the Supreme Court as they may be to the operations of the executive branch where there's more participation. You know, the governor is elected by the people of the state of Nebraska. The Supreme Court is under a retention system so the public accountability pieces there would be nonexistent under the Supreme Court. And I think generally, the system under an executive branch format would be more responsive to the general public, to victims, to offenders and that sort of thing.

SENATOR Dw. PEDERSEN: Would the department also, the department of probation and parole under itself probably have, as you see it, would maybe have a little bit more persuasion or contact with the people who make the decisions about their positions and salaries and things like that too, wouldn't it?

SENATOR SYNOWIECKI: Yeah, I think so. I think they're probably more...for example, the appropriation end of things. There will probably be more of a link, I think, with the department of probation and parole administrator, with the Appropriations Committee, be more of a direct link rather than where it currently is where the probation administrator kind of has to jockey through the court system to get matters heard before the Appropriations Committee, for example. Now, I have this session been advocating strongly on behalf of probation in the Appropriations Committee and in the preliminary budget been quite successful. But if, you know, if that linkage wasn't there being a former probation officer and that, I don't know what the effectiveness would be relative to that. So I hope that's...I'm answering your question sufficiently.

SENATOR Dw. PEDERSEN: You have done a very good job. Thank you, Senator.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

SENATOR SYNOWIECKI: Thank you.

SENATOR BOURNE: First testifier in support? And again,

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we're going to make use of the on-deck area so if you plan on testifying in support, make your way forward and sign in. Have you already signed in?

\_\_\_\_\_ : I signed (inaudible). Okay.

SENATOR BOURNE: Okay, go ahead and have a seat there. Would the next testifier in support make their way forward? Okay, so this is the last testifier in support? Have you signed in?

PAT KRELL: Yes, sir.

SENATOR BOURNE: Okay, all right. Anybody else that's a proponent that hasn't signed in, come forward and use this on-deck area. We're ready.

PAT KRELL: My last name is Krell, K-r-el-l. First name is Pat. I'm going to take a little different tack. Number one, I'm old and handicapped and some people say senile. And that may be the more accurate characterization. I was appointed as a chief adult probation officer of the 4th judicial district in January of 1967. At that time, there were ten chiefs appointed by the district judges and serving at the pleasure of the district judges. We were pretty much autonomous. In the early seventies legislation created the Office of Probation Administration with an administrator appointed by the Supreme Court. The first one was a gentleman by the name of Edwin Garrison. He was retired military. He had no knowledge of probation. He had very few administrative skills and these shortcomings were abundantly demonstrated during the short tenure that he was there. Following Edwin Garrison was a gentleman by the name of Bob Keller. Bob had been the chief probation officer in the Lincoln municipal court. He was extremely well qualified educationally and by virtue of his experience. Bob did an excellent job for the first few years and the system moved forward. There were several things that happened that had a very negative effect on Bob and on the system. There was a thing called the Yanders Affair in Columbus. I don't remember the year but somebody was accused of stealing, the probation officer, the probation officer's wife. The bottom line was that they were denied due process. This fiasco caused the state, caused Bob a lot of furor, cost the state a lot of money. Bob was the

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administrator and he took the heat. It was not his fault singularly, but nevertheless, he took the heat. When the whole episode ended the probation system was diminished in the eyes of the public and the state paid a lot of money. The judge involved in that was subsequently convicted of three felonies and sentenced to a federal penitentiary. I don't know how he was involved and I'm sure the record would reflect that but I can't recall. In 1985, the felony misdemeanor in juvenile probation systems merged into one under the probation administrator. This created a number of problems, not least of which the blatant disregard of the legislative intent by Bob and the systems committee when they opted to keep eight unfunded Douglas County juvenile court employees. There again, that embarrassed everyone in the system, thoroughly provoked the Legislature and caused a lot of budgeting problems in the probation system and, again, Bob was in the hot seat. During the last couple of years of Bob's life, he was battling cancer. It was evident that he was devastated by problems. He was a very sick man. He tragically ended his own life in August of 1989. Shortly thereafter, Carol Schoenleber was appointed by the Supreme Court to be the probation administrator. Carol had progressed through the ranks from a secretary in the Lincoln Probation Office to a deputy administrator. Carol was very intelligent and very familiar with the logistics of the probation system. However, in my opinion, and by no stretch of the imagination was she qualified to be the administrator. She didn't have a degree, a requirement for an entry level probation officer. She had never worked as a probation officer. However, the most egregious aspect of this appointment was the total disregard of EEOC mandates that require a position to be advertised. No one in the system was given an opportunity to apply for the job and Carol was the administrator who monitored compliance of the EEOC guidelines in the system. This was quite simply an imperial appointment by the Supreme Court. My perception of Carol's administration was it simply overwhelmed her, not just because she knew that her appointment was not legal but also her ineptitude in dealing with statewide problems. Following Carol's appointment and in compliance with EEOC guidelines, Ed Birkel, the chief probation officer in Columbus, who had worked his way up through the career ladder was appointed chief administrator. I recently read in the paper that didn't work out either.

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SENATOR Dw. PEDERSEN: Pat, your time is up. Would you like to close briefly, please?

PAT KRELL: Okay, I'll do it in two seconds. All right, now...

SENATOR Dw. PEDERSEN: If you want to submit that to the committee, we would make it a part of the record...

PAT KRELL: Well, I will. Another thing I want to say is, in my opinion, the oversight of the probation system over the last 30 years has been dismal at best.

SENATOR Dw. PEDERSEN: Thank you. Is there any questions for Mr. Krell by the committee? Seeing none...

PAT KRELL: Questions?

SENATOR Dw. PEDERSEN: Seeing none, thank you, Mr. Krell. It's good to see you.

PAT KRELL: You bet.

SENATOR Dw. PEDERSEN: Next testifier, please take the.

DAN ALATI: My name is Dan Alati. I'm a senior probation officer, A-l-a-t-i, in Omaha, Nebraska. Senator Pedersen, I had spoken earlier with Senator Synowiecki and I had taken a different approach to this. And I just want to know if it would be out of line, I was doing a comparison between LB 642 and LB 747. Would that be out of line?

SENATOR Dw. PEDERSEN: Whatever you want to do with your three minutes is entirely up to you.

DAN ALATI: Okay. Okay. At my first reading of the bills, it was my opinion that there appears to be little or no significant difference in the substance of the ways in which these probation systems would be set up as it relates to the specifics of management, of adult and juvenile and parolees under the jurisdiction of the court. I say this because both bills appear to address the philosophical issues relating to what is viewed as being the supervision strategies of both probation and parole offenders. It is my opinion that both look at the methodology of supervision of

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the various offenders as well as the sanctions and prohibitions of noncompliance. Further, both tend to put forth the fiduciary responsibility of program management as well as identifies the principles and supervision strategies for the goal of an effective and efficient program management. Although there are similarities in the bill, there also appears to be differences as it relates to the authority and responsibility for management of the program. Specifically, under LB 642, although merging of the two previously separate agencies take place, the ultimate enactment of the rules governing still rest with the Supreme Court who, in my opinion, has not been as, I see it, as cognant of the everchanging needs of the offender. I say this because in my 16 years as a probation officer I have witnessed the evolution of supervision of offenders away from the client-based philosophy to a more community-base approach to supervision. In other words, we're moving away from the focus on the needs of the offender to a stronger push towards safety and society. Although I realize that community safety is the pinnacle of which the probation mandate is set upon, we also need to keep in mind the needs of the offender. I'd just like to say as we move into what I see as the error of the...what I would call the supervision of the 21st century offender, we need to be aware that as today's offenders move into an already overcrowded system we need to be aware of the issues and concerns which require a more far-reaching approach to the offender's supervision than we have in our current system. Because of these diverse needs; today's probation officer needs to be more proactive in their supervision and also the strategy needs to look at the whole of the offender versus the focus on community base. I would like to just close by saying that either bill would afford us a management system. It is my opinion that LB 747 offers a greater possibility of probation achieving that goal by not only merging the two programs but also allowing us to do the job that the state has entrusted us to do and that is to help in the reconstruction of the prosocial conduct of the offender. Thank you.

SENATOR Dw. PEDERSEN: Thank you, Mr. Alati. Is there any questions from the committee? Senator Flood.

SENATOR FLOOD: Thank you, Senator. Thank you for your testimony today. When I look at the numbers I show that in

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the fiscal note on page 4 or 5, the probation administration has 384 full-time equivalent employees where the parole administration has 29.37 FTEs. It would seem to make more sense to me to incorporate the 29 into the system that's already supervising 384 rather than creating a new agency that will now become familiar with 384 essentially state employees that it's had no supervision or direction of over in the past. What's your reasoning and I heard you say both Senator Synowiecki's bill and Senator Brashear's bill have, you know, a good purpose in mind. That's the comanagement of both systems. Why should we create a new agency under the executive branch and bring in the vast majority of state employees rather than just bringing parole up into probation?

DAN ALATI: Well, Senator Flood, I guess that was my understanding as to what LB 747 would do would merge the probation and the parole department into one entity. That one entity would then be responsible for the management and the supervision of offenders throughout the state whether they be parole or probation if I understood that. But if I might, sir, just to kind of go back and give it from my perspective in terms of my probation. On any given time I'm managing somewhere between 250 to 275 offenders. When I started this job 16 years ago, I was told that I was paid for 115 hours of supervision. The other 45 hours of the month that we could work was supposed to be for leaves, vacation, sickness, and whatever the case might be. I can honestly say that I've probably not supervised 115 hours of supervision in probably the past ten years nor have some of my colleagues who will be coming up and testifying as well. The merger, as I see it, takes from what I understand the parole department which has a smaller caseload, thus giving us as a result of the budgetary constraints and everything else that we have facing us, giving us those bodies to merge into a system to possibly spread out the number of cases that are being supervised. Thus, as I stated in my testimony, allowing us to do the job that the state has entrusted us to do as probation officers and that is to provide for the well-being not only of our communities but also for the well-being of that offender because I didn't get a chance to get to it. But if we don't do that, I feel that we're on a destiny of failure in terms of the system.

SENATOR FLOOD: What I'm hearing from you and the prior

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testifiers, a lot of concerns seem to be directed at the scope of your work and maybe the lack of any organization, labor organization or a way to protect maybe your caseload from becoming greater than it is. How much of this issue is connected to your desire or lack thereof to organize the employees in some type of a labor union versus how much of this is about efficiency for the state? I guess...strike that question. Do you have an interest in organizing?

DAN ALATI: Let me just answer that by first backing up. I came to this job with twenty-one and a half years of military service. When I came into this job, I was fortunate enough to be interviewed by the chief probation administrator that Mr. Krell talked about, Bob Keller. And I told Mr. Keller at the time that I came into the system, I came into this job not because of what I could feel was a monetary gain but what I felt was my desire to continue to work in the public arena, to work and serve the public so to answer your question, for me to say that I want to see this so we can organize, we can become a union, so we can strike or we can do those things that unions do, no. I could say for my own point, that is not the case. What I'm looking at is something that I feel and I strongly feel this and I know I've had conversations with Senator Pedersen in terms of our relationship is we are not meeting the mandate of what we are supposed to do as far as a probation system is concerned.

SENATOR FLOOD: Are there those...and remind me what district are you serving?

DAN ALATI: I'm out of district four in Omaha.

SENATOR FLOOD: Omaha. Are there those in district four that you work with as colleagues that support this measure because it would make the opportunity to organize as a labor union a possibility, this type of a merger into the executive branch rather than staying where you're at?

DAN ALATI: Well, again,...

SENATOR FLOOD: And I just would appreciate a yes or no answer to that.

DAN ALATI: I would have to say no.

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SENATOR FLOOD: Okay, thank you. I really appreciate it.

DAN ALATI: Okay.

SENATOR BOURNE: Are there further questions? Seeing none, thank you. Appreciate you coming down and taking the time to testify. Next testifier in support?

MIKE ERICKSON: My name is Mike Erickson. Last name is E-r-i-c-k-s-o-n. Good afternoon. I've been a probation officer in the state of Nebraska for the past 14 years. I believe our current delivery system for probation and parole can be changed to better serve the offender and give the taxpayer more efficiency for their money. I have several examples why our current system is flawed and if the probation and parole systems were merged would better serve the public. There are currently two officers in my office that are supervising a probationer while that same person is also being supervised by a parole officer. So there are two agencies that are supervising the same client. The next example is I recently received a transfer case from the state of Montana. The offender received an eight-year sentence in Montana with four years of that suspended. The defendant was released from prison in October of '02 and transferred to the state of Nebraska. He served two years on parole and the last two years were supposed to be supervised probation. He served the two years on parole here and the parole officer in Nebraska then had to close his file, send it back to the state of Montana because he's not able to supervise a probation case. Montana then had to resubmit the case through interstate compact to our probation office for acceptance. In the meantime, no one had been supervising this offender for almost three months because of the time it takes a transfer case. This appears to be a potentially dangerous situation simply because our probation and parole systems can't work together. Since in over 30 states the probation and parole systems are merged, they often give the offender probation sentence after they served the prisoner parole time. This conflicts with how Nebraska supervises the offender and causes problems like I just mentioned. In closing, I feel this bill just makes sense and would provide the best service to the offenders of the state and to the taxpayers of the state.

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SENATOR BOURNE: Thank you. Are there questions for Mr. Erickson? Seeing none, thank you.

MIKE ERICKSON: Thank you.

SENATOR BOURNE: Appreciate your testimony. Next testifier in support? Welcome.

PETE GIGLIA: Good afternoon, Senator Bourne and members of the Judiciary Committee. My name is Pete Giglia. Last name is spelled G-i-g-l-i-a. I'm here today to speak in favor of LB 747. I am here as a senior probation officer in the Nebraska State Probation System. I think this committee may have some interest in knowing that in my professional experience I have worked in a probation and a parole executive branch system similar to what was envisioned in last year's bill brought by Senator Synowiecki. My first job in the field of probation and parole was with the state of Missouri as a state probation and parole officer. I was employed in this capacity for three years. Since that point, I have served as a state probation officer for the Nebraska state probation system. This committee might be interested to know that essentially I found and find no difference in the level and degree of communication with the courts that I had in the executive branch as is now the case in my workings as a probation officer under the Supreme Court. Further, my function as probation officer in the state of Nebraska is identical to the functions that I performed in the state of Missouri under the executive branch. Last fall I was present at a hearing similar to today's hearing. At that hearing, those that opposed the idea made it very clear that they were concerned about the issue of ex parte communication between probation officers and judges. I am here today to tell you that during my three years as a Missouri probation and parole officer I had several conversations with judges regarding individuals who they placed on probation. And I also know that judges contact the probation officers all the time with questions regarding presentence investigations. I've also been told by my former district supervisor in the state of Missouri that some judges in smaller jurisdictions actually carry laptops with them wherever they go in order to give them the ability to respond to e-mail sent by probation officers with questions regarding active probation cases. Based on my professional experience, the issue of ex parte communication

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should not be considered a barrier or hindrance to what LB 747 is attempting to accomplish. Finally, I would like to say that I feel the idea of combining the Department of Probation with the Department of Parole under the executive branch only makes good sense. Aside from the example Senator Synowiecki provided to the committee regarding the parolee that resides in Falls City, Nebraska, I would like to discuss a few other factors. First of all, the issues that probationers and parolees have with society and the criminal justice system are very similar. Places where these people are sent for rehabilitative services are the same. There is no difference in the level of education or training needed or required to supervise a probationer versus a parolee. In fact, the standard order of probation would be identical to the standard order of parole. Furthermore, the procedure to follow when someone would violate an order of probation would be the same as when someone would violate an order of parole. Ultimately, I believe that when it comes to cost, time management, and overall efficiency what is proposed in LB 747 simply makes good sense. Thank you for your time and consideration.

SENATOR BOURNE: Thank you. Are there questions for Mr. Giglia? So you've worked in both systems set up both ways and...

PETE GIGLIA: That's correct.

SENATOR BOURNE: ...and the concerns expressed earlier, you never saw in the...

PETE GIGLIA: No, we never had any problems doing what we had to do. Defense attorneys never raised any issues. Presentence investigations were conducted. They were sent to the sentencing court. A copy was sent to defense attorneys and a copy was also sent to prosecuting authority. Everybody had an opportunity to review it. At sentencing, the judge would ask the defense, have you had an opportunity to review the presentence report? And if so, are there any additions or corrections that you would like to make? The defense attorney would answer accordingly and then the judge would turn to the state's attorney and the same question, have you had an opportunity to review the document? Are there any additions or corrections you'd like to add? The state would, you know, follow suit and then they'd conduct

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the sentencing.

SENATOR BOURNE: Thank you.

PETE GIGLIA: You're welcome.

SENATOR BOURNE: Further questions? Seeing none, thank you.

PETE GIGLIA: Thank you.

SENATOR BOURNE: Thanks for your testimony. Other testifiers in support? Testifiers in opposition? And, again, we're going to make use of the on-deck chairs so if you're opposed, please sign in prior to testifying. Chief, welcome.

JOHN HENDRY: Good afternoon, Chairman Bourne. Mr. Chairman, members of the Judiciary Committee, my name is John V. Hendry. I am the Chief Justice of the Nebraska Supreme Court. I appear today in behalf of the Supreme Court in opposition to the proposed merger of the offices of probation and parole administration into a single executive branch agency. My testimony reiterates that which I presented last year regarding LB 1253 and LR 347 but also addresses revisions made to LB 1253 which now appear in LB 747. The Office of Probation has been a part of the judicial branch of state government for over 47 years. I believe the relationship of probation to the work of the courts is such that there are sound administrative reasons why probation should remain with the Supreme Court. When an offender is found guilty in Nebraska, it is the judge's responsibility to sentence the offender. In order to determine the appropriate sentence given the facts and circumstances of the offense, the history of the offender, and the need to protect the community the sentencing judge usually requests the probation officer to prepare a presentence investigation. A probation officer can also then provide supervision to the offender if he or she is sentenced to a term of probation. Because the probation officer is considered court personnel the current process is highly efficient for several reasons. First, because the probation officer works for the Supreme Court the Supreme Court has direct administrative control over the work product of the probation officer. If the work product is inadequate or substandard the Supreme Court can take

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immediate administrative action. If the Office of Probation is removed from the judicial branch of state government and placed within an executive branch agency, this direct administrative supervision would be greatly diminished. If a merger occurs that branch of government directly relying upon the services of probation would no longer be that service provider's immediate supervisor. Second, it is often necessary that the sentencing judge and probation officer discuss issues relating to the presentence investigation. If the proposed merger were to occur, there are serious questions as to whether these discussions could continue in the manner they currently exist. This could cause significant disruptions particularly in our juvenile courts. It is clear from examining LB 747 that there has been an attempt to resolve some of the concerns raised last year by the judicial branch with respect to this proposed merger and the Judiciary is appreciative of Senator Synowiecki's effort. LB 747 now provides that probation officers who are currently court personnel would become agents of the court. Such officers could act as a court agent only if that officer was certified by the Supreme Court. Nonetheless, if this merger occurs probation officers will be employees of an executive branch agency and be subject to the direction and control of the executive branch. Because probation officers are currently considered court personnel a judge is permitted to seek the officer's aid and exercise of a judge's adjudicated duties. If enacted, LB 747 would blur the classification of probation officers to an extent that judges may determine it necessary to conduct hearings in order to assess the same probation information which is readily available in the ordinary course of judicial business. Judges are bound by the obligations to the Code of Judicial Conduct and legislative acts cannot relieve judges of those ethical constraints. In addition, LB 747 provides in several sections that the director of this newly merged department who will be appointed by the governor with the approval of the Legislature shall make administrative and financial decisions in this executive branch department in consultation with the Supreme Court. Probation and parole districts will be established in consultation with the Supreme Court. Chief probation officers are to be appointed in consultation with the Supreme Court. And the preparation of the budget of the department is to be accomplished in consultation with the Supreme Court. Even assuming that

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such a cooperative venture between the two branches of government could pass constitutional scrutiny, consultation with the Supreme Court does not constitute the authority to control decisions of an executive branch agency with whom the court might disagree. This is particularly troublesome given that this executive branch agency's principal function will be serving the judicial branch of government. The separations of power clause in Article II, Section 1 of the Nebraska Constitution contains two prongs, the institutional aspect and the personal aspect. I will not opine this to the complex application of these principles to the facts involved in this legislation. My intent is only to raise such issues for the legislative consideration given that such issue relates in my view to the legal system and the administration of justice. I believe the current structure of probation has allowed the Supreme Court and the probation department to work effectively for 47 years and I believe it should stay as it is. Thank you.

