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Floor Debate
March 03, 2009

[LB52 LB54 LB63 LB89 LB90 LB94 LB142 LB144 LB151 LB167 LB209 LB231 LB241
LB260 LB275 LB277 LB345 LB346 LB356 LB367 LB379 LB389 LB403 LB472 LB477
LB603 LB681 LR31 LR42]

SPEAKER FLOOD PRESIDING []

SPEAKER FLOOD: Good morning, ladies and gentlemen. Welcome to the George W. Norris Legislative Chamber for the thirty-seventh day of the One Hundred First Legislature, First Session. Our chaplain for today is Sister Kevin Hermsen of the Missionary Benedictine Sisters in Norfolk, Nebraska, that would be my district. Please rise. []

SISTER HERMSEN: (Prayer offered.) []

SPEAKER FLOOD: Thank you, Sister Hermsen. I call to order the thirty-seventh day of the One Hundred First Legislature, First Session. Senators, please record your presence. Mr. Clerk, please record. []

CLERK: I have a quorum present, Mr. President. []

SPEAKER FLOOD: Thank you, Mr. Clerk. Are there any corrections for the Journal? []

CLERK: I have no corrections, Mr. President. []

SPEAKER FLOOD: Are there any messages, reports, or announcements? []

CLERK: Mr. President, your Committee on Enrollment and Review reports they've examined and engrossed LB52 and find the same correctly engrossed; LB89, LB90, LB142, LB151, LB167, LB231, and LB379, all of those reported correctly engrossed. Senator Dubas has selected LB356 as her priority bill for this session. Your Committee on Revenue, chaired by Senator Cornett, reports LB94 to General File with amendments. Your Committee on Judiciary, chaired by Senator Ashford, reports LB63 to General File with amendments; and LB144, LB277