SENATOR BOURNE: Thank you, Chief Justice. Now if I ever appear in your court and you have a timer, I want you to let me go over as well (laughter).

JOHN HENDRY: I will give you time (laughter).

SENATOR BOURNE: (laugh) Questions for Chief Justice Hendry? Seeing none,...

JOHN HENDRY: I thank the committee for giving me a few extra seconds. Thank you.

SENATOR BOURNE: Thank you. Next testifier in opposition?

PAUL MERRITT: Senator Bourne, members of the Judicial Committee, my name is Paul Merritt, M-e-r-r-i-t-t. I'm one of the district judges for Lancaster County and I have been asked to appear here today in opposition to LB 747 on behalf of the Nebraska District Judges Association. I appeared before this committee last October, giving the association's position on a proposed merger of the offices of the probation and parole administration into a single executive branch agency. Basically, the association's opposition position has not changed. With respect to LB 747, the association's primary concerns relate to what I will call logistical issues into the efficient management of the

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criminal justice system. Although they sound different, the concerns go hand in hand. Generally speaking, the district judges across the state work closely in addressing various probation related issues with their district probation officers. That interaction is made possible because probation officers come under the office of probation administration which is created in the judicial branch of our government. As a result of that structure, probation officers have been found by a Nebraska Supreme Court to be court personnel whose function is to aid a judge in carrying out his or her adjudicate duties. Those duties may include talking one on one with a probation officer during and after the preparation of a presentence investigation report and during a person's probationary period. The association's concern arises when probation officers are no longer in the judicial branch but rather become members of the executive branch as proposed by LB 747. LB 747, Section 5 subparagraph 10, has obviously attempted to address this concern by designating the probation and parole officers, although executive branch employees as certified agents of the court in performance of probation related activities. This attempt to create an agency relationship between an executive branch department and the judicial branch is noted at other places in LB 747. While the association appreciates Senator Synowiecki's attempt to address our separation of powers concerns, we feel that the issue continues to exist and that if LB 747 becomes law criminal hearings will be delayed and there may very well be the need for additional criminal hearings. As an aside, I personally have met with Senator Synowiecki on this issue. I am convinced that he has tried to address the association's concerns. Notwithstanding that, I believe that calling executive branch employees agents of the courts for limited purposes in accordance with, as I note, the rules and regulations of the executive department is akin to trying to fit a square peg into a round hole. Until the Supreme Court says the peg will fit, I suspect a number of judges will not take the risk of violating the Code of Judicial Conduct. Finally, the association wants to point out that as a general rule, the district judges of the state of Nebraska are satisfied with the services provided by our probation officers and the working relationship we have with them over the years. Living in Lincoln, yesterday when I was looking at this, I came up with this little analogy. While there have been bumps in the road there have not been any major

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potholes over the years (laughter). We would hate to see change to a system that, in our opinion, has been and continues to be working well. Thank you.

SENATOR BOURNE: Thank you. Questions for Judge Merritt? Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Judge Merritt, do you have a drug court in Lancaster County?

PAUL MERRITT: We do.

SENATOR FLOOD: Are you familiar with the drug court or do you have anything to do with it?

PAUL MERRITT: Somewhat, yes, sir.

SENATOR FLOOD: It would seem to me that moving probation officers into parole would compromise the effectiveness of the drug court if it relies on probation officers to help administer the aftercare of the post-conviction plea or the...pre...post-conviction plea?

PAUL MERRITT: Well, it's post conviction in Lancaster County and the drug court systems across the state are not uniform. The one in Lancaster County does not use probation personnel. They have their own staff personnel that I think are out of...well, I don't know about that. I guess they are hired through the probation office. Quite frankly, I hadn't thought about that but there are two employees that are hired through the probation office that are our main personnel to work with the drug court program.

SENATOR FLOOD: In my county of Madison there...we're attempting to put a drug court together and one of the things they want to do is use probation officers in the administration of the drug court to work with folks. Would you have a concern about an efficient drug court if the court did not have direct supervisory role over the probation officer in that situation?

PAUL MERRITT: I would speak for Judge Flowers on this because she is the primary person in Lancaster County. And I suspect she would have a concern if she did not believe that she had direct control over the officers who supervise

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and meet with all the people in our drug court program, yes, sir.

SENATOR FLOOD: Thank you very much for testifying.

SENATOR BOURNE: Further questions for Judge Merritt? Seeing none, thank you.

PAUL MERRITT: Thank you.

SENATOR BOURNE: Next testifier in opposition?

VERNON DANIELS: Good afternoon. My name is Vernon Daniels. I am a judge of the separate juvenile court in Douglas County. At the present time, I am president of this Juvenile Court Judges Association for the year. There are ten juvenile court judges and we discussed this matter at our meeting in October of 2004. And the general consensus of the body unanimous decision was that the association was opposed to the bill, that the association very much like the district judges view this process as currently existing as a process that is working, that is working well, and that it is working efficiently. Now, from the juvenile court arena, we deal with somewhat of a different animal in that our charge is rehabilitation and treatment. Many times that requires us to reach out into the community to find treatment, treatment avenues, treatment bodies and there is the application process for these because as judges we cannot order any facility to accept a child for treatment. That's an independent decision that's made by these agencies and quite often there's a flood of information, materials, applications that have to be completed and it can be quite monstrous, and it can be quite intimidating. And the spaces, once they are available they are not there for very long. And so it's a matter of a day or two where one has to act. Probation works very well in assisting with these and providing and monitoring the placement, monitoring the treatment, monitoring the discharge, monitoring the recommendations for aftercare, and monitoring the discharge recommendations so that those...if that information is available to the judge for further dispositional reviews that may occur. This, in the juvenile arena, one of the things that we are fighting for here is that we simply don't have a lot of time to have hearings. This process of assisting with placement and treatment and providing and

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facilitating the information has been very helpful and it substantially cuts down on the number of hearings that we would have to have. The question would become, where would we find the time to have the hearings, particularly when you have judges who are having hearings now practically every 15 minutes and particularly when you're dealing with the family arena, family issues they just don't fit into the textbook. You have to allow the opportunity for the human element to come through. So these areas have been very helpful. We find that this is an area that is not broken. It's an area that's very efficient, an area that's working well, and an area that is, I believe, showing success and benefit to children and families within our various communities. That's the gist of my comments. I would be very happy to respond to any questions that any of you might have.

SENATOR BOURNE: Thank you. Questions for Judge Daniels?  
Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Judge, coming from the juvenile court, you already work with an agency under the administration, do you not? The Office of Juvenile Services?

VERNON DANIELS: Juvenile Services, yes.

SENATOR Dw. PEDERSEN: Do you not work with them people just as much as you do at probation?

VERNON DANIELS: That's correct, we do.

SENATOR Dw. PEDERSEN: And so you've got a pretty good relationship with them. Do you see that as being different than what it is with the probation and how you work with them?

VERNON DANIELS: I don't see it as different. Do I understand your question?

SENATOR Dw. PEDERSEN: Yeah, I think you're answering what I want. There's no difference and I don't know why they cannot...I mean, what especially in the juvenile court arena, what it would be any difference in putting a probation under administration than it is the Office of

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Juvenile Services because them caseworkers are officers, whatever you call them, have the same interaction with you as the probation officers.

VERNON DANIELS: Well, you have to also understand something. With OJS, there are still...we still have these administrative hurdles that we have to be overcome. With probation, we find the (inaudible) information, there's not such a cut-off or a disjointed approach.

SENATOR Dw. PEDERSEN: Thank you.

VERNON DANIELS: Um-hum.

SENATOR BOURNE: Further questions? Seeing none, thank you.

VERNON DANIELS: Um-hum.

SENATOR BOURNE: Next testifier in opposition?

CURTIS EVANS: Judiciary Committee members, my name is Curtis Evans and I'm representing the County Judges Association. And I'm here to oppose LB 747 for basically the same reasons set forth by the Chief Justice in his testimony. Thank you. Any questions? I'm making up for the time (laughter).

SENATOR BOURNE: Questions for Mr. Evans? Seeing none, thank you.

CURTIS EVANS: Thank you.

SENATOR BOURNE: Next testifier in opposition?

ELAINE MENZEL: Senator Bourne and members of the Judiciary Committee, for the record, my name is Elaine Menzel, M-e-n-z-e-l. I'm here on behalf of the Nebraska Association of County Officials and the reason we oppose LB 747 is because of the cost shift to counties. Counties would have the additional expense for paying the expenses incident to the conduct and maintenance of the principal office for parole. We respectfully ask you to consider modifying this provision under the bill and that's all I have to testify. Thank you.

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SENATOR BOURNE: Thank you. Questions for Ms. Menzel?  
Senator Flood.

SENATOR FLOOD: Thank you for testifying. What type of cost are you expecting if this was shifted to the executive branch? Talk about what that would do in Madison County, for example.

ELAINE MENZEL: In Madison County? Based on the fiscal note...well, I believe it's on page 15 of the bill. The parole...it indicates that parole would be shifted as probation costs are now, that it would be under the one of the responsibilities for office and.

SENATOR FLOOD: Would it be left to the counties then to pay you're saying?

ELAINE MENZEL: The office.

SENATOR FLOOD: The office...

ELAINE MENZEL: Office and maintenance costs in...

SENATOR FLOOD: Who's paying that right now for probation?

ELAINE MENZEL: I believe the state is because it's not currently something that...

SENATOR FLOOD: So the state Supreme Court currently pays the office expense and rent for probation currently?

ELAINE MENZEL: No. For probation, I believe counties do.

SENATOR FLOOD: And for parole?

ELAINE MENZEL: For parole I believe that the state does. In the...

SENATOR FLOOD: So this would...would this have an effect on counties then if it was switched over to an executive branch function? I guess I'm trying to understand...

ELAINE MENZEL: Based on the way the bill is written, if I understand it correctly, it would be the expense is incident to the conduct and maintenance of the principal office, is

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something that would be picked up by the counties. The office portion of it.

SENATOR FLOOD: Okay, thank you very much.

ELAINE MENZEL: You're welcome, and if I remember correctly, there is a provision within the fiscal note that indicates the last paragraph.

SENATOR BOURNE: Thank you. Further questions for Ms. Menzel? Seeing none, thank you.

ELAINE MENZEL: Thank you.

SENATOR BOURNE: Next testifier in opposition? No further opposition testimony. Are there any neutral testifiers? Senator Synowiecki to close.

SENATOR SYNOWIECKI: Thank you, Senator Bourne, appreciate the testimony from all the testifiers. I thought it was a good hearing. I just want to inform the committee, I am a member of the Community Corrections Council and this is a major undertaking under the guidelines of LB 46. In every state that I'm aware of in my endeavors with the Community Corrections Council that has embarked on such an endeavor to streamline probation and parole services so as to significantly mitigate correctional costs in their state have done something like this. They've done something in the area of probation and parole as a starting gate measure in their endeavor to do something with skyrocketing corrections costs. And we need to do something. We need to do something. I think LB 747 represents the correct venue to go. You know, within the executive branch is all other areas of carrying out court dispositions in the executive branch. And these include the community-based corrections programs. All the human service agencies' social and rehabilitation services, medical services, employment services, education and housing are all under the executive branch. I think it behooves us to have a relationship with our probation officers within executive branch services. The services that these offenders need are in the executive branch. And lastly, with regard to the Community Corrections Council, we have for services \$3 million in the probation cash fund, almost \$3 million. Under the parole cash fund we've got like \$60,000. I would argue that a

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parolee who is exiting our correctional system confinement is in probably in higher need of services than a probationer, arguably. It's going to be real shaky constitutional ground, Senator Flood. I'll turn the stuff you've been bringing up. It will be real shaky constitutional grounds when we take money out of a Supreme Court driven fund, the Supreme Court probation fund and use that money for parole services. That is going to be real shaky. I think we need to get this done, get it done in a timely manner so that we can proceed with LB 46. We're ready for implementation. I've been successful in the preliminary budget with regard to probation thus far to get the personnel infrastructure in place. Now, we are going to begin to...now we have the sentencing guidelines, the sentencing grid is now in place. We're ready to proceed with community corrections. I think this bill is an important ingredient to get us there. Sorry, Senator...oh, I have a minute left. I'm sorry.

SENATOR BOURNE: You have a whole minute.

SENATOR SYNOWIECKI: Okay. That's fine. I'll stop there. Appreciate the hearing again, appreciate the questions asked by the committee. I thought it was a good hearing. Thank you, Senator Bourne, for a fair hearing.

SENATOR BOURNE: Thank you. Are there any questions for Senator Synowiecki? Senator Combs.

SENATOR COMBS: Senator Synowiecki, I tend to be very interested in outcomes rather than process when I think about changes that might take place. Is there any data related to negative outcomes in all the states that have done this so far? I mean, like has anyone compiled data or did a study or, I mean, what are we actually afraid of here as far as the people that already have it and documented negative outcomes? Are there any?

SENATOR SYNOWIECKI: Quite the contrary. And one state that comes to mind in particular that the Community Corrections Council has had a large conversation and dialogue with. You could almost argue we've patterned a lot of our LB 46 stuff around North Carolina. And their correctional costs have gone south with the implementation of their LB 46. But what they did was this as a starting gate measure. They combined

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the probation and parole services as has Tennessee and some other states that have done exactly what I am attempting to do and that is to take probation and parole and put them in their own mission-driven agency. Senator Combs, what we have now is the probation department under the Supreme Court. The primary mission of the Supreme Court administratively is not to do presentence investigations. It's not to do community supervision. It's to provide a court service for the citizens of Nebraska. The main mission of the Supreme Court almost conflicts or digresses with probation's mission; likewise with parole. You could almost argue that the mission of parole is in contrast to their mother department, the Department of Correctional Services. Anyone will tell you that the mission of the Department of Corrections is public safety through institutions so you can almost argue that the parole mission is in conflict with the Department of Corrections' mission. I want to take these two missions, the mission of probation, community service and presentence investigation. I want to take the mission of parole and put them in an executive branch agency, have a comparatively small agency that's mission-driven. And we will get them successful outcomes.

SENATOR COMBS: Thank you. I like the vision that you have for change and it sounds like you've thought it through thoroughly. And what fears are there of any, in your opinion, as far as the human component goes for the services to be rendered to the people that are involved?

SENATOR SYNOWIECKI: I think it will be significantly enhanced. I think you will see a greater marriage, a greater partnership with our probation department in an executive branch. As I said earlier, where the allied systems are located. I think you will see more intergovernmental relationships there. We are in the midst of another reform, substance abuse and mental health. You know, with probation being under the Supreme Court there's been very little, I think, dialogue between our probation systems and the executive branch reforms under mental health and substance abuse service delivery. And I think the cause of that, Senator Combs, is because of that disconnect bureaucratically and institutionally speaking.

SENATOR COMBS: Thank you. It sounds like the only thing that we're afraid of perhaps is change.

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SENATOR SYNOWIECKI: I think we're afraid of change and, you know, you listen to the judges. We've been doing it for 45 years this way. You know, we hear a lot of that and I just think we're ready. I think we're ready in this state to take the next step and do some really constructive and neat things relative to our criminal justice system which, quite frankly, has needed to be done in the last 40 years.

SENATOR COMBS: Thank you.

SENATOR BOURNE: Thank you. Senator Chambers.

SENATOR CHAMBERS: Are we ready to end the death penalty?

SENATOR SYNOWIECKI: We're ready for that discussion too, Senator Chambers.

SENATOR CHAMBERS: No, not the discussion. Are we ready to end it?

SENATOR Dw. PEDERSEN: I am.

SENATOR SYNOWIECKI: You know, it's a little digressing off the subject but...

SENATOR CHAMBERS: We've been killing people for a lot of years.

SENATOR SYNOWIECKI: Yeah.

SENATOR CHAMBERS: And they say we've been killing them a lot of years so we want to keep on.

SENATOR SYNOWIECKI: Um-hum.

SENATOR CHAMBERS: So if the argument that we've been doing it a lot of years is no justification to maintain the present system with probation and parole, why is it an argument to maintain the death penalty? You don't have to answer that. That's not what you came here for.

SENATOR SYNOWIECKI: No, I will, Senator Chambers. I'm very open to this. I came down here in support of the death penalty but what I have discovered, what I have learned

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during my years down here and listening to the debate and so forth. I am very seriously second-guessing that position, quite frankly.

SENATOR CHAMBERS: I'm not going to push it. Thank you. That's all that I have.

SENATOR BOURNE: Further questions? Senator Synowiecki, I want to follow up with what Senator Flood was saying, and he kind of...I thought, I don't want to put words in his mouth, was kind of asking if there was another reason behind this. And I meant to ask the Chief and I didn't, I forgot. Are there morale problems in the Department of Probation? Or is there? I truly don't know. Are there problems?

SENATOR SYNOWIECKI: I think what Pat Krell, during his testimony, was trying...

SENATOR BOURNE: And I apologized to Mr. Krell. I had to introduce a bill so I didn't hear his testimony.

SENATOR SYNOWIECKI: Oh, that's right, you were absent. I think what he was trying to trace was kind of a long history of some personnel issues relative to probation officers being under the Supreme Court. Working conditions problems and so forth. For example, you know, I was a probation officer for 12 years and literally, Senator Bourne, working for foodstamp salaries until members of the Legislature stepped in and corrected it. It was appalling what probation officers' salaries were for a very, very long time and it was due to the good works of Senator Chambers, Senator Lindsey, my predecessor, Senator Hilgert kind of stepped in and corrected that situation through the Appropriations and we got an equity package some five or six years ago. And that was very much appreciated. But there was a very long history of very poor salaries under the Supreme Court and that was an issue. There were some of my colleagues that were literally qualified for foodstamps while they were working as a probation officer. There's been...personnel issues have been prevalent and I'll just put it that way. We have had instances where individuals have had to sue just to move from one district to another within the system of the Supreme Court relative to lateral movements within the system. They've had to go to the courts to sue to get this ability that is accorded all of

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our other state employees, just one small example. I could go on and on but I don't want to do that and there have been a history of personnel problems for the probation officers. The courts will tell you it's a great system. It probably is from their perspective but I get a lot of calls through my office being that I was a probation officer for 12 years for what I would characterize as some very serious problems and some individuals that are not treated very well, quite frankly, in the current system.

SENATOR BOURNE: Thank you. Appreciate that. Further questions? Seeing none, thank you.

SENATOR SYNOWIECKI: Thank you.

SENATOR BOURNE: That will conclude the hearing on LB 747. Senator Pedersen to open on LB 572. As Senator Pedersen makes his way forward, could I get a showing of hands of those here to testify in support on LB 572? Hold the hands up, please. I see two testifiers. How many in opposition? I see none. Neutral testifiers? I see none. Senator Pedersen.

LB 572

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne, colleagues on this committee. Today I'm introducing to you LB 572, my attempt this year to facilitate a comprehensive study of the Department of Correctional Services. As those of you who have served with me on this committee are well aware, I have been trying for quite some time to find a way to take a real good look at several issues of concern in the Department of Correctional Services. I have tried various ways of conducting a study from the interim study process to a study involving other stakeholders staffed by our own legislative staff to this year's version which would assemble a task force of interested parties and utilize the College of Public Affairs and Community Service at the University of Nebraska at Omaha to provide administrative support and independent viewpoint. Over the past 12 years I have tried many ways to address concerns brought to me by constituents, inmates, and employees of the Department of Correctional Services. I have questioned and questioned policies and procedures. I have been concerned over the ever increasing

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costs of the department especially while hearing that programming is unavailable, medical care is lacking, staff are being required to work mandatory overtime and mental health and substance abuse treatment programs are referred to by many as a joke. My goal is trying to get a comprehensive study of what is going on, is not to demean the Department of Correctional Services but to ensure that the tax dollars we are investing in keeping our community safe are truly being utilized in the best way possible. My past efforts have been met with skepticism and assurances by the department that they were working on those issues. Unfortunately, I have yet to see a report indicating the outcome of this work. If it is true that the department has been working on these issues for the past several years it would seem only logical that allowing an independent entity such as UNO to coordinate the report would be welcome by the department. Several years ago, I stood on the floor of the Legislature and said that if the outcome of such a study indicates that I have no basis for my concerns I can live with that. It would seem to me that the department would welcome a fresh viewpoint as well. Over the past few years, there have been studies on various issues including medical care and community corrections opportunities. There has not been, with the exception of an interim study report produced in 2001, a detailed look at what we are doing in the area of corrections and why. I think it is time to do that. This bill would propose that a task force be appointed to perform a study of the Department of Correctional Services that would examine the mission, structure, programming, and staffing of the department and make recommendations for any necessary changes in several areas which are clearly outlined in your green copy of the bill. In addition to reviewing our current structure and mission, I envision the study as allowing us to look at any other promising programs or strategies implemented by our jurisdictions. The task force itself would be composed of the director of the Department of Correctional Services, the executive director of the crime commission, the chairperson of the Community Corrections Council, the parole administrator, the chairperson of the Board of Parole or their designees. In addition, the executive board would appoint two members of the Legislature, two representatives from the Nebraska Association of Public Employees who are also employees of the department. Two persons working with inmates in post-release programs and two at-large members of the

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public. According to the current language of this bill the task force would be appointed by May 15, 2005, have a preliminary report finished by December 15, 2005, and have a final report complete with recommendations for the Legislature and the Governor by March 1, 2006. The task force would then disband. I believe that the Legislature would be well-served if we could assess the benefit-cost ratio of certain programs and procedures used by the department. I view LB 572 as the beginning step to this process. I hope that you will give this bill every consideration. Thank you.

SENATOR BOURNE: Thank you. Questions for Senator Pedersen?  
Senator Combs.

SENATOR COMBS: I just have a comment for Senator Pedersen and that is that I want to tell you how much I truly appreciate the after-hours visits that you've arranged for me and other senators to go and actually talk with the people that work in these facilities. And I understand the need for a study and I welcome the opportunity and hope that with the change in administration that's going to take place in corrections, that it would now be well received. It sounds like it's overdue. Thank you for bringing the bill.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: Thank you. Further questions? Senator Chambers.

SENATOR CHAMBERS: I just have one. Speaking logistically, the appointment of a chairperson will be made from the task force members and appointments to the task force will have to be made no later than June 15. I see this bill has the emergency clause. Is it going to be prioritized?

SENATOR Dw. PEDERSEN: I have not looked at that yet, any priority yet, Senator Chambers.

SENATOR CHAMBERS: And I'm asking because this is a 90-day session and I don't know how close to June 15, or I don't know what the last day we're scheduled to be here. But it's not going to leave a very wide window for any of this to be done.

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SENATOR Dw. PEDERSEN: You are right. You're right.

SENATOR BOURNE: Thank you. Further questions? Senator Aguilar.

SENATOR AGUILAR: Not a question. I just, you know, appreciate what you're trying to do here and would offer to be a legislative representative if someone chooses to choose me.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: (laughter) Further questions or statements? Seeing none, thank you. First testifier in support. (See also Exhibit 4)

BRAD MEURRENS: (Exhibits 5, 6) Good afternoon, Senator Bourne, members of the Judiciary Committee. For the record, my name is Brad Meurrens, M-e-u-r-r-e-n-s, and I am the public policy specialist for Nebraska Advocacy Services Incorporated, the Center for Disability Rights, Law, and Advocacy. As the designated protection and advocacy organization for the state of Nebraska, we offer our strong support for the task force study initiative proposed in LB 572, specifically the inclusion of mental health. We have come before this committee in the past and have provided this committee with data and reports about the gravity of the mental health and treatment issues within corrections, both nationally and statewide. I will not reiterate those statistics here today. Suffice it to say that mental health is a component of the corrections system that has until recently garnered little attention yet is a very serious matter that must be addressed and included in discussions about the corrections system. Nebraska Advocacy Services has initiated work in this area. In 2004, we convened our own task force to examine this issue. I have attached a copy of our task force report to my written testimony for your review, as it provides some context to our task force's preliminary work in this area and its focus and may assist in identifying potential persons to fill slots on LB 572's task force. Additionally, we have developed a work plan to follow up on the recommendations and information from that report for fiscal year 2005. This is an area that has garnered attention within our board of directors, advisory councils, and staff. We would be happy

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to assist in the study of the mental health/corrections issue, either as a member of the LB 572 task force or in any other capacity. I'll entertain any questions that this committee might have.

SENATOR BOURNE: Thank you. Questions for Mr. Meurrens?  
Senator Flood.

SENATOR FLOOD: Thank you for your testimony today.

BRAD MEURRENS: You're welcome.

SENATOR FLOOD: For an offender that's sent to our Department of Corrections maybe for a year sentence and they serve six months with good time or any meth offender, what are we doing for treatment in Nebraska?

BRAD MEURRENS: Well, in terms of substance abuse or in terms of mental health?

SENATOR FLOOD: Let's start with substance abuse.

BRAD MEURRENS: Well, that's a good question. We didn't really look at substance abuse per se in our task force. From what information I've been able to gather, very little. On the mental health side there are lots of conflicting reports. But the preponderance of the evidence indicates that the treatment that inmates would receive during incarceration and post incarceration is piecemeal and haphazard at best. Human rights law reports in its 2003 report, it says that there is, in one of the prison systems in Nebraska the staff is given an orientation on mental health called Con Games and the preponderance of treatment, according to this report, it indicates that the treatment is sort of things like stop your criminal behavior, not focusing on what the mental health needs of that inmate might be. I can certainly provide you with those reports if you'd like.

SENATOR FLOOD: I would be interested. Thank you.

BRAD MEURRENS: No problem.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Next testifier in support.

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MARSHALL LUX: Good afternoon, Senators. My name is Marshall Lux. I'm the ombudsman for the state of Nebraska and I wanted to visit with you for just a moment to add my voice and support of Senator Pedersen's LB 572. I know that that the senator has worked really tirelessly for a number of years to try to get traction on correctional issues. He's to be congratulated for that. It's been a long, hard slog for him. He's tried many different ways to get broad studies of correctional issues and it's a difficult thing to do because of the complexity of the issues and because of a number of reasons. I encourage the committee to advance this bill. There are a lot of issues out there in corrections that do need to be looked at. Our office has really decades of experience working on correctional issues. We're aware of it. We'd certainly offer any help that we could provide to a task force if that's the decision that the Legislature makes. And I wanted to encourage the committee to advance LB 572.

SENATOR BOURNE: Thank you. Questions for Mr. Lux? Seeing none, thank you.

MARSHALL LUX: Thank you.

SENATOR BOURNE: Are there other testifiers in support? Are there testifiers in opposition? Are there any neutral testifiers? Senator Pedersen to close. Senator Pedersen waives closing. That will conclude the hearing on LB 572. Senator Pedersen to open on LB 677. As he prepares to testify, can I get a showing of hands of those here to testify in support? I see three, four, five. Those in opposition? I see one. Are there any neutral testifiers? I see none. Senator Pedersen.

LB 677

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne and colleagues on the committee. For the record, I am Senator Dwite Pedersen. I'm here today to introduce to you LB 677. For quite some time now I have been receiving complaints from inmates held on administrative confinement in our correctional system. By way of background, prison inmates are often placed in a segregation cell or solitary

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confinement for purposes of punishment after they are found to have violated prison rules. The terms, administrative confinement or administrative segregation, refer to those situations where prison administrators place an inmate in a segregation cell or solitary confinement for management purposes rather than as a form of punishment. Statutes and court rulings setting limits on the length of time that an inmate may be made to remain in solitary confinement for punishment purposes do not apply when an inmate is placed in solitary confinement for management purposes. This leads to inmates being kept in administrative confinement for long periods of time with no reasons having to be given other than that is to protect the safety and security of the institution, a term that I have learned to despise. This bill would regularize the use of solitary confinement or administrative segregation for management purposes so that its use is limited to those situations where it is truly necessary. In every case where an inmate was placed in administrative segregation the bill would require prison administrators to develop a written plan for reintegrating the inmate back into the prison's general population. The bill would also make it clear that administrative segregation is not to be used as a punishment and that inmates held in administrative segregation are entitled to receive the same basic rights and privileges afforded to all other inmates in the facility. I receive complaints from inmates who have been held for months or even years based on the administration's feeling that an inmate was involved in or had planned an altercation even though no proof of evidence existed to file charges or even to write a misconduct report. Think about being locked up in a cell for at least 23 hours a day for weeks and months and even years. Think about how you would feel if that was done with no reason given and that safety and security of the institution required it. While I understand the need to be able to remove an inmate who is suspected of causing trouble from the general population, there must also be checks in place to ensure that inmates are not simply thrown into this situation and then forgotten or automatically reassigned to several more months in administrative confinement every time they come up for the required review. The complaints that I received from inmates regarding this issue are usually turned over to the ombudsman's office for investigation. And it is my understanding that someone from that office will be testifying today. They can provide specific

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examples of cases where this situation is occurring in our system today and explain further how the statute could be applied in an effort to make our correctional system work in a more fair and consistent manner. I want to add to the end, when we're talking about confinement...administrative confinement or whatever, you would most likely most of you be in...heard the term, the hole. That's what the inmates call it. The Department of Corrections call it the control unit. I wish all of you could see it; some of you have. It is a hole and it is not a pretty place and it's not that it's not completely not necessary from time to time. But it is...I have seen people locked up there for many years. One inmate that I visited on a regular basis, month to month, had been there three and a half years before I started visiting him. And he had mental problems which caused some discipline problems for the institution when he was in this hole. And he's only one. I could tell you many stories and you'll hear a few more as you hear the testifiers behind me.

SENATOR BOURNE: Thank you. Questions for Senator Pedersen?  
Senator Aguilar.

SENATOR AGUILAR: Yeah, Senator Pedersen, is there any evidence of, you know, you talked about some of them having mental problems. Some of the inmates...is there any documentation where they maybe developed mental or emotional problems from being in there for extended periods of time?

SENATOR Dw. PEDERSEN: I would think...I don't know that there's been any studies done. That's why I bring a study bill to them and we need to look at some of them things. But, obviously, if you're in a room that's not much bigger than this desk, about two times the size with a cement bench on it, you can have a cushion but I've seen people sit there for weeks with nothing more than a pair of paper boxer shorts and a suicide blanket. A suicide blanket is a blanket you can't tear up into pieces and hang yourself with it, obviously, and that's all they have. And they're fed their meals through a hole and taken back, and they're in there for weeks and months. They get to go out into what they call the yard but the yard is not even a hole that I would place somebody into sometimes. It's unbelievable.

SENATOR AGUILAR: Thank you.

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SENATOR BOURNE: Further questions? Senator Chambers.

SENATOR CHAMBERS: Does the jurisdiction of the Nebraska Legislature extend to Guantanamo Bay, Cuba? (Laughter)

SENATOR Dw. PEDERSEN: No, it doesn't, Senator, but I wish it did (laugh).

SENATOR CHAMBERS: It sounds like you're describing something even worse than what I've heard coming from there.

SENATOR Dw. PEDERSEN: I'm sure it is.

SENATOR CHAMBERS: Thank you, Senator Pedersen.

SENATOR BOURNE: Senator Combs.

SENATOR COMBS: Yeah, I just...looking at this task force...Criminal Justice Task Force report and this might answer Senator Aguilar a little bit there. It says that 40 to 60 percent of state prison population, large numbers of people with mental illness are in prison and jail so 40 to 60 percent already have mental illness. And it says there's three times more individuals with mental illness in prisons than in mental health hospitals. So given that data from this study and my knowledge as a nurse work in psychiatric patients, I can tell you what segregation and isolation does for a mentally ill person and this is appalling. Thank you.

SENATOR Dw. PEDERSEN: Thank you, Senator.

SENATOR BOURNE: Further questions? Seeing none, thank you. First testifier in support.

TIM BUTZ: (Exhibit 7) Good afternoon, Senator Bourne, members of the committee, my name is Tim Butz, B-u-t-z, executive director ACLU Nebraska. We're here today in support of LB 677. Senator Pedersen, thank you for this piece of legislation. The testimony that I have in writing describes one case of a man held in administrative segregation for four and a half years. His name is Lonnie Thomas. Lonnie Thomas served 1,693 days in administrative segregation. He was never afforded any kind of meaningful opportunity to know what he was being charged with or an

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opportunity to present evidence in mitigation or explanation. During the time that he was there he was held in a cell for 23 hours a day. He had no educational opportunities which is a factor to be considered in getting parole. He had no access to religious services during that four and a half years. He had no work assignments. He showered three times a week, had one hour a week in the legal library, one call a week to the outside and only limited physical exercise. The prison would tell him only that he was being held in administrative confinement because he'd violated the rule book and when pressed they were a little more specific. They said that he was suspected of engaging in high-risk behavior but they never told him what high-risk behavior. Was he suspected of engaging in sex, getting tattooed, fighting, drug use, planning an escape. Nobody would tell Lonnie Thomas what it was. They simply said, you know what it is. You broke the rules. In fact, the Department of Corrections was using administrative confinement as punishment. Had he been charged with any of those activities, he would have been held in administrative segregation for no more than 60 days. As it turned out, he spent 1,600 plus days. We sued the state on behalf of Mr. Thomas and I'm sorry to report that the district court got a hometown decision and the judge ruled that they would defer to the prison's judgment on confinement in the administrative segregation. The appeals court upheld that. We filed a notice of appeal with the Nebraska Supreme Court and by that time Mr. Thomas had the unique distinction of actually being paroled while still in administrative confinement, one of the few people if not the only person to ever have that happen where he went from the hole out into the community. When he got out, he instructed us to drop the appeals. He wanted to get on with his life and as you'll hear about some of the mental health implications that Senator Combs has talked about, you would understand why he would just want to put this nightmare behind him. This was a cop and novel plot line. This wasn't the way we treat human beings. If the guy had done something, the state has the right to bring him up on charges, present the evidence against him, and let him rebut them. And my time is over so I'll stop.

SENATOR BOURNE: Thank you. Questions for Mr. Butz?  
Senator Aguilar.

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SENATOR AGUILAR: When you were in court was there any more forthcoming information as to what the particular charges were?

TIM BUTZ: Yeah, the state finally...in discovery, we got information that the state feared that he would engage in sexual activity. They had no evidence that he engaged in sexual activity. They just feared it. He was HIV positive. He did not have full-blown AIDS, he was HIV positive. This is a guy that really needed...because of his medical condition, needed serious mental health counseling. And we put a guy out on the streets with no mental health counseling for four and a half years that had a major illness and there was no preparation to put him back into the community. And this was criminal conduct on the part of the Department of Corrections to be honest with you, and they get away with it all the time.

SENATOR BOURNE: Further questions? Senator Chambers.

SENATOR CHAMBERS: Mr. Butz, having tried to go through the judicial system and failing to obtain elemental justice in a country like what the United States is supposed to be, the only alternative left is a legislative solution, isn't that correct?

TIM BUTZ: And I hope that there is one, Senator.

SENATOR CHAMBERS: Okay.

TIM BUTZ: You know, your description of conditions worse than Guantanamo was accurate. I would suggest perhaps even further that Mr. Thomas would have been better treated had he been confined at the Nebraska Humane Society because he was treated worse than a dog.

SENATOR CHAMBERS: And I know that to be true because I know how the Humane Society treats the animals that they have in their...

TIM BUTZ: Um-hum.

SENATOR CHAMBERS: ...custody and control and care. I'm not going to ask questions because what needs to be done can be done through this bill and there's no need in me

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fulminating.

SENATOR BOURNE: Senator Combs.

SENATOR CHAMBERS: That's 1,500 feet again, Mr. Chair. I'm trying to...

SENATOR BOURNE: Bring it down. Senator Combs.

SENATOR COMBS: Yes. Enlighten me here because I'm learning a lot about Judiciary and that kind of thing and I wondered, who in the corrections system was the decisionmaker directly responsible for this man's housing situation?

TIM BUTZ: Well, it's explained in detail in the written testimony but there was a review committee that recommended he be removed from administrative segregation. And, in fact, the Department of Corrections has a behavioral checklist that has...you can earn up to 33 points on that checklist to determine how you're behaving within the system. And Mr. Thomas scored 33 out of 33. Despite that fact, the warden overruled the decision and kept him in administrative segregation.

SENATOR COMBS: So the buck stopped with him.

TIM BUTZ: The buck...the final authority rests with Warden Clarke.

SENATOR COMBS: Despite the committee's recommendation and...

TIM BUTZ: Despite the committee's...

SENATOR COMBS: ...his test score.

TIM BUTZ: ...recommendation and his test score and his...I mean this is a guy that really needed to have the services that prepare offenders for going back into the community. And we just cut him loose, you know, two months before he would jam out before his sentence would end. They just all of a sudden...Board of Parole cuts him loose. No preparation, no cushion.

SENATOR COMBS: Thank you.

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SENATOR BOURNE: Further questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. You just brought up something that I should have mentioned in my (inaudible) but jamming out somebody, it means they've reached their ultimate length of time they can be in prison.

TIM BUTZ: Yes, sir.

SENATOR Dw. PEDERSEN: They're taken to the gate whether they've been treated like animals or acted like animals, whatever, and released. Is that right?

TIM BUTZ: Yes, sir. You know, in Mr. Thomas' situation, he was in prison for almost seven years for writing bad checks and writing stolen checks. Certainly something that society wants to prevent and punishing people for that is appropriate but the kind of punishment visited upon him was just extremely unusual and cruel in our mind. We let him go out the gate, said good-bye to him and nothing more.

SENATOR Dw. PEDERSEN: Don't you agree, Mr. Butz, that that's much more dangerous to our society than they ever believed?

TIM BUTZ: I think if that the state doesn't take the time to help people integrate back into society, they've caused more problems than they cure.

SENATOR Dw. PEDERSEN: So we're part of the problem and not part of the cure.

TIM BUTZ: Yes, sir.

SENATOR BOURNE: Thank you. Senator Chambers.

SENATOR CHAMBERS: Mr. Butz, you said he was HIV positive but he hadn't reached the stage of full-blown AIDS yet?

TIM BUTZ: Yes, sir.

SENATOR CHAMBERS: It's almost, as I listen to this, as though he were being punished for being HIV positive.

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TIM BUTZ: Well, we think that was a factor in the decision to keep him...

SENATOR CHAMBERS: I think that is contemptible. It is reprehensible. It is unconscionable. It is uncivilized and it reflects some of the attitude in society at-large and it's why people will not be tested to see whether they're HIV positive. If they turn out to be HIV positive they will not seek treatment because they know what might be in store for them. But for an institution of the state to treat somebody who's HIV positive in this manner, I think is, as you said, criminal. And what I would like to see at some point...I'm not going to try to do it on Senator Pedersen's bill, but bring criminal sanctions against some of these Corrections employees who take it upon themselves to inflict a punishment not authorized by the statute, punishing a condition which is not criminal and which cannot constitutionally be punished. And if we tried to pass a law to do that, it will be struck down as a violation of the Eighth Amendment to the U.S. Constitution. I'm very appreciative that Senator Pedersen brought this bill. I appreciate your testimony and I'm not going to say more than what I have because I think it might be clear to anybody who has any interest, the contempt and disgust I feel toward the Corrections administration for having treated this man in this fashion.

TIM BUTZ: You know, Mr. Thomas with his HIV positive status, Senator, really needed mental health counseling the whole time that he was in prison. And the extent of his mental health counseling was a Department of Corrections employee coming up to his cell once a week and asking him whether he felt suicidal or not. He could not get psychiatric care. The psychiatrist recommended that he read some books and that was his mental health care. That was his mental health plan.

SENATOR BOURNE: Senator Aguilar.

SENATOR AGUILAR: Yeah, even if Mr. Thomas had full-blown AIDS, there's no reason he would have to be confined in that manner even if he did have it and he did not. But my question is, if a person did have something severely contagious and needed to be separated from general population is there anything else available within the

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prison walls besides the hole for such...?

TIM BUTZ: Well, if someone needs to be quarantined for health reasons and there's valid health reasons for doing it, you would think that a medical setting would be the appropriate place. He was placed in a part of the prison that houses death row. He was a nonviolent offender and he was living on death row with death row inmates.

SENATOR AGUILAR: So there were other available options open to them?

TIM BUTZ: The hospital should have been considered for any inmate who is contagious and in need of medical attention or medical isolation. But those should be very rare cases.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

TIM BUTZ: Thank you, sir.

SENATOR BOURNE: Next testifier in support.

MARSHALL LUX: Good afternoon, Senators. My name is Marshall Lux, L-u-x. I'm the ombudsman for the state of Nebraska and I'm here to testify in support of LB 677. LB 677 is a bill that digs deep into the details of the corrections system and the classification of inmates and particularly addresses as has been discussed the institution or the classification of administrative segregation. Administrative segregation refers to a situation where an inmate is kept in segregation or solitary confinement not because of misbehavior but for management purposes. It's supposed to address situations where it's been determined that a particular inmate cannot be properly managed while he is in the general population of the institution and so he or she is placed and kept in a solitary confinement cell. In theory, this is an approach which is to be used where inmates are viewed as being escape risks or as threats to the well-being of other inmates but in practice we have seen in our work in the ombudsman's office administrative segregation being used as an alternative form of punishment, as a way of separating suspected gang members and particularly, and this is important, as an alternative placement for mentally ill inmates who are unable to

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function in the general population. At any given time there are scores of inmates in the Nebraska system sitting in administrative segregation cells where they not only have minimum contact with other human beings but where they are also deprived of normal access to jobs, education, counseling, and even rehabilitative programming. Often the placing of an inmate in administrative segregation is not a temporary fix. In fact, as has been mentioned, it's not at all unusual for inmates to be continuously held in administrative segregation for months and even years. Time which when they have limited contact with other human beings and minimal programming. The bill guarantees that inmates in administrative segregation would have access to the same rights and programming made available to all other inmates and would require the Department of Corrections to develop written plans for reintegration of administrative segregation inmates into the general population. Senators, very often the inmates in administrative segregation cells are the forgotten inmates, the inmates to whom the system itself cannot adjust. LB 677, at a minimum, will tell the Department of Corrections that it needs to pay more attention to these problem cases and look for other solutions for them besides putting them out of sight in a solitary cell where they can languish without hope and without attention, sometimes literally for years. And I'd encourage the committee to advance LB 677.

SENATOR BOURNE: Thank you. Questions for Mr. Lux? Seeing none, thank you. Next testifier in support.

DUANE SANDERS: (Exhibit 8) Thank you, Chairman and Senators for allowing me to speak. My name is Duane Sanders. Just to briefly introduce myself, as recent as five months ago and for 26 years I was incarcerated in the Nebraska Department of Corrections. A few years prior to my release I was also AC'd for nine plus months. Because I understand that a picture says a thousand words, first I want to kind of represent what the hole or AC is like. And the width of it is about this and approximately two wing spans. I'm 6'2" and inside of the cell is a steel bunk that is fixed to the rear wall, two windows about yea wide, a steel door that your food is served through about that wide, a sink and a toilet, that's one unit, mirror that is tin foil or I'm not sure exactly what it is that is very hard to see yourself in, a light about five times at least the brightness of that

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that never goes out, a mattress that is about that wide or about that thick. And when you shake it down because it folds out or pans out, a blanket...you get one blanket, a pillow that pitifully is a pillow and two sheets and you stay in that room for 23 hours except for the 10 minutes or 15 minutes that you might get for a shower three times a week. You get possibly an hour or so of yard which is comparable to a dog run but actually I've seen dog runs that are more lavishly outfitted. And you're in that cell. And just to briefly talk about the mental and emotional impact of being in that cell 23 hours, not everybody that stays in the hole or goes to the hole is in any kind of healthy mental state in the first place. So I've seen people deteriorate over the years and over the months who have been in the cell. There are guys who holler all night for various reasons so that disrupts whatever sleeping pattern anybody else might have. There are guys who abuse themselves in the cells. There are guys who suffer all kind of things and the most mental attention that they get, again, it's like somebody come to the door and say, do you feel suicidal? You say no in most cases, of course, and they check it on the paper and they go back. The classification process to get you AC'd, to be candid with you, is a joke. If the administration has an issue with you that they can't caption under a disciplinary matter, then you're AC and that process is a protracting one because of the appeals process because of the two or three levels of appeals and committees or classification boards that you have to deal with. Each one is subservient to the previous one. So who's going to, out of friendship or whatever or the camaraderieship, say I want him to stay in the hole and you let him out. And also the classification committee is one internally in AC process may, for example, make a recommendation that you not be AC. That decision entrusted to those persons is disregarded by the next committee. My distress is being able to take 23 years or 26 years and describe to you in three minutes the whole process that, of course, I'm familiar with on an intimate basis. It's the same to me as pulling the hair off the elephant's tail and giving it to you and say, tell me what this comes from.

SENATOR BOURNE: Hold on one second. Excuse me. We let the Chief Justice go over (laugh) so we certainly will let you do the same. If there's anything else you want to finish up with, please continue.

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DUANE SANDERS: Actually, I've been labeled as a management problem during probably the term of my incarceration because I adamantly challenged the procedures or processes or even statements and decisions made about me and regarding me. And I've passed out some things that are in no particular order but you will see that I've written the warden; I've written Harold Clarke, the director; I've written the Parole Board personnel; I've written virtually everybody who might be able to have some input or influence as to why I was put in the hole and put on AC after it was determined several different ways that I had committed no violations of the rules or regulations, that I had just received a final to be released in a few more years that was extended for 36 months. Because of my having been AC I was not released. But nobody was able to articulate for me or to me why I had been AC'd after classifications initially then after the fact said that I shouldn't have been AC. And that, again, is just to emphasize that the procedure and the process is that if anybody in administration has an issue with you, their difference is expressed and your AC. And you have no recourse in the literal sense because it's unappealable, because it's not a disciplinary matter so you're not afforded the same category of rights or appeal processes or so forth.

SENATOR BOURNE: Thank you. Questions for...and I didn't mean to cut you off. Senator Pedersen.

SENATOR DW. PEDERSEN: Thank you, Senator Bourne. Duane, before I ask you any questions, I want the committee to know that I've known Mr. Sanders for a long time and he's been a friend for quite a bit of that time. Who makes the decisions, the actual end decisions of when you go to the control unit?

DUANE SANDERS: Briefly, the process is and I can just describe mine. I was taken up to the custody staff's office twice in one evening and after a conversation with them and to which I went back to my cell, after they told me and determined that I had done for violating no rule or regulation. The next day I was called back up and I was placed in the hole for violation or suspicion of violating the safety and security of the facility. There and immediately I was proceeded to be placed on AC. That

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decision was made by the warden who I immediately appealed to and say, what am I being AC'd for? And, as you might read, and in this letter the top page and then skip to the second page in the pile of papers that I gave. He said that you have put us in a predicament. You have put TSCI in a predicament which he wouldn't elaborate as to what kind of predicament. I appealed it to his boss and was told basically the same thing. And I ultimately appealed it to Harold Clarke and was told that he supports and goes with what the warden said at the time.

SENATOR Dw. PEDERSEN: The second question I have for you is, there is a formal appeal process, is that right?

DUANE SANDERS: There is an appeal process that is disrupted because when you ask for the information or the OMs or ARs to best preparing...

SENATOR Dw. PEDERSEN: Would you tell the committee what them are? I mean, I know but I want...

DUANE SANDERS: The OMs are operational memorandums by which procedures and so forth are enacted and carried out. The ARs are administrative regulations which are also governing policies and procedures. But to know those which very few inmates do and I, you know, take the initiative to find those out, you have to request those from the legal library or through staff. They're not going to give you those things. Or they're going to make it very difficult and very long before you receive them. By then your appeals window is closed. When you receive them to best state your argument and your position and the reason why you should be released it's too late.

SENATOR Dw. PEDERSEN: Duane, I think it's important that the committee understand OMs, operational memorandum and the ARs, administrative regulations. When you come into the department as an inmate, how do you get them? What are they given to you in? Is it a handbook? I mean, I know it is a handbook but can you tell the committee what size that handbook is?

DUANE SANDERS: The handbook is, I think, like 6 by 9 and it only references certain OMs and ARs. To get the full content of what those are, you have to go to the law library

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which you have to write a kite for and basically have to ask or say why you're coming to the library. What they've done over the years is slowly and deliberately taken out and removed from all the libraries across the facilities certain and select OMs and ARs, especially those that address those things that inmates are most likely to attack or appeal or a grievance. So you have no viable access to them.

SENATOR Dw. PEDERSEN: I need to add just for the committee's sake, OMs and ARs are usually about this size. The OMs themselves are in a book that are over a foot tall and the ARs also are over a foot tall. And the inmate is requested, you are supposed to know what's in them, is that right?

DUANE SANDERS: You're supposed to know every syllable and every definition of them and when you don't know and can't articulate and have to rely on somebody else to do it for you, you're in a catch-22 because they'll tell you that you need to have said this and because you didn't say this or because you didn't get it in in a proper or stated time or because you failed to do some little minute thing that shouldn't make a difference, your appeal is thrown back, disregarded, lost, or whatever the case may be. It's not given any value.

SENATOR Dw. PEDERSEN: My last question for you Duane is, can you tell us a little bit what it was like after being locked up in the hole that long to reintegrate back into the yard?

DUANE SANDERS: After having been and I was fortunate in this time only having approximately nine months in there that you have to get used to being around people again because you're in isolation. It is just you by yourself with you. Now you're with people who are making noise and who are doing all kind of things and running around and that's a whole new adjustment to make. Then, of course, if they put you in a cell with somebody who you have to now learn his living habits and his social habits and his politics or whatever, and get used to that or adjust to that to where there's no conflict. And very rarely are you going to be put in the cell with a person who you have to live with for weeks or months unless and until they let you move if no physical confrontation breaks out and learn all of

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that.

SENATOR Dw. PEDERSEN: Thank you, Duane.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you. Appreciate your...

DUANE SANDERS: Thank you very much.

SENATOR BOURNE: Appreciate your testimony and your documentation you provided.

DUANE SANDERS: You're welcome.

SENATOR BOURNE: Further testifiers in support?

JAMES DAVIS: Good afternoon, Senator Bourne and the Judiciary Committee. My name is James Davis, D-a-v-i-s and I am the assistant state ombudsman. And basically, I've been in the ombudsman's office for approximately nine years and so I handle most of the correctional investigations. I'm going to go over what Mr. Sanders described as far as the physical makeup of the cells because basically he did an eloquent job in describing it. But I did work Mr. Sanders' case while he was on administrative confinement for approximately nine years and worked with communicating with the director and assistant director and the warden and the deputy warden on his particular case. In looking at his case it wasn't a situation where he should have been placed in administrative confinement. It was a long investigation and then basically documentations were going back and forth. And then we concluded that Mr. Sanders should not have been placed in administrative confinement for the actions that they seemed to say that was mutinous. Senator Aguilar had a question about whether or not when an individual placed on administrative confinement. You know, when they go in do they break down mentally? And, yes, they do. There's been a case with Jack West Martin who I've worked on for five years who pretty much had some illness but it deteriorated to the point where he became paranoid and delusional. And the reason why I say that because he was making obscene gestures and when he went to court because I had followed his case throughout the court and the judge was asking him questions and he just sat there and didn't try to defend himself. And then wouldn't eat. When he was in general

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population he weighed approximately maybe 220 and this guy is around probably 150 or 140 now. And I think his frame, he's probably 6'2" so there have been cases where people who have some normalcy when they go down into administrative confinement really break down mentally. Also, I've seen cases where individuals have been placed on administrative confinement and sexually assaulted because of a lack of security. And these individuals are mentally ill also and was not able to defend themselves. Also in administrative confinement I've seen cases where individuals have incurred more charges than what they were originally charged in coming into the system, have picked up more charges since they've been on administrative confinement because they were not able to be responsible for their own action because of the mental illness. And based on what I've seen is that the mental counselor or the staff are afraid to go down there and deal with these people. So if you have any questions, I'd be more than happy to answer.

SENATOR BOURNE: Thank you. Questions for Mr. Davis?  
Senator Chambers.

SENATOR CHAMBERS: Mr. Davis, when you receive a complaint such as that of Mr. Martin, what are some of the steps you go through in trying to resolve that complaint? How do you address it? With whom do you deal and what generally might the outcome be?

JAMES DAVIS: Well, first of all, what I'd do is I'd go down to the institution so I am physically at the institution inside the cells talking to these individuals because basically I don't want them to be transported across the yard in chains and shackles. So it's more convenient for me to go inside there and visit with them and then I go look at their record. And then based on what I determine, you know, on the information and the records I go talk to the deputy warden. Usually, their case, the individual case starts at the unit which is unit classification. They call UCC. So those individuals oversee that individual on the inmate on a daily basis but I'd go directly to the deputy warden. I'd give him my case and ask him, why do we have this guy on administrative confinement? And then I ask if this individual has a legitimate case, can we take him off of administrative confinement? Now the deputy warden is not the final word. It goes to the warden and then basically

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from the warden it goes to a director subcommittee which is the process that they go through and usually nine times out of ten I see that rubber stamp because I don't see them making independent decisions based off, one from another. So like if it starts at the unit classification which is the lower totem pole, then they try to guess what the institution wants. And then from there, from the institution to the warden and then from the warden to the director subcommittee. So pretty much they stay in unison. And the reason why I say that was because I worked a case where I saw the unit classification committee decide that they should pull this individual off administrative confinement. Then when it went up to the institutional level, the institutional level said, well, no, he should stay on. And then what happened was they send it back down to the unit classification and then they changed their mind and then they said, well, he should stay on. And then it went out to...I mean, it went up to the warden and then the director subcommittee and then they determine whether or not that individual stays on. Now they can appeal that process to the director review committee because we got a lot of committees here and there's no consistency. So, and remember, when a person serves on the committee and sits and decides whether an individual stays on administrative confinement, the next cycle it could be a different committee deciding that individual's fate. So they don't have to stick to what the previous committee has said. So once it gets up to the director review committee they can decide to appeal it or stay the sanction. And then basically it goes to the director, if you appeal it all the way up to the director.

SENATOR CHAMBERS: Just a follow-up because I want to get to this, if you don't mind. How many cases have you handled where a person was taken off administrative confinement?

JAMES DAVIS: I've had quite a bit and not because it was in good faith for the administration to take them off. It was just more persistent and hounding the administration and also indicating that I was going to involve you in the process. So, therefore, they may move to get that person off administrative confinement. But it's a tough road to get a person off administrative confinement. Usually the average stay I've seen since I've been doing it is usually a year or two. I mean, just the average. I have a case

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here...I have several cases here, one case where a guy has been on intensive management in AC for 15 years. Now, what happens with that is that they sort of get...they play the double-edge sword where they will say, well, we got you on disciplinary seg that you're doing disciplinary time and then also they'll say, well, we're going to put you in administrative confinement. So once your disciplinary seg time runs out, it carries over into your administrative confinement. Now the disciplinary seg time means that they have a certain time to pull you off of administrative confinement. I mean, disciplinary seg but when you're on AC there's no definite time where you will be pulled off. So you can do that time indefinitely. And a couple of cases I've worked a Fleming case where this individual was on administrative confinement and also intensive management for approximately 15 years. And one case which is a Troy Hess that I'm currently working on now who has been on intensive management and then transferred to administrative confinement and he's been there for 15 years. And what's ironic about that, I sat at his hearing and the administration indicated that we want to take the slow route to pull you off. And I'm just like, well, how slow can you get? If you've been on for 15 years and then you're going to put him on AC and he has abided by everything that they asked him, no misconduct reports approximately for a year, done his step program. And then they just said, well, we need to see you, how you accept disappointment. That was the kicker there.

SENATOR BOURNE: Thank you. Further questions? Senator Aguilar.

SENATOR AGUILAR: Earlier in the conversation about Mr. Thomas, they said he could never find out what he was charged with. In your role as ombudsman's office if you go to the deputy warden and ask him point blank, what are the charges that he did to deserve this being in the hole like this. Will they give you an answer directly or?

JAMES DAVIS: Usually I go to the files and pull it because the inmates don't have access to their criminal history records. Yeah, once I get into the files and start researching them, finding out what happened then I go directly to the deputy warden and ask, why are we keeping this guy on administrative confinement and so yeah, they

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will give me the answer if I ask them.

SENATOR AGUILAR: Okay. Now in the case of the person that was in there for 15 years, does his file show repeat incidences during those 15 years or this all back from the original time he was put in?

JAMES DAVIS: Yeah, like for example, this is Addendum A and I just brought this down with me. And the individual that we're talking about would be Troy Hess so with Addendum A it will give a brief synopsis of what he was charged with, the misconduct reports that he had incurred while he was on administrative confinement. And if you pass this to you so you get an idea. So it sort of gives you a brief synopsis so I can look at that form and see whether or not that individual has caused any problems while he's on administrative confinement. And it will tell me and basically one thing that's misleading about Addendum A is that if a person goes to IDC hearing which is Institutional Disciplinary Committee hearing for segregation and they beat that charge there then that information is supposed to be expunged from his record. Well, what the administration has done has carried that over and placed it under that classification action so therefore that information is not expunged and then they use that for placement on administrative confinement. They use that particular information that was supposed to be expunged and placed it on their Addendum A to further classify them on administrative confinement which they should not be doing.

SENATOR BOURNE: Thank you. Further questions? Senator Chambers.

SENATOR CHAMBERS: Just for clarification, so that would mean in doing that, they're violating their own procedures.

JAMES DAVIS: Correct and I have talked to the associate director, Larry Wayne, about this process. I've talked to the director Clarke about this process, and I've talked to the wardens about this process that they use. The thing is, with the IDC when you get a misconduct report and it's in our statutes that if it gets dismissed it's supposed to be expunged. Well, what they do is place it on the AC side and say, well, it's a classification action. It's not a disciplinary action. And, in fact, they use that as a

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disciplinary action and so that perpetuates them to place an individual on administrative confinement because they got that charge dismissed or they didn't serve enough time on disciplinary seg so that will carry over to AC and then that will continue their stay on administrative confinement.

SENATOR BOURNE: Thank you. Senator Aguilar.

SENATOR AGUILAR: I just want to point out to the committee, there's nothing on this file after 1993 as far as any charges against Mr. Hess.

JAMES DAVIS: Well, usually on Troy Hess but they'll go back and say 1993, this is what you did. I mean, as far as an escape and then pretty much they'll track his performance on IM. There's not too much you can get in trouble while you're on IM. And so what he did, Mr. Hess, has completed all of the classifications, I mean, the not the classification but the programs that they requested of him and then far exceeded that. So when it came to looking at him coming off it was like a court hearing where he had no rights. He just had to sit there and listen and basically we had a psychologist that was sitting on that committee who pretty much should have intervened and said something about his mental capacity or functioning. But, you know, I didn't hear anything from him other than the deputy warden who was pretty much calling all the shots. I mean, who was chairing the committee at the time and decided that we shouldn't pull you off because we should go slow. And, basically, I have the comments from him on Troy so when I look at the addendum A I also have the comments here too.

SENATOR BOURNE: Thank you. Senator Pedersen.

SENATOR DW. PEDERSEN: Thank you, Senator Bourne. You've answered most of the questions I was going to ask but a couple that are very important to me and I've passed you many times. And I know you've been out there much more than I have timewise. Is there any programs that you're aware of that would help these people...that they use in this confinement that would help a person change their behavior or be better than what they were, why they're in there, for what the reason they're in there?

JAMES DAVIS: And that's a good question. First of all,

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when I started looking to administrative confinement there's no programming while an individual is on administrative confinement. So, in other words, you don't have any counseling, you don't have any substance abuse, mental health, education program. Very rarely do they have a work assignment for you to do so a person is sitting idly on administrative confinement. So when the administration placed him on AC they don't deal with the issue. In other words, the issue which got them there. They don't have counselors down here to deal with it. They have a counselor come down and ask for your name, do you know where you are, and can you tell me what day it is? But pretty much, no, they don't have the one on one counseling. They don't have any programming for these individuals who are on administrative confinement, and I would think that we should have programming for these individuals who are on AC who need it the most but we don't provide any type of programming. So, yes, I think that we should have some counseling programming, I mean, in place. I think that we should have some educational programming for them. I also think that we should have substance abuse programming for them just as well as the individuals in general population and also jobs for these individuals while they are on AC.

SENATOR Dw. PEDERSEN: My last question is and not necessarily a question but it's something I'd like you to speak to because I don't want to make it sound like we're all against the institution completely. But is there any cases where this place can serve as something that we need to keep? Is there any good that comes at all from administrative segregation that you see?

JAMES DAVIS: Truthfully, no, I don't. I think that the department has intensive management. That's an area where you can place an individual on for a very long time and keep them there. You have disciplinary segregation and also you have administrative confinement. I think this system AC is broken. We need to fix it and if we can't fix it then we should do away with it.

SENATOR Dw. PEDERSEN: But the department does have a way that they can separate these people who are troublemakers or may be dangerous and still be humane.

JAMES DAVIS: Yeah, they could place them on IM which is

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intensive management just like, for example, they had an incident with David Dunster who...that issue where his roommate was murdered and they placed him on IM. So they do...they can put you on intensive management which is a different form of segregation but they have a lot of other options too. Like I say, they have disciplinary seg and they have IM. They have immediate segregation so when they put you on immediate segregation they can investigate what happens and determine whether or not to place you on AC or disciplinary seg.

SENATOR Dw. PEDERSEN: Thank you, Mr. Davis and thank you for all the work that you've done.

JAMES DAVIS: Thank you.

SENATOR BOURNE: Further questions? Senator Foley.

SENATOR FOLEY: Does the intensive management program involve placing them in the hole also?

JAMES DAVIS: Correct, it is. Intensive management is basically where an individual is placed probably in an 8 by 10 cell where on the back end you might have your shower and then you go out to the yard so everything is right there and your cell is really small.

SENATOR FOLEY: It's basically solitary confinement.

JAMES DAVIS: Correct. And AC is also solitary confinement so it's just more of a window dressing name that, you know, administrative confinement so.

SENATOR FOLEY: Do we have similar procedures for the female inmates?

JAMES DAVIS: That's a good question. The females at NCCW, based on cases I have investigated, were treated more at par than the men. And case in point where I was dealing with one case with a Pamela Moore, individual who had some mental illness, and as a result, lack of communication and mental health, refused. I mean, they did go back there but they just did the bare necessities and she had a serious mental condition, I mean, medical condition and they didn't get treatment to her in a timely fashion which ended up that

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that person died.

SENATOR FOLEY: Thank you.

SENATOR Dw. PEDERSEN: Any other questions from the committee? Seeing none, thank you, Mr. Davis. Did you have another question? Thank you, Mr. Davis. Next testifier?

GEORGE JOHNSTON: (Exhibit 9) I've got to squeeze four minutes into three minutes and could I give my name before you press the button? (laugh) My name is George Johnston, J-o-h-n-s-t-o-n. My son is an inmate in the Nebraska State Penitentiary, and currently held in administrative confinement since April of 2004 for an alleged assault of an inmate for which my son has maintained his innocence. A hearing was held by correctional professionals and my son was found not guilty. The misconduct charge against him was dismissed but the AC staff felt my son was guilty despite the dismissal and made their independent decision to place my son in AC for 90 days. After 90 days the staff made a decision to extend my son's confinement for an additional six months. Recently my son received another notice from staff that was recommending another six months. That's to be decided next month now. I'm not discounting the fact that the injured inmate suffered considerable medical needs. What I do challenge is that my son is being punished for the incident by being placed in AC after the charges were dismissed by correctional professionals. And the AC staff is making the decision to keep extending his confinement claiming it's for the good order of the facility. Please note that while my son was in general population and while he did receive several misconduct reports none were for fighting or endangering the good order of the facility. While he has been in AC for about a year now, he has no misconduct reports. He has on record a statement that he interacts appropriately with the staff and other inmates and, as a result of his conduct, he has also received good time restoration. I may not be totally accurate but I will be close in observing that in general population my son can work a job, go to the law library as needed, exercise in the yard, have as many books in his cell as he needs, have a chair to sit on, have a supportive bed, converse with other inmates as needed, and peace of mind. In administrative confinement my son cannot work a job, can only go the law library one hour a week, is allowed to exercise and walk in

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the yard for one hour. An exception was made after my son's back surgery but is periodically cancelled and then a kite needed to get an extension. He is limited to five books including a dictionary and a Bible. Has no chair to sit on in his cell or elsewhere. Sleeps on a stuffed bag called a mattress placed on a raised cement slab. He has limited access to converse with other inmates and because of the small cell, constant noise, he has no peace of mind like in general population. Now you tell me, is administrative confinement a punishment or not? I've alluded to a medical problem my son had which began after he was confined in AC. My son advised staff of his back pain back in February, 2004. For a while his complaints were ignored or at best took a long time to be acknowledged and checked out. These delays were a lack of medical attention and are documented in kites, forms used to communicate with inmates. My son's intense pain was ignored and to make a long story short, he eventually collapsed on the unit floor and had to crawl back to his cell to await medical attention. They would not help him. The having to crawl back to his cell is another matter but indicative of AC. He eventually had to have back surgery on his lower back and still suffers lower back pain and at this time is awaiting the staff and medical personnel to return him to the surgeon for further examination to see if he is healing properly or if something else needs to be done. This is documented by kites. Ignoring or delaying the action to inmates' needs, in my opinion, seems to be another form of harassment or punishment carried on in the AC section almost like in Iraq. There are more situations I could relate. However, I cannot prove them personally but can only relate that AC at NSP in my opinion is a vindictive, cruel and punishing place for inmates in general and needs better management and understanding of the inmates' mental and physical conditions and needs. Thank you for your time and interest. Please do something.

SENATOR Dw. PEDERSEN: Thank you, Mr. Johnston. Any questions from the committee?

GEORGE JOHNSTON: Yes, sir.

SENATOR Dw. PEDERSEN: Senator Chambers.

SENATOR CHAMBERS: Just one. Mr. Johnston, this confinement of your son began after a disciplinary action against him

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had been dismissed. Is that true?

GEORGE JOHNSTON: It was after the allegations were made, he was taken to AC and put there and then eventually a hearing took place at which time he was returned back to AC because despite the fact that everything, he was found not guilty and the allegations were dismissed. The staff in AC felt he was guilty and I've got that written...

SENATOR CHAMBERS: No, that's okay. You don't have to do that. I just want to be clear that it grew out of that one incident where he was found not guilty but because the AC staff felt he should have received some kind of punishment for it, he was put in AC and those periods were extended for him to remain there. Is that correct?

GEORGE JOHNSTON: That's correct, right.

SENATOR CHAMBERS: Okay.

GEORGE JOHNSTON: The reading of it says, due to the seriousness of the incident which led to his placement in segregation which, remember, was dismissed and he was found not guilty. Alleged assault causing bodily injury, the unit team recommends inmate Johnston be confined on administrative confinement status and review in six months. That's the, you know, taxation law, representation, so to speak (laugh).

SENATOR CHAMBERS: Thank you.

SENATOR Dw. PEDERSEN: Any other questions from the committee? I have a couple, Mr. Johnson (sic). You and I have known one another for a long time. How is your son's mental health and his physical health doing since you've seen him? I've seen him a couple of times. I know who he is.

GEORGE JOHNSTON: Well, he's frustrated. He's been found not guilty yet he's being punished. He is in prison because of actions resulting from drug and alcohol use and now he's sober. He's trying to pursue something that's (inaudible) for him and can't. I've sent him books. I've helped him enroll in a paralegal course he's going to go after the prison. And I hope he does. I'll support that. That will

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cost the state money. And while out of prison and still under drugs he maintained a 3.65 average. He's no dummy but he's stymied there now. He can't do anything.

SENATOR Dw. PEDERSEN: Where he's at, obviously, you haven't been to his housing unit but I've actually been to the housing unit. He's been good, hasn't he? I mean, he hasn't been a problem in AC?

GEORGE JOHNSTON: No, as I stated, they reinstated his good time. The officer on this form here says that since his last appearance before the director subcommittee inmate Johnston has received no misconduct reports. He interacts properly, appropriately with staff and other inmates and his good time has been restored. He's...

SENATOR Dw. PEDERSEN: So he got good time back while he's there and they still gave him another six months.

GEORGE JOHNSTON: (inaudible)...

SENATOR Dw. PEDERSEN: Just recently.

GEORGE JOHNSTON: Yeah, that's indicative on this form that that's what they're recommending and there will be a hearing next month on it.

SENATOR Dw. PEDERSEN: And he's never been found guilty. What all have you done to try and help your son?

GEORGE JOHNSTON: Well, I...like I mentioned, I go to the book stores and I send him books. He's only allowed five. He prefers to keep his dictionary and his Bible. That's what's sustaining him. And I helped him enroll in Blackstone paralegal course. He wants to be a paralegal while in prison and he's just...but he's...

SENATOR Dw. PEDERSEN: What have you done as far as the department goes? Have you...

GEORGE JOHNSTON: There's nothing that...

SENATOR Dw. PEDERSEN: ...what you've done individually for him but what...

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GEORGE JOHNSTON: Oh, okay, I'm sorry, yeah.

SENATOR Dw. PEDERSEN: ...could you tell the committee a little bit what you've had to go through, trying to help him?

GEORGE JOHNSTON: I met with the warden which he was kind enough to give me an hour and a half of his time and I appreciated it. But it got nowhere. It's double talk that they give you. It seems like one's afraid of the other and I don't know who the king pin is there. It's hard to tell. And I've written Larry Wayne. I did not go to Harold Clarke because Harold Clarke is transferring and whatever he does or says isn't going to hold any water. But I've even called and talked to his, a unit manager and asked him some questions. But it's all to no avail. They don't listen. They run a vindictive little self-serving combine (sic) down there.

SENATOR Dw. PEDERSEN: Thank you. Senator Friend.

SENATOR FRIEND: Thank you, Senator Pedersen. Mr. Johnston, I've been reading through some of the language in here and I guess based on a lot of the conversation that's been going on, let's say the assumption at the end of everything here was to actually get rid of, you know, this type of administrative confinement. Would you fear based on your experiences that in your situation, based on what they did to your son and how you've testified, you know, to that whole issue, that they would punish him through disciplinary segregation? I mean, I guess what I'm saying is if this went away, what makes us all believe that they wouldn't, you know, get real creative and start doing things...

GEORGE JOHNSTON: I, I...excuse me, I'm scared to death of being here. I'm scared to death for my son and his pursuits of what he's doing because what they'll do is, and I'm sure, it's predictable. They'll send him to Tecumseh. He'll be a nuisance. He's smart, he's a smart kid and he knows his law what little he's been allowed to learn up in the law library. And he's done some very innovative things in his attempts to get out of there so I'm scared to death. I'm scared to death that these people are going to try to get even some way or somehow. In fact, the warden's words were when I met with him was that, well, we're keeping him here

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possibly to protect him, implying that to protect him from another inmate who might have believed that my son had done this incident and tried to get even on behalf of the other party. But I don't believe that for a fact (phonetic). I'm scared to death that something is going to happen to him.

SENATOR FRIEND: Thanks.

SENATOR Dw. PEDERSEN: Any other questions from the committee? Thank you, Mr. Johnson (sic).

GEORGE JOHNSTON: Thank you.

SENATOR Dw. PEDERSEN: I'm going to do something that's unprecedented in this committee and that's...we're going to stop right now for five minutes, just take a five-minute break so some people can rest and we'll come back to this bill just immediately.

BREAK

SENATOR Dw. PEDERSEN: Do we have any more testimony in favor? Testimony in opposition.

SHARON LINDGREN: (Exhibit 10) I've already been warned that this is a dangerous seat for me so be gentle (laugh). I do have copies of my written statement. Good afternoon, Chairman Pedersen, I guess at the moment, and members of the Judiciary Committee. My name is Sharon Lindgren. That is spelled L-i-n-d-g-r-e-n. I am associate legal counsel for the Department of Correctional Services. I would like to comment on some of the concerns that the department has regarding LB 677. LB 677 would adversely affect the safety and security of the department's facilities. It would limit the ability to respond to violent inmates and to protect inmates who need to be isolated for their safety. The chief executive officer is given 14 days to investigate and to obtain sufficient evidence to prove beyond a reasonable doubt that segregation of an inmate is appropriate. Beyond a reasonable doubt as the proof required in a criminal case. Unless this burden is met in the 14-day period, the inmate would have to be returned to general population no matter what danger it was believed the inmate posed to others or the danger the inmate might face in general population. The bill gives the authority to make decisions on segregation to

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the chief executive officer of the facilities. It eliminates the involvement of the department's central office and of the director. At this time, the department has an internal appeal process and the requirement of periodic reviews. These checks and balances would be eliminated by this bill. This bill does not establish a process for the warden to make the decisions. However, due to the limitations placed on the warden's discretion and the need to prove that the inmate meets the statutory requirements beyond a reasonable doubt, a hearing would be necessary and this hearing would have to be completed in the 14-day period allowed under the bill for investigatory segregation. The proof required by the bill would make it almost impossible to use segregation in most situations. If it were believed that an inmate had assaulted another person it would have to be proved beyond a reasonable doubt that the inmate did the assault. In other words, we would have to have a criminal trial, that the assault posed a serious immediate and continuing threat to the facility, not just that there was a threat in the past but we have to predict the future beyond a reasonable doubt. And, finally, the way the bill is written, it has an and, and that the inmate committing the assault would be in danger if he remained in general population. If the proof was insufficient on any one of these, the inmate would be left in general population, again, no matter how dangerous or threatening the inmate was or the extent of the risk to the inmate. Administrative confinement which includes not only administrative confinement but involuntary protective custody and intensive management as it's defined in this bill is a way to control an inmate's ability to commit serious rule infractions and/or often criminal acts. As of February 11, 2005, there were 309 inmates on protective custody, administrative confinement, or intensive management. And this number includes voluntary protective custody. We don't have a way of singling them out. This is 7.6 percent of the inmate population. Of these inmates, only 117 have been segregated for more than one year. Passing this bill would limit the ability to control violence, serious acts of mischief in our correctional facilities which would increase the occurrence of serious actions including assaults on inmates and employees and would decrease the department's ability to protect inmates at risk. For these reasons, the department is opposing the passage. I had an interesting conversation with...

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SENATOR BOURNE: Ms. Lindgren, I'm sorry.

SHARON LINDGREN: Yeah.

SENATOR BOURNE: I've been entirely too lax this afternoon in our red light process and we've got three more bills yet to go. Can I ask...?

SHARON LINDGREN: That's fine. I know you do and it's been taking an awfully long time.

SENATOR BOURNE: Thank you.

SHARON LINDGREN: I'm willing to respond to any questions that the committee has.

SENATOR BOURNE: Appreciate that. Questions for Ms. Lindgren?

SHARON LINDGREN: Yes, Senator Chambers.

SENATOR BOURNE: Senator Chambers.

SENATOR CHAMBERS: Ms. Lindgren, I know you heard the testimony. The thing that troubles me would be these cases of people who have been in administrative confinement for 15 years. That is not supposed to be a punishment. Is that true?

SHARON LINDGREN: It is not a punishment. It is based upon the best discretion that the department has, that these people would still be a danger to other inmates or staff.

SENATOR CHAMBERS: How do they know that if a man has been locked up for 15 years?

SHARON LINDGREN: It's hard. I admit that it is hard. I admit that it's based upon a feeling or the best guess that we have but if we let someone out who we believe is dangerous and, in fact, they hurt someone then we are facing Eighth Amendment liability. And so we have to balance this and we have to have the discretion to make these types of judgment calls.

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SENATOR CHAMBERS: But when it's based on a feeling and a best guess, it's not acceptable to me because you're confining a person within a confined set of circumstances for 15 years with no counseling, no mental health care, no drug treatment, nothing. Now, you're a lawyer. Do you think a judge could sentence a person to solitary confinement for 15 years as a part of the sentence?

SHARON LINDGREN: Well, see, we disagree on whether this is solitary confinement and that, we can talk words for a long period of time...

SENATOR CHAMBERS: Okay, then let me not get into semantics. Is this person the only one in a cell?

SHARON LINDGREN: They are celled individually rather than having roommates because of the concern that they could harm their roommate.

SENATOR CHAMBERS: Okay, okay. Yes and no would be good where that can be answered in the interest of time, not to cut you off.

SHARON LINDGREN: Okay.

SENATOR CHAMBERS: How much time per day are they allowed out of that cell when they're on administrative...

SHARON LINDGREN: An hour.

SENATOR CHAMBERS: Okay, so in the cell alone 23 hours out of each day.

SHARON LINDGREN: That is correct.

SENATOR CHAMBERS: How many times can they shower?

SHARON LINDGREN: It depends on your classification. You can be in segregation and the showering privileges vary from intensive management to...

SENATOR CHAMBERS: I'm just talking about administrative confinement.

SHARON LINDGREN: I believe that that's three times a week.

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SENATOR CHAMBERS: Okay, now...

SHARON LINDGREN: This bill talks about administrative segregation, though, and it would include intensive management.

SENATOR CHAMBERS: Well, I'm not talking about the bill right now. I want to...

SHARON LINDGREN: Okay.

SENATOR CHAMBERS: ...have somebody from the department address these cases that were given to us. All right, if being in a cell 23 hours a day seven days a week for 15 years is not solitary confinement, what is solitary confinement in your opinion?

SHARON LINDGREN: Solitary confinement includes more of a sensory deprivation, no contact really with staff, no, you know, bedding, no mattress which they will lose if they abuse them. But we do not define that as solitary confinement nor does the ACA define that as solitary confinement.

SENATOR CHAMBERS: So then these are semantics and definitions are used...

SHARON LINDGREN: Um-hum.

SENATOR CHAMBERS: ...to characterize being locked up 23 hours a day seven days a week for 15 years. And the department obviously is comfortable with that or that would not have occurred. Is that correct?

SHARON LINDGREN: The department feels that there are inmates who need to have that type of control. Yes.

SENATOR CHAMBERS: If a man's crime, if you want to call it that, well, let's deal with the crime that got him there, writing bad checks. Then he's a problem because he asks questions or questions various things and winds up locked up for nine months and the original offense that got him into prison is not one of violence. He's not put in administrative confinement because of violence. How can the

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fear of violence be used as the excuse is what I would call it, the justification for maintaining him in that status?

SHARON LINDGREN: And I apologize, I don't know the facts of that case. And it would be inappropriate for me to then try to speculate and comment. I do not know why he was placed in administrative confinement or why he's being kept there. Obviously, I...

SENATOR CHAMBERS: Okay, that will answer...

SHARON LINDGREN: ...I couldn't research all...

SENATOR CHAMBERS: ...Well, since you can't answer it, I don't want you to go...again, not to cut you off. Are you the only one from the department who will testify today?

SHARON LINDGREN: I am the only one who will testify today.

SENATOR CHAMBERS: And you...they knew that because of the work that you do and your advisory capacity as an attorney, would not be able to comment on some of these issues that they could anticipate would be raised on a bill such as this and they sent you.

SHARON LINDGREN: No. I don't know that anyone could know the history of every inmate who's on administrative confinement...

SENATOR CHAMBERS: We're not talking about the history of every inmate. We're talking about a general ongoing practice. The director knows, wardens and deputy wardens know the concerns that surround administrative confinement even if you don't so for them to not come over here, for the director not to send somebody here I think is a disservice to the committee. You didn't make the decision. You don't even have to comment on that and I'd rather you not try to speculate and give them an excuse because if you try to do that, you're going to draw me into an exchange with you that you would ask not occur because you want to be treated gently. So I'd advise you to...well, you can answer however way you want to. Then I'll deal with it the way I think I should.

SHARON LINDGREN: If you want to talk about policy, I

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understand the policy. I was on a committee looking at segregation and analyzing how we do it...

SENATOR CHAMBERS: No, I don't want policy. I want specifics on specific cases.

SHARON LINDGREN: I couldn't and I doubt whether Harold Clarke or Frank Hopkins could discuss one inmate's case.

SENATOR CHAMBERS: That's all I would have. Thank you, Mr. Chairman.

SENATOR BOURNE: Thank you. Are there further questions? Thank you. Further questions, Senator Pedersen?

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Ms. Lindgren, do you have any idea why you were chosen to come over here today?

SHARON LINDGREN: Yes, because it was felt that I could discuss the language of the bill and its legal ramifications and how it would affect the institutions.

SENATOR Dw. PEDERSEN: Is the legal division or the legal department of the Department of Corrections, is it...obviously, if you're here then and you're aware of what's been going on with even policywise what's going on with the control units and a process that people... How often do you get involved in individual cases as far as those who file appeals?

SHARON LINDGREN: Appeals in disciplinary action or the appeals in classification?

SENATOR Dw. PEDERSEN: Either one.

SHARON LINDGREN: I sit on the appeals board for inmate discipline, the appeals from the IDC and I review those cases and prepare opinions in those cases. So I'm directly involved in the discipline part of it, day in, day out. If there is a major question in regard to segregation and the procedures or what can or cannot be done then we are often consulted on that.

SENATOR Dw. PEDERSEN: Only from your aspect as a legal

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person working for the department, you heard Mr. Johnston's testimony about his son, Sean, who is in the control unit at the NSP, Nebraska State Pen. In his case, for instance, he was found not to be guilty. How do you see that in your department as?

SHARON LINDGREN: We handle that in two different ways. If, for example, I don't know if he was found not guilty by the IDC or the appeals board. I'll use the appeals board for an example. If we find that there's insufficient evidence that the inmate committed the offense, 1) we will always reverse it, and 2) then there is a question whether there's sufficient evidence to use that incident in classification. However, we also reverse a number of them on procedural matters. You know, someone failed to file the misconduct report within 72 hours. That doesn't mean that the act didn't occur. It means that we violated a procedure and because we violated that procedure again, the appeals board will reverse the charges. And so that's the type of information I don't have on this particular case. I don't know why it was dismissed, whether it was a failure to make a timing procedure or a failure to, you know, say the right things on the action sheet. So I don't know. And I, you know, if I had known ahead of time that this was the case that was going to be discussed, I assure you I would have looked it up and I would have been able to provide this information.

SENATOR Dw. PEDERSEN: Is it common practice of the department...Mr. Davis spoke about where something is supposed to be expunged and they move it over to another side, to another case, addendum A or something. Does that sound right?

SHARON LINDGREN: Addendum A is a classification document prepared by the unit staff and it is a summary of why they think the person should remain in segregation or be removed from segregation and it goes both ways. And, as I said, you know, if a disciplinary action was dismissed for a procedural reason there still is a factual basis for saying that inmate hurt someone or tried to escape or whatever the facts are. Then it can be used in classification. If it's reversed or it's a finding that there's not enough evidence then it should not be used in classification. So it depends on why it was dismissed or reversed.

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SENATOR DW. PEDERSEN: Thank you.

SENATOR BOURNE: Further questions? Senator Aguilar.

SHARON LINDGREN: Yes.

SENATOR AGUILAR: Here's a part I'm having trouble understanding and let's talk about the young man that was in AC for 15 years.

SHARON LINDGREN: Um-hum, Mr. Fleming or...

SENATOR AGUILAR: Whichever one. Okay?

SHARON LINDGREN: Okay.

SENATOR AGUILAR: From what I understood from earlier testimony, in that time period there is no mental health evaluation to speak of. How would anyone have a clue after that period of time whether or not that person is still violent, still a threat to the facility without a proper evaluation?

SHARON LINDGREN: There are mental health evaluations and we also have a mental health professional on the classification review committee so we do have mental health's input.

SENATOR AGUILAR: Thank you.

SHARON LINDGREN: Also if they want to see a mental health worker they can request it and one will be brought down to the area and they will be able to meet in privacy...

SENATOR AGUILAR: Thank you.

SHARON LINDGREN: ...in order to deal with the problem.

SENATOR AGUILAR: From what we heard earlier testimony and I believe it was from the ombudsman's office but I can be corrected if I'm wrong.

SHARON LINDGREN: Yep.

SENATOR AGUILAR: But that mental health evaluation

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consisted of what is your name and do you know what day it is.

SHARON LINDGREN: Those are weekly checks just to check on whether an individual is suicidal or he's having major problems. There are provisions for periodic mental health evaluations that are more in-depth and also if they want mental health visits or treatment they can sure ask for it and we will make sure it's provided.

SENATOR AGUILAR: And do you know for a fact that they are provided in all cases when...?

SHARON LINDGREN: As far as I know in any cases I've seen it has been provided.

SENATOR AGUILAR: Thank you.

SHARON LINDGREN: You know, once again, I'm an attorney, I'm going to fudge. I don't know that I could say every case but whenever I've become involved in one of them I have seen that it's been provided.

SENATOR AGUILAR: So you can understand with that answer why we're a little disappointed there's not somebody here that can provide...

SHARON LINDGREN: They couldn't say either because you don't know everything that happens.

SENATOR AGUILAR: Thank you.

SENATOR BOURNE: Thank you. Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne and thank you for your testimony today. I'm primarily interested in the testimony of Mr. Butz and the story about Lonnie Thomas who had HIV. He was HIV positive prior to being incarcerated in our state in the Department of Corrections. Could you answer a couple of questions for me with regard to the procedures and policies for an HIV positive inmate?

SHARON LINDGREN: Definitely.

SENATOR FLOOD: And I should ask you, are you familiar with

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Mr. Thomas' case?

SHARON LINDGREN: My understanding of Mr. Thomas' case is that we had evidence that he had AIDS and that he continued to be sexually active with other inmates.

SENATOR FLOOD: That seems to...your testimony certainly is in contrast to the testimony of Mr. Butz who suggested that at no time did he have a history of violence, sexual assault, predatory behavior.

SHARON LINDGREN: He may not have had the predatory behavior but he was, through our information, and, once again, Mr. Butz has a client. Our knowledge was that he was engaging in sex with other inmates with the risk that they would get AIDS and we felt that that was a threat to the security.

SENATOR FLOOD: And it's your testimony today that his behavior was not predatory.

SHARON LINDGREN: I don't know...is having sex in a prison, when you have AIDS and not informing other inmates, predatory? I think we could argue that.

SENATOR FLOOD: Was...

SHARON LINDGREN: You know. If I have sex with you and you can get AIDS that may be deemed to be predatory if I know I have the disease.

SENATOR FLOOD: Let's not go there. With regard to Lonnie Thomas, was he placed in segregation, in part, because he was a homosexual?

SHARON LINDGREN: No, it was because he had AIDS.

SENATOR FLOOD: Did he have AIDS or was he HIV positive? There is a difference.

SHARON LINDGREN: My understanding is he had AIDS. And if you listened to Mr. Butz testimony closely, he did point out that this went to trial and that they did not win at trial, that this was an inappropriate placement. It was on appeal to the Supreme Court, had already gone through the lower

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courts so, you know, obviously, there is a difference of opinion.

SENATOR FLOOD: How many inmates in administrative segregation are HIV positive?

SHARON LINDGREN: I think at most we have had three or four at different times.

SENATOR FLOOD: How many in the Department of Corrections system are HIV positive?

SHARON LINDGREN: There are a number of them. I cannot give you the exact number. One, that information is confidential. We do check everyone for HIV so the medical staff does know that but inmate medical records are confidential. And we do not let people know which inmates have HIV, which inmates have hepatitis C, those types of diseases. They are allowed to be in general population unless there is a medical need to isolate them and they are able to have jobs, they are able to work in the kitchen. I just dealt with a matter where there was confusion at York and a woman was removed from working in the kitchen because she had HIV, and I have corrected that. It was brought my attention and I was assigned to look into it and we've corrected that policy because they made a mistake.

SENATOR FLOOD: Is it possible that someone could be placed in administrative segregation because they have HIV, that they are HIV positive?

SHARON LINDGREN: There would have to be something else in their behavior.

SENATOR FLOOD: And what specifically do you look for in their behavior that would cause the Department of Corrections to place that individual in administrative segregation?

SHARON LINDGREN: If they assaulted another inmate, if they tried to escape, if they hurt a staff member.

SENATOR FLOOD: And none of those things occurred with regard to Mr. Thomas. It sounds as though he may have engaged in what we might assume was consensual sex. Is that

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safe to say?

SHARON LINDGREN: It could be but he was...he knew that he was in a position that he could endanger other people by engaging in this behavior. And we really...having a spread of HIV or AIDS, full-fledged AIDS within a prison is not a positive thing, and it's a very expensive thing. And so it was felt that rather than putting other inmates at risk it was better to have him isolated.

SENATOR FLOOD: Are all inmates that engage in sexual activity placed in administrative segregation?

SHARON LINDGREN: No. One of the offenses we have in discipline is engaging in certain sexual behaviors but in order to violate that it's got to have more of a force to it or, you know, that there is something more than just engaging in a sexual relationship. And the mere fact that inmates, at times, I'm sure have sex, it's not going to probably get you in AC unless there is something more. If I sexually assault another inmate, then that involves force and that will get you into segregation. And it should get you into segregation.

SENATOR FLOOD: What specifically about the due process suggested in Senator Pedersen's bill frustrates the Department of Corrections? In a system that we have evidence of, has a number of different forms and processes for inmates to complete and be processed through when they have a question or a concern or?

SHARON LINDGREN: One is the standard of proof beyond a reasonable doubt. As I said, that's what we use in criminal cases. It is much higher than what we use in inmate discipline actions. Two, the way the bill is written we not only would have to have, as I pointed out, some belief or we would have to have proof beyond a reasonable doubt that inmate X assaulted someone. We would have to have proof that this is a continuing threat. It wasn't just a one incident. We'd have to have proof that it's a continuing threat beyond a reasonable doubt which is, again, you know, we're proving future dangerousness beyond a reasonable doubt. And the way it's written it has an and, and that this inmate would be in danger in general population.

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SENATOR FLOOD: What standard of proof would you prefer other than this?

SHARON LINDGREN: We would prefer not having the bill. But...

SENATOR FLOOD: But what standard of proof would you prefer?

SHARON LINDGREN: But, okay, in a disciplinary action it is substantial evidence which is more than a little evidence. It's enough to persuade you that this might have happened. That's for discipline. That's under Wolff v. McDonnell. To go from there to beyond a reasonable doubt, I think is a massive jump so I'd be looking at something at least what we use to discipline inmates, if not less. Once again, as I said, we'd prefer not to have it but beyond a reasonable doubt,...

SENATOR FLOOD: What about clear and convincing if we amended the bill to say clear and convincing, would that make more sense to you?

SHARON LINDGREN: I think I would like it less and I think clear and convincing is more than what we use in discipline. I think it's more than substantial. If you read the definitions in the court decisions.

SENATOR FLOOD: What about a preponderance of the evidence?

SHARON LINDGREN: I think that's still more than what we'd use in discipline. I mean, discipline at least...

SENATOR FLOOD: And doesn't it leave this decision to a somewhat subjective...doesn't it...the standard of evidence you want to use which is basically if I wake up that day and decide that this individual is going to hurt somebody in three days or two years or ten years, isn't that a subjective standard versus something that I'm asking for that is a standard grounded in the law? As a lawyer, don't you appreciate a standard grounded in the law rather than some subjective standard that gives an administrator...?

SHARON LINDGREN: I think there are situations in which administrators have to have discretion to make decisions based upon their training and their expertise. And one of

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the things that the department and their administrators are required to do is to do whatever they can to make sure that people are not hurt in our institutions by other inmates or staff. I mean, you know, I don't want anyone hurting anyone and we have to be able to look at it and say, you know, there is something...

SENATOR FLOOD: And I can appreciate that point but can you...would you agree with me that the standard that you...

SHARON LINDGREN: I would want some evidence, some evidence to support that this is our belief.

SENATOR FLOOD: Doesn't it seem rather subjective if we look at the current standard used today?

SHARON LINDGREN: It is a discretion that has been traditionally given to correctional administrators here and in other states. And it is recognized...

SENATOR FLOOD: Can you see...and I appreciate that but can you see where we sit on this committee and we hear testimony about someone living in a 6 by 8 box with a steel door and a small hole and two small windows and wonder why...and would think that at least there would be some hard evidence that would place somebody there rather than the subjective decision of an administrator given that true restriction of freedom?

SHARON LINDGREN: I think if we sat down and went through those people who are in segregation, either in voluntary protective custody, administrative confinement, or intensive management I think you would find that there is a basis for their being there. And people will disagree. We're willing to listen to input from the ombudsman's office, from family, but when push comes to shove, if it's still felt that there is evidence that this person could still be dangerous, that he could hurt someone. I don't want to come back next year and be testifying on, okay, we passed this bill. Why are you having X number of employees assaulted?...

SENATOR FLOOD: And I appreciate that. I appreciate your testimony and thank you very much. I don't mean to cut you off but I know the committee's got another (inaudible)...

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SHARON LINDGREN: Yeah, but I mean, I don't want to be here next year explaining why are your prisons violent? And this is one of our tools.

SENATOR BOURNE: Thank you. Further questions? Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. I'll make this fairly fast, Ms. Lindgren.

SHARON LINDGREN: Fine.

SENATOR Dw. PEDERSEN: When we're talking about understanding or feeling...let me go back to the Johnston case. You know, there's...we feel that he might...that he was still guilty of this assault that he's doing time in the control unit for. Does a lot of times that feeling and understanding and that type of stuff come from hearsay or snitches in the population?

SHARON LINDGREN: We have a pretty strict policy that we do not base decisions upon snitches or inmates' statements. I will tell you that I...when I represent the department in the Attorney General's Office, I got in on the end of the snitch system so I know what it is. And it did exist years and years ago. I'm talking late seventies, early eighties. In fact, in discipline, if all...that the only testimony we have is one inmate saying another inmate did this and the inmate denying it or even confidential informants, we will usually not uphold the discipline. I had one that I just worked on yesterday. I was writing a decision on, and I reversed the finding that an inmate had assaulted another inmate because the only testimony I had were two inmates saying the assault occurred and three saying that it didn't. And based on that, I gave the inmate facing the disciplinary charges the benefit of the doubt and reversed the institution's finding...

SENATOR Dw. PEDERSEN: Then why...

SHARON LINDGREN: ...and we do that because we don't want to rely upon a snitch system. We want to have some valid evidence of injuries. We want to have something that will substantiate what's going on because a snitch system is not a good system so we don't work on that. We try to work upon

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what we can prove and what we know.

SENATOR Dw. PEDERSEN: But as you know, we still have people locked up in the control units like Mr. Johnson (sic) who they have not been proven did nothing more than appealing.

SHARON LINDGREN: There is probably, as I said, if I had known this was going to be this case, I sure would have pulled his file and I sure would have been ready to talk on it. And anyone else who would come to testify would have been in the same position, that they would have had to have some notice in order to update themselves on what's going on and the status and to review it. But...

SENATOR Dw. PEDERSEN: In the essence of time, if you will look up that case and contact my office, I would appreciate it. His name is Sean, S-e-a-n Johnston, J-o-h-n-s-t-o-n. And I don't have his number right off the top of my head but he's in NSP.

SHARON LINDGREN: I can find that. Yeah, as long as, you know, no one has an object to privacy I will share any information I have. And, you know, if I look into it and I feel there's a problem, I'll promise you something. I will bring it up to the upper administration and say, I think we have a problem here. I'm not afraid to do that.

SENATOR Dw. PEDERSEN: Thank you.

SENATOR BOURNE: Thank you. Further questions?  
Seeing...oops, Senator Chambers.

SENATOR CHAMBERS: Just a comment. Ms. Lindgren,...

SHARON LINDGREN: Do you want me to look up another case?

SENATOR CHAMBERS: No, no. I've been dealing with the Department of Corrections for 35 years. I've had many cases referred to me and I've referred cases to the ombudsman. I have been involved in cases where guards have lied, administrators have been found to lie. We had a man not too many days ago talking about, in one instance, he supervised certain people out at the institution. Then he didn't. So, fortunately, for the inmates and the people of this state the smooth presentation of a lawyer who's put in a position

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to say, I don't know, is not going to determine how we vote. We decide these issues and your presentation to me has not been convincing of anything except what these inmates confront when they face these disciplinary proceedings. And I'm the one you were answering when you said, a feeling and a hunch is why somebody might be kept in administrative confinement for 15 years. The cavalier, flippant, almost jesting manner of presenting what you offered, the defense of people who are not even here, based on what they wouldn't know either. Well, some of them would because they've been involved in some of these cases so I don't want you to go away from here thinking that because I didn't ask a lot of questions I had been snookered or that my view had been moved to support that of the Department of Corrections. I get volumes of mail. I get complaints from family members, lawyers, and even some corrections employees about certain things that are happening and that's why I can speak with such authority on some of these cases. So I don't want you to leave here with the wrong impression and that's not a question so you don't have to respond...

SHARON LINDGREN: I'm going to respond.

SENATOR BOURNE: No, I'd rather you didn't. We're going to move...

SENATOR CHAMBERS: No.

SHARON LINDGREN: May I just say one thing?

SENATOR BOURNE: We're going to move on.

SHARON LINDGREN: That was not my impression, Senator. I have great respect for you and I always have. Okay?

SENATOR BOURNE: Thank you, Ms. Lindgren, appreciate your testimony. Are there further opponents to the bill? Are there any neutral testifiers? Senator Pedersen, to close. Closing is waived. That will conclude the hearing on LB 677. Senator Brashear to open on LB 538. As Senator Brashear makes his way forward, could I get a showing of hands of those here to testify in support? I see one, two, three...I see five. Those in opposition? There are no opponents to the bill. Are there any neutral testifiers? I see none. Senator Brashear. It was kind of like deja vu

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all over again, wasn't it?

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SENATOR BRASHEAR: Maybe more than I wish it had been. Chairman Bourne, members of the Judiciary Committee, my name is Kermit Brashear. I'm a legislator. I represent District 4. I come in introduction and support of LB 538. LB 46 which was a Comprehensive Community Corrections Act was passed during the 2003 legislative session. Key components of LB 46 included strategies to reduce reliance on incarceration in order to prevent the need of building another prison and for multiple other reasons of good public policy, I would suggest, and to encourage the use of sentencing alternatives through probation and parole. Central to LB 46 was creation of the Community Corrections Council to oversee and ensure that a continuum of community corrections is developed for use by probationers and parolees. I serve as chair of the council and a privilege to do so. Since the formation of the council, in accordance with the council's duties under the Community Corrections Act, issues focusing on offender supervision in the community have been and continue to be addressed. Such subject areas include drug treatment of offenders, the incorporation of problem-solving courts specifically drug courts in community corrections and enhancing probation and parole services. LB 538, the instant bill, is designed to make the statutory changes needed in the opinion of the Community Corrections Council to effectively deal with these matters. LB 538 makes the following statutory changes. A council member is added from the Health and Human Services System in order to make a formal link between the criminal justice system or the council and the state agency responsible for substance abuse treatment. This reflects the importance of treatment as part of the mission of community corrections and that of the council. Language is included within the Community Corrections Act to clarify administrative processes of the council within the crime commission and to ensure that community corrections includes specialized problem-solving courts. Probation and parole administrations are to ensure the risk and needs assessment instruments that are utilized are validated in order to make reliable recommendations regarding the proper placement of offenders among the range of options available within

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community corrections and traditional incarceration. Administrative and supervision fee collection from participants in problem-solving courts including drug courts is incorporated. A duty of the council is added to study substance abuse treatment for offenders, provide recommendations as a result of such study, and evaluate the implementation of actions taken pursuant to the recommendations. An intensive drug treatment component to the Work Ethic Camp at McCook is incorporated and language clarified regarding the eligibility of Work Ethic Camp participants. The Work Ethic Camp program does not currently have an intensive drug treatment aspect. The crime of assault of an officer has changed to include probation officers and youth rehabilitation center employees under the Office of Juvenile Services. The Nebraska Supreme Court is permitted to direct probation officers to participate in drug court programs. LB 538 also amends civil forfeiture provisions to make certain the procedure is a civil forfeiture, able to be utilized by local law enforcement, and to assure a portion of such funds be utilized for drug treatment. The council determined to enter into the issues in the area of forfeiture because it viewed the proceeds of such as a potential source of resources for treatment programs for felony drug offenders. It is only appropriate in the judgment of the council that the property used by and the illicit gains obtained by drug traffickers be used by the state to offset the cost of addressing the addictive behaviors of drug users. I'll be happy to provide more information, of course, to the committee regarding any of these issues and to answer any questions you might have. I understand the judicial branch has some issues with one aspect of the bill which I hope can be addressed through an amendment and I'm happy to work with the committee on any of the issues that might arise. Thank you.

SENATOR BOURNE: Thank you. Questions for Speaker Brashear?  
Senator Chambers.

SENATOR CHAMBERS: Not a question but there are a number of issues that you know I will have and we will discuss those as we always do other than during the hearing.

SENATOR BOURNE: Thank you. Further questions? I have some questions as well regarding the shift of the burden of proof

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and that but since it's almost 5 and we have two to go, we'll (inaudible) another time...

SENATOR CHAMBERS: And he's a fish in our barrel so we'll have access to him (laugh).

SENATOR BOURNE: That's right (laughter). Further questions?

SENATOR BRASHEAR: And I'll be happy to work with the committee, obviously, in any way that I need to.

SENATOR BOURNE: Oh, obviously, absolutely. Thank you. Seeing no questions, appreciate your testimony. Next testifier in support or I should say first testifier in support.

JOHN HENDRY: (Exhibits 11, 12) Mr. Chairman and members of the Judiciary Committee, my name is John V. Hendry. I am the Chief Justice of the Nebraska Supreme Court. I appear today on behalf of the Supreme Court in support of sections 15 through 19 of LB 538. Effective July 16, 2004, the Legislature enacted what is now 24-1301 in the Nebraska Statutes. In 24-1301 the Legislature found that "drug court programs are effective in reducing recidivism of persons who participate in and complete drug court programs. The Legislature recognizes that a drug court program offers a person accused of drug offenses an alternative to traditional criminal justice or juvenile justice proceedings. The Supreme Court is also of the view that drug courts programs are effective in one, reducing recidivism and two, giving nonviolent drug offenders a second opportunity for a meaningful life. The Supreme Court is actively engaged in attempting to expand our drug court programs across the state of Nebraska. Frankly, I look at the issue of statewide expansion as one of equal opportunity. The Nebraska citizens access to the advantages of drug courts should not be dependent upon his or her geographic location. Drug courts have shown it to be an effective tool in addressing drug addiction. I have handed out to the committee a cost benefit analysis of the Douglas County Drug Court prepared March 31, 2004, in a one-page document entitled Drug Court Benefits in Douglas County. As these documents indicate, there was determined to be a total cost savings of \$11,336 per drug court participant over more

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traditional means of judicial sanctions. In addition, recidivism outcomes were significantly lower for drug court participants than for matching offenders who were sanctioned in a more traditional fashion. In the Supreme Court's budget it requested approximately \$900,000 to aid in its efforts to expand drug court programs. However, neither the governor's proposed budget nor the tentative draft budget of the Appropriations Committee appropriates to the Supreme Court any money to support these efforts. LB 538 may provide the only means of financial support to the Supreme Court's initiative. LB 538 assists the court in its effort in two ways. First, LB 538 would permit the Community Corrections Council in its discretion to provide some funding to the Supreme Court to support its drug court program initiative. Secondly, LB 538 would permit our probation officers to provide supervision to offenders in these drug court programs. Any funds that would be generated from the Community Corrections Council as a result of the passage of LB 538 would not, in my view, be sufficient to sustain the statewide effort. However, given the probability that no other funds appear to be forthcoming to the court in its effort, LB 538 would appear to be the Supreme Court's only hope for financial support.

SENATOR BOURNE: Thank you. Questions for Chief Justice Hendry? Seeing none, Senator Chambers.

SENATOR CHAMBERS: Not questions but just a statement. There are some things in your area of support of the bill that I'm going to have to consider but I'm not going to go through any questioning right now.

JOHN HENDRY: Okay. Thank you, Senator.

SENATOR BOURNE: Further questions? Seeing none, thank you.

JOHN HENDRY: Thank you.

SENATOR BOURNE: Next testifier in support?

LINDA KRUTZ: (Exhibit 13) Good afternoon, Chairman Bourne and members of the Judiciary Committee. My name is Linda Krutz and I am the chief of the Community Corrections Council. The Council has continued to work to identify gaps and needs within the justice system and LB 538 addresses

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some of those issues. The council felt it would be helpful to have a representative of the Health and Human Services System on the council since they are the agency responsible for providing substance abuse services in Nebraska. While they currently serve some of the population that would also be served by Community Corrections it was determined they should participate as a nonvoting member since they are not directly a part of the justice system. The council assessed the current use of the Work Ethic Camp, considered feedback from probation officers and parole officers and felt it would be appropriate to add an intensive drug treatment component. It is believed the Work Ethic Camp could be used to its fullest potential and capacity if additional substance abuse programming were added. The council also reviewed the current civil forfeiture provisions. While the council recognizes the importance of the current uses of forfeiture funds they also feel that it is critical for the procedure to be civil and assure that a portion of those funds be utilized for drug treatment. The council recognizes the importance of drug treatment for offenders and the benefits of providing substance abuse services and supervision in the community. Ongoing study and analysis of the current system of delivering those services and the proposed implementation of best practices relating to substance abuse services needs to continue. The bill also designates that participants in specialized programs shall pay the one-time administrative fee and the monthly probation programming fee. District probation officers will participate in drug court programs and other specialized programs with consideration given to current workload. Payment of fees by drug court and specialized program participants would expand and allow for the sharing of resources. In addition, LB 538 would allow probation officers and the staff of the Youth Rehabilitation Treatment Center to receive the same protection from assaults that other Department of Correctional Services employees including parole officers currently have. The bill also includes language that would clarify the working relationship between the council and the crime commission. It would remove the conflicting identification of the executive director as chief and also broaden the use of the Uniform Data Fund to include analysis. This summarizes some of the most critical changes the council has identified as being necessary for providing public safety while allowing for rehabilitation and enhanced substance abuse services to

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combat the growing number of substance related problems in Nebraska and the continued growth of the prison population. The council believes with enhanced services including programming and additional personnel for supervision, more offenders can be safely managed in the community thereby better managing prison space and delaying the immediate need for building another prison.

SENATOR BOURNE: Thank you. Questions for Ms. Krutz?  
Senator Chambers.

SENATOR CHAMBERS: This Community Corrections Council from what I read here had something to do with determining that fees should be paid by these participants. Are they just in agreement with that or is that one of their recommendations?

LINDA KRUTZ: Is the council in...is it a recommendation of the council to pay fees?

SENATOR CHAMBERS: Um-hum.

LINDA KRUTZ: They were in agreement that that should happen. That was a...

SENATOR CHAMBERS: But they didn't originate that idea.

LINDA KRUTZ: It was a discussion that happened within the council, yes.

SENATOR CHAMBERS: Was a vote taken?

LINDA KRUTZ: Yes.

SENATOR CHAMBERS: And the council voted for the fees.

LINDA KRUTZ: Yes.

SENATOR CHAMBERS: To raise money.

LINDA KRUTZ: Yes.

SENATOR CHAMBERS: Because they can't get it anywhere else probably.

LINDA KRUTZ: Probably (laugh).

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SENATOR CHAMBERS: So it's not that these fees are felt to be a good thing. They're fallback. In other words, payment of the fee is not expected to enhance the treatment received by the person receiving it or creating in that person a feeling of responsibility. It's cash register justice, isn't it?

LINDA KRUTZ: Well, no, I don't think so. I think actually as the fees are collected now they are designed to provide services back to currently the probation...those fees have not been expended at this point. But the council has taken a long time and made some careful consideration of trying to create a program that would most benefit those offenders. And so if...

SENATOR CHAMBERS: How much money do they have then from these fees, just if you have any idea?

LINDA KRUTZ: Probation has, I think, about 2.8 million and as was earlier stated, I think parole has about \$60,000.

SENATOR CHAMBERS: From these fees so far.

LINDA KRUTZ: Um-hum.

SENATOR CHAMBERS: That's all I would have. Thank you.

LINDA KRUTZ: So far, um-hum.

SENATOR BOURNE: Thank you. Further questions? Senator Flood.

SENATOR FLOOD: Real quick and I thank you for your testimony. Methamphetamine abuse and addiction in Nebraska is out of control.

LINDA KRUTZ: That's correct.

SENATOR FLOOD: Would the drug service, treatment services include in-patient services or would that be your goal?

LINDA KRUTZ: Well, I would concur with you, Senator Flood, just we have identified through, you know, talking with probation and parole officers that that's also a concern of

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theirs. And we are still in the process of working on how we would deliver those services. There's been great progress made on that in about the last month, I'd say, and so probation...we have a meeting this week and probation has worked very hard to come up with a plan for delivery of services, those type of services, so I would think that certainly in-patient would be a part of that plan.

SENATOR FLOOD: And at this point across the state, have you found in-patient treatment almost impossible to secure?

LINDA KRUTZ: We did a probation and parole survey in April of 2004 of this year, and I would have to say that from the field staff, that was one of the really primary frustrations for them is the number of methamphetamine clients they deal with and the intensity of those addictions and the lack of services to deal with them. There's a feeling and a belief and that methamphetamine almost takes a special kind of addictions treatment to be effective, longer term.

SENATOR FLOOD: Thank you very much.

LINDA KRUTZ: Um-hum.

SENATOR BOURNE: Further questions? Seeing none, thank you. Next testifier in support? (See also Exhibit 14)

DAVID WEGNER: Mr. Chairman and members of the Judiciary Committee, my name is David Wegner, W-e-g-n-e-r and I'm happy to be the acting probation administrator with the Administrative Office of Courts and Probation. I'm speaking today in support of a particular section of LB 538, 29-2258(15). This particular section of LB 538 would allow the Nebraska probation system to participate in drug court programs and other specialized programs and services within the district, county, and juvenile courts as directed by the Supreme Court. As the probation system has only been authorized by statute to supervise adjudicated adult offenders, this would allow for the supervision of either preadjudication or predisposition adult offenders. Understandably, the passage of this legislation may impact the probation system's workload. This factor was considered in a most recent adjustment request and there seems to be some latitude across the state which would accommodate this impact. Should LB 538 be passed? Workload assessments

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would be completed and any impact demonstrated in a request for the next biennium budget. This opens a new door for what has been a rather traditional probation system. This change is embraced by the Supreme Court, probation administration, chief probation officers, ISP or intensive supervision coordinators, and probation officers in general. We understand this is a new day in the criminal justice system as traditional probation systems are being modified, allowing for community corrections, drug courts, problem-solving courts, and we want to play an intricate role in this development so as to assure that strength-based supervision is being completed while assuring of community safety. I appreciate the ability this afternoon to provide this testimony and would be glad to answer any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Wegner?  
Senator Chambers.

SENATOR CHAMBERS: Rarely does a person come before this committee with a song in his heart but you almost achieved that. A question I would ask is, if there is a fiscal impact on probation, where will probation get additional money if needed?

DAVID WEGNER: Senator, we have, obviously, this year requested the Legislature, the General Fund, for additional staffing and will make our appeal, of course, in front of the Appropriations Committee on the 28th in regards to that. And some of this impact was considered in that request. We are also and have prepared a programming piece to meet some of these needs that will be presented to the Community Corrections Council that will spend some of those funds, as a matter of fact, to impact methamphetamine felony drug offenders out in the field to assist them in programming and getting some help and treatment.

SENATOR CHAMBERS: But they're not looking at coming to try to get additional fees imposed if they don't get the General Fund money, are they?

DAVID WEGNER: I am not.

SENATOR CHAMBERS: Okay. That's all I would have. Thank you.

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SENATOR BOURNE: Further questions? Seeing none, thank you.

DAVID WEGNER: Thank you.

SENATOR BOURNE: Next testifier in support?

JOE KELLY: Mr. Chairman, members of the committee, my name is Joe Kelly, K-e-l-l-y. I'm a chief deputy county attorney in Lancaster County, Nebraska. I'm also a member of the Community Corrections Council and I'm here to testify in support of this bill. One quick clarification to some previous testimony. The fees that have been referred to and the amounts that have been collected came from the original LB 46 legislation that authorized, I'll use very rounded-off numbers, fees in the range of \$35 to \$25 a month from probationers and parolees. And so that's where those figures do come from. I thought I'd take one issue that's in this piece of legislation, LB 538 and offer a quick explanation. In 1999, the Franco case came down from the Nebraska Supreme Court and the court held that double jeopardy principles prevented a county attorney from criminally prosecuting a person for a drug offense and also moving to forfeit the money that was in their possession or the vehicle that was in their possession that was being used for the drug transportation. Due to those double jeopardy considerations prosecutors statewide then were faced with either the choice; the choice of either proceeding in a criminal prosecution or proceeding to forfeit the property. You could not do both. What this legislation does by taking guidance from that Franco decision is changes the forfeiture law so that a county attorney will be our contention is, allowed to do both, prosecute on the crime and forfeit on the money proceeds or the conveyances like the cars. Now, in doing so, the community corrections philosophy and our hope is that it will encourage local prosecutors to do more of the local forfeiture work on the local level to get the funds into those county funds. The change that you see and you may hear about it from law enforcement on this is that, and we're saying, well, we think it will bring more money into you and the change is that this law also mandates that half of those funds be used for certain purposes like drug court. That's all I have.

SENATOR BOURNE: Thank you. Questions for Mr. Kelly?  
Senator Aguilar.

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SENATOR AGUILAR: Previously, the State Patrol got all that money, is that not correct? You're saying...

JOE KELLY: Previously, there's a split on the local level and the State Patrol, if they were involved in it, yes, would receive part of those funds. And those funds are important to the State Patrol on a local forfeiture.

SENATOR AGUILAR: Thank you.

JOE KELLY: Yes.

SENATOR BOURNE: Further questions? Senator Chambers.

SENATOR CHAMBERS: If this change that you're recommending were adopted, the local law enforcement could still opt to go through the federal system so that none of that money would have to be shared with these counties. Isn't that true?

JOE KELLY: Yes.

SENATOR CHAMBERS: What incentive is there for the law enforcement to give up money that it currently, I feel, is circumventing the Constitution to get? Why should they give, split that when they don't have to?

JOE KELLY: LB 538 offers one reason and that is an effort by local law enforcement and the county attorney's office to fund their drug courts and those particular mechanisms. And the other one would be that it's not unheard of that in a certain forfeiture by going local that the sheriff or the State Patrol may receive more than they might have had they gone federal.

SENATOR CHAMBERS: But part of the money that's done locally would have to go to the public schools, wouldn't it? Half of it.

JOE KELLY: Half of it, yes, sir. And the constitutional amendment that will be heard after this speaks a little bit to that issue as well.

SENATOR CHAMBERS: There are some very optimistic proposals

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being brought today and some people refer to those things as houses of cards where if all the cards are put in place and each one holds its position and nobody and no...oh, oh, I think the point is made. I don't want to ask you any more questions, Mr. Kelly, because you've been very direct and there's no lack of clarity in what you presented.

SENATOR BOURNE: Thank you. Further questions for Mr. Kelly? Seeing none, thank you. Next testifier in support?

JOHN KREJCI: (Exhibit 15) I know it's late and I will be brief.

SENATOR BOURNE: No, that's okay. It's been a long afternoon but please...

SENATOR CHAMBERS: We love it being late (laughter). We're night owls.

JOHN KREJCI: You're always so kind to me, Senator Chambers. My name is John Krejci, K-r-e-j-c-i. I have been following very closely the Community Corrections Council. I attend most of their meetings. I'm speaking for the Nebraska Chapter and National Association of Social Workers and they are very much interested in this bill, the humanitarian qualities. I won't go over the reasons why we should support this bill or the things that it will do. But I would commend you the article that I wrote in this little publication we put out, Nebraska Criminal Justice Review. It really reviews the whole process and will save you from doing a lot of other work, you know. And even Senator Brashear thought it was a fairly decent article, I think, (inaudible). Anyway, LB 538 is a first step in a journey of community corrections. In other words, I think the main thing of this is the nonviolent felony drug offenders who are not put in prison and where they'll cost us \$22,000 a year. They'll be given drug treatment. They'll be better off, the community will be better off and I think this is a first step. We need to get into the whole idea of mental health and a whole raft of other things. But this is certainly...and I'd also like to give accolades, I've watched the Community Corrections Council work and I've never seen those stakeholders which are law enforcement, Legislature, courts, police, judges work so well and have

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such a good respectful dialogue and in this day and age that's really exceptional. And I don't throw accolades around very much and Senator Brashear and...they have just been wonderful. We're going to have a meeting this Friday and I'm looking forward to it. I hope you don't have a war and a break-up anyway. I urge the committee to vote this out and that the bill will be passed.

SENATOR BOURNE: Thank you. Questions for Mr. Krejci? Seeing none, thank you. Other testifiers in support? Are there testifiers in opposition? Are there neutral testifiers? Senator Brashear to close.

SENATOR BRASHEAR: Chairman Bourne and members of the Judiciary Committee, I'll be very brief. I know the hour is late but I would like to touch on a couple of things. I'd like to assure Senator Chambers that the issue with regard to additional fees in problem-solving courts would be an extension of the fees that were established in LB 46 two years ago. We would simply now be charging those fees in drug courts where we are not now. We would have the same provisions for waiving fees and they are being waived in those instances where people are unemployed or cannot. And those monies will be used for treatment. That would be my first point. Second point is that while probation is seeking staff for...to do what we need to do through the appropriations process, I also have a bill pending before the Appropriations Committee in which I'm seeking \$5.1 million or whatever portion thereof I can get for treatment. And these monies would also be used that are within the Community Corrections Council, would also be used for treatment and the reason we have held onto them all and not expended them is because we want to make certain that we're building the system so that we will get dollar value for the expenditures of the monies. Thank you.

SENATOR CHAMBERS: I do have a question.

SENATOR BOURNE: Thank you. Questions? Senator Chambers.

SENATOR CHAMBERS: Senator Brashear, instead of changing the standard of proof so that there can be a prosecution for crime, then a forfeiture action, and you make the prosecutor choose. Do you want the property or do you want the person? Now, leave that like that. We could enact a statute which

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would say, if forfeiture is undertaken pursuant to the federal law and any of the, naturally that occurs in Nebraska, any of the money is returned to local law enforcement, 50 percent of that will go to the public schools. We could do that with a statute, couldn't we?

SENATOR BRASHEAR: Fifty percent does go to the public schools now.

SENATOR CHAMBERS: Not now because when law enforcement gets it from the federal government, they keep it all...

SENATOR BRASHEAR: Oh, the federal, you're right. Yes, you're right.

SENATOR CHAMBERS: ...so we could pass a statute to just correct what's going on now and say when that money comes into their hands from a forfeiture that was taken through the federal system, 50 percent of that money that comes into their hands will be paid over to the county to go into the public school fund. We could do it that way, couldn't we?

SENATOR BRASHEAR: You'll recall that I had a bill once to do that. We packed the hearing room.

SENATOR CHAMBERS: And that's the approach I would like to take. Just so that that's out there and people will be aware but I'm not going to force you to discuss it now.

SENATOR BRASHEAR: I understand and I only ask and know you will. But there's another bill to follow in which I further explain how we're changing. We would be taking some money away from the schools and again using it for drug treatment. There's a bargain being struck here with law enforcement to get money for treatment.

SENATOR CHAMBERS: You're bargaining with the devil and I'm not sure I like it but we'll wait till that bill comes up (laughter).

SENATOR BOURNE: Further questions for the Speaker? Seeing none, thank you. That will conclude the hearing on LB 538. Senator Brashear to open on LR 22CA.

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LR 22CA

SENATOR BRASHEAR: Chairman Bourne, members of the Judiciary Committee, my name is Kermit Brashear. I'm a legislator. I represent District 4. I come in introduction and support of LR 22 as a constitutional amendment. LR 22CA would amend Article VII, Section 5 of the Nebraska Constitution to change the distribution of money forfeited and seized pursuant to the enforcement of drug laws. Currently, 50 percent of the money forfeited or seized pursuant to drug law enforcement in Nebraska is paid over to a county's County Drug Law Enforcement and Education Fund. The fund may be used for drug enforcement and drug education as statutorily provided. The other 50 percent is paid to the schools. LR 22CA would increase the distribution of this forfeited or seized money paid to the County Drug Law Enforcement and Education Fund to 75 percent in order to expand drug enforcement, drug education, and drug treatment at the local level. This proposed constitutional amendment is part of the Community Correction Council's package and is a companion to LB 538. LB 538 proposes a statutory change that would ensure that 50 percent of the County Drug Law Enforcement and Education Fund be used for substance abuse treatment. LR 22CA increases the portion the fund receives from 50 percent to 75 percent, therefore allowing increased money for substance abuse treatment. As I noted in my introduction of LB 538 the council views the proceeds of forfeiture as an appropriate source of resources to address the significant need for drug treatment programs. Increasing the percentage that is constitutionally available for drug programs will direct more resources in that area of need. It is important, I think, and I respectfully suggest that we recognize the totality of the package that is being proposed. In the current state of the law, virtually no money is flowing to schools or drug programs because of the double jeopardy ruling and the other issues. This package would "solve the issues that are depriving resources to both the schools and the drug enforcement currently." We believe that as Community Corrections Council that the package will provide some political momentum to address these issues. Therefore, I think we ought to and I know that the committee will carefully consider it and the Community Corrections Council and as a member thereof are certainly willing to work on any reasonable solution. We're trying to take an opportunity at this moment in time and further enhance

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treatment.

SENATOR BOURNE: Thank you. Questions for Speaker Brashear?  
Senator Flood.

SENATOR FLOOD: Speaker Brashear, thank you for your testimony. I guess I just...this may be an off-the-wall comment but how long does it take...say, the State Patrol or the Madison County sheriff's department seize \$15,000 in a drug bust. And they keep that money as evidence in the court case against the criminal defendants. How long after that court case is that money released from the evidence room to be placed in the political subdivision's coffers?

SENATOR BRASHEAR: Senator Flood, I regret that I cannot answer your question because I don't know.

SENATOR FLOOD: I guess...

SENATOR BRASHEAR: But I'll try and find answers for you.

SENATOR FLOOD: ...and I am very supportive of what you're doing. And I guess the only thing I'd like to maybe look into is a way to speed up the process of getting that evidence out of the evidence room and into the bank account so that some very cautious sheriff or prosecutor is afraid to move the money out into the fund.

SENATOR BOURNE: Further questions? Seeing none, thank you. First testifier in support? Testifiers in opposition? Are there any other individuals testifying in support? Are there any opponents? Any neutral testifiers? Okay, so this is testimony in support.

ELAINE MENZEL: It is. For the record, my name is Elaine Menzel, here on behalf of the Nebraska Association of County Officials. LR 22CA would provide counties with additional funding for the purposes of drug enforcement, drug education, and drug treatment. Such programs may reduce costs to the judicial system incurred as a result of drug abuse. For those reasons, we support LR 22CA. Thank you for your consideration of these issues in support of the constitutional amendment.

SENATOR BOURNE: Thank you. Are there questions for

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Ms. Menzel? Seeing none, thank you.

ELAINE MENZEL: Thank you.

SENATOR BOURNE: Okay, no testifiers in support. Any opposition testifiers? Neutral? Senator Brashear to close. Senator Brashear waives closing. That will conclude the hearing on LR 22CA. Senator Brashear to open on LB 642.

LB 642

SENATOR BRASHEAR: Chairman Bourne, members of the Judiciary Committee, my name is Kermit Brashear. I'm a legislator. I represent District 4. I appear in introduction and support of LB 642. LB 642 would consolidate parole and probation supervision under the Nebraska Supreme Court. It is similar to Senator Synowiecki's bill which the committee heard earlier and it is, in effect, the reverse. Instead of, this is how I've described it in multiple discussions. Instead of the minnow swallowing the whale, my bill proposes that the whale swallow the minnow. Currently, parole administration is within the Department of Correctional Services and probation administration is under the Supreme Court. It's simply a division and a methodology that we inherited historically and traditionally. LB 642 would transfer parole administration from the Department of Correctional Services to the Supreme Court, creating the Office of Probation and Parole Administration. When addressing the idea of merging probation and parole services to serve the state in the most efficient and effective manner possible, consolidating under the Supreme Court truly seems to make economic sense. Probation is one of the state's most progressive agencies in putting together innovative programs to serve offenders in the community while preserving public safety. The probation system has over 250 employees across the state. It is my understanding that the parole administration has fewer than 25 employees. Bringing the smaller agency under the progressive larger agency, I respectfully suggest, would make the best use of the state's resources and provide the most public safety as a unified agency supervising offenders in the community. Under LB 642, the following changes are made in order to move parole into one offender supervisory agency. Parole is added to the Nebraska Probation Administration Act. The

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Office of Probation Administration becomes the Office of Probation and Parole Administration. For clarity purposes, any reference to probation officer or parole officer is changed to community corrections officer. There is a single probation and parole administrator. Programming cash funds are consolidated as one. Probationer is included within the crime of sexual abuse of an inmate or parolee. The intent of this legislation is to consolidate probation and parole. LB 642 harmonizes language in order to do so. If there are unintentional substantive changes beyond the merger with the language in the bill I would, of course, be pleased and privileged to work with the committee to rectify any of those changes. I have also received some comments from some of the affected agencies and I appreciate their assistance and their input. I thank you.

SENATOR BOURNE: Thank you. Questions for the Speaker? No questions. Seeing no questions, thank you. First testifier in support? Testifiers in opposition? Did you sign in?

NATE ANDERSON: No, I haven't yet.

SENATOR BOURNE: Okay. Well, we'll do that after your testimony. If there's other opposition testimony, sign in. Welcome to the committee.

NATE ANDERSON: (Exhibit 16) Thank you, Senator Bourne. My name is Nate Anderson, A-n-d-e-r-s-o-n. I'm representing the Nebraska Association of Public Employees, AAFCSME Local 61 which is the collective bargaining agent for Nebraska state employees. I'm here to speak in opposition of LB 642. Based on the grounds that, a little bit of history. The 1987 Collective Bargaining Act which was proposed by Senators Jerome Warner and Senator Bill Barrett allows state employees under the executive branch of government to engage in collective bargaining, organize a union, so on and so forth. And it provides, the Collective Bargaining Act has been an effective and efficient framework for communication and deliberations between state employees and their employer which is, you know, the state of Nebraska, has been very successful in that regard. LB 642 would remove parole officers which currently are covered under the Collective Bargaining Act as Department of Corrections employees from, I guess, their rights under that act and remove their right to collective bargaining. You

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know, this constitutes basically a roll-back of their civil rights to organize and of property rights with regard to buying out state employees for early retirement and things like that. And also, it's contrary to the spirit of American freedoms. I mean, Americans in this country and I think one of the things that makes America great and the state of Nebraska great is the fact that folks are guaranteed the right to free association, guaranteed the right to peaceably assemble, guaranteed the right basically to form these organizations and it's contrary to the spirit of those American freedoms. Therefore, I would strongly urge you to protect the civil rights and property rights of the parole officers under the Collective Bargaining Act of 1987 and oppose LB 642.

SENATOR BOURNE: Thank you. Questions for Mr. Anderson? Let me...since there's no other questions, let me ask a quick one. Okay, so is...and I truly don't know the answer is, if they're underneath the court now they're precluded from bargaining collectively?

NATE ANDERSON: That's correct. The Collective Bargaining Act includes only employees that are covered under the executive branch of government. Folks under the judicial branch of government are excluded from that.

SENATOR BOURNE: Okay. If the bill was amended so that that wasn't an obstacle, would that eliminate your opposition?

NATE ANDERSON: Yeah, our main opposition to this bill is not, I guess, the idea of combining probation and parole. It's protecting the collective bargaining rights of state employees.

SENATOR BOURNE: What would happen functionally? So the twenty-some employees would lose their union status or how would it work?

NATE ANDERSON: Right. Basically, they would, you know, not being employees under the executive branch would be completely removed from the state master contract that NAPE, AAFCSME and the state have bargained and would lose all protections and benefits and whatnot of having a union and a union contract.

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SENATOR BOURNE: Understood. Further questions? Seeing none, thank you. I'm sorry, Senator Flood.

SENATOR FLOOD: Thank you for your testimony. Earlier this afternoon, it was Senator Synowiecki's bill, LB 747, I asked Senator Synowiecki and maybe another one of the testifiers if collective bargaining or union considerations were at issue there. Has your organization taken a position on LB 747?

NATE ANDERSON: We would be in support of LB 747 from the standpoint that it would protect the collective bargaining rights of people who are currently under the state master contract.

SENATOR FLOOD: Thank you.

SENATOR BOURNE: Let me just ask one more question. Okay, so with LB 747 the 300 and some employees would be merged into the unit with the 29 employees. And so would those...would the 29, say if LB 747 passes, would the 29 automatically then be incorporated under the collective bargaining agreement of the...

NATE ANDERSON: Now, clarify for me. So under LB 747 when the probation officers are put under the executive branch, is that the question you're asking? I guess, rephrase the question.

SENATOR BOURNE: Yeah. We have 29 people who are not under a bargaining agreement, right?

NATE ANDERSON: Well, the...

SENATOR BOURNE: There's 20-some.

NATE ANDERSON: ...I think that the parole officers were the 29 and they are currently under the Collective Bargaining Act.

SENATOR BOURNE: Okay, so I have it backwards.

NATE ANDERSON: Right, right.

SENATOR BOURNE: Okay. But if LB 747 goes, then are those

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folks already...the new people in that unit would automatically be included in that collective bargaining agreement, already negotiated? Or would...

NATE ANDERSON: From what I understand and, you know, I'm not 100 percent sure on this but I can get you the 100 percent sure answer. But the way I would understand that would be that those folks would have to undergo the same type of union certification that new units would have to undergo in that they would have to, you know, petition for an election, have that election, and vote to, in fact, be covered under the collective bargaining contract.

SENATOR BOURNE: Okay. Further questions? Senator Flood.

SENATOR FLOOD: In your written testimony here letter dated February 16, 2005, which is part of the record, is it my understanding that your interpretation of which state employees are covered by the state Collective Bargaining Act with regard to property rights was determined by the legal counsel of the Retirement Committee?

NATE ANDERSON: Yeah, from...and like I said, you know, I wasn't involved in that hearing but...

SENATOR FLOOD: Did the legal counsel or Retirement Committee cite any law or statute or did they make a legal analysis?

NATE ANDERSON: I don't know the answer to that. Like I said, I was not at that hearing but...

SENATOR FLOOD: So is it possible that maybe that opinion could be an error and that the employees under the Supreme Court simply don't want to organize?

NATE ANDERSON: Whether or not the employees in the Supreme Court want...that are currently under the Supreme Court would want to organize if they were eligible to do so is entirely their option.

SENATOR FLOOD: Have you discussed that with them?

NATE ANDERSON: I have not personally, no.

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SENATOR FLOOD: So your opinion as to whether or not state court employees qualify for the state Collective Bargaining Act is based upon a legal counsel opinion of a committee of the Legislature.

NATE ANDERSON: What excludes them from...

SENATOR FLOOD: That's where you got this, yes.

NATE ANDERSON: Yeah, well, rephrase your question. I'm sorry.

SENATOR FLOOD: You're relying on the legal counsel opinion of a committee of the Legislature that says which employees are covered by the state Collective Bargaining Act. Do I read your letter correctly?

NATE ANDERSON: No, we're not relying on that opinion as to who is covered under the state collective bargaining contract. The discussion, I believe, was whether or not those folks that are under the collective bargaining act would have some kind of property rights and that was a discussion. And I think that the...

SENATOR FLOOD: I guess maybe the probation officers in my district have told me they don't want to be part of a state union.

NATE ANDERSON: And that's their option. They have that right to vote in the certified election whether or not they would want to be in the union.

SENATOR FLOOD: And it's my understanding...correct me if I'm wrong, that a majority of the probation officers across the state of Nebraska do have little or no interest in participating in a state union.

NATE ANDERSON: Again, I'm not in a position to, you know, answer that question either way. I don't know. I haven't talked with them. I believe that they should have the right to decide that through an election.

SENATOR FLOOD: Okay. Thank you very much.

SENATOR BOURNE: All right. I hate to prolong this but I do

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need to clarify this. Okay. So right now the parole office has 20-some employees.

NATE ANDERSON: Right.

SENATOR BOURNE: And they're under the...they are not under collective bargaining agreement.

NATE ANDERSON: They are. They're housed under the Department of Corrections which is part of the folks that we represent on the collective bargaining agreement.

SENATOR BOURNE: They are. Okay. And probation is under the Supreme Court now and they do not have a collective bargaining agreement.

NATE ANDERSON: That's correct, that's correct.

SENATOR BOURNE: Okay. Now, doesn't...okay, so then, and you had talked about Jerry Warner and Bill Barrett, the State Employees Collective Bargaining Act. But wouldn't the probation employees have the ability under federal law to organize?

NATE ANDERSON: I'm not a hundred percent clear on that. As far as the National Labor Relations Act that guarantees the rights of the vast majority of workers in this country to organize, when it comes to public employees there's a lot of gray area there. That was the purpose of the 1987 Collective Bargaining Act was to guarantee state employees the right to organize. Folks under the judicial branch are excluded from that act and so far in this state, to my knowledge, have not had the right or the option even of organizing a union.

SENATOR BOURNE: Thank you. Further questions for Mr. Anderson? Seeing none, thank you. Next testifier in opposition?

KEN MASS: Senator Bourne, members of the Judiciary Committee, my name is Ken Mass, M-a-s-s representing the Nebraska AFL-CIO and in opposition to LB 642. As you heard earlier today, the conversation that another bill that would give the probation in the Supreme Court opportunity to have a...to voice their concerns of being represented or not.

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Right now they don't have that opportunity to do that. That would have gave that to them. So, and this is, was stated earlier, reverses what the other bill did. It takes away the rights of employees that fall under the corrections services going the other way. So we're in opposition to that so, thank you.

SENATOR BOURNE: Thank you. Are there questions for Mr. Mass? So, I mean, again, those 300 employees don't now under federal law have the ability to organize?

KEN MASS: They fall under the state law, not under the national Supreme Court. They fall under the state, and they're not part of the state collective bargaining rights. Yes, um-hum. They have no opportunity to be there. They have no opportunity to (inaudible) voice (inaudible) at this time.

SENATOR BOURNE: Okay. Understood. Okay. Further questions? Seeing none, thank you. Appreciate your testimony.

KEN MASS: Thank you.

SENATOR BOURNE: And hanging around all afternoon. Further testifiers in opposition? Opposition?

ELAINE MENZEL: Yes.

SENATOR BOURNE: Okay.

ELAINE MENZEL: For the record, my name is Elaine Menzel appearing in behalf of LB 642 and I'm here on behalf of the Nebraska Association of County Officials. We oppose LB 642 for the same reasons we oppose LB 747 and that's because of the cost shift to counties. Under LB 642 the counties would have the additional responsibility for paying the expenses incident to the conduct and maintenance of the principal office space for parole. We respectfully ask you to consider modifying this provision within the bill. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Ms. Menzel? Seeing none, thank you.

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ELAINE MENZEL: Thank you.

SENATOR BOURNE: Is there further negative testimony? Is there any neutral testimony?

JOHN HENDRY: Good evening, Senator Bourne, members of the Judiciary Committee. My name is still John V. Hendry and when I left I was still the Chief Justice of the Supreme Court and I think I still am. I am just here to testify in a neutral position and to limit my testimony to those administrative concerns that I raised in support of LB 747. And those same administrative concerns would not be present, of course, if parole was brought into the judiciary as opposed to the opposite. I would say that my acting chief probation officer indicated to me that if parole would come over to the Supreme Court their salaries would actually increase and significantly in some areas. Okay, thank you.

SENATOR BOURNE: Thank you. Are there questions for Chief Justice Hendry? Seeing none, thank you. Further neutral testimony? Senator Brashear to close. No, you're all right.

SENATOR BRASHEAR: I'm sorry. Chairman Bourne, members of the Judiciary Committee, I know I'm pushing the envelope here closing (laugh). I usually try not to but I'd just like to make a very simple kind of clear statement about this in view of the opposition testimony. I have been persuaded by Senator Synowiecki's very hard work that the split as between parole and probation is not efficient, is not as effective as it could be, and does not make sense. But it was in response to being persuaded for the need for a combination or consolidation that I developed the minnow-whale concept that I talked about earlier. And I hope that in the end and I'm confident that the committee will make its decision based on something other than whether we are adversely, in the opinion of some, adversely impacting a 20-person bargaining unit. And the fact is, salaries would increase and while I show...I'm not trying to indicate any disrespect for the opposition testimony. I think there's more at stake here and it is the administration of justice in the state of Nebraska in the most efficient and effective manner possible to achieve the greatest good.

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SENATOR BOURNE: Thank you. Questions for the Speaker?  
Seeing none, thank you. That will conclude the hearing on  
LB 642 and the hearings for today. Thank you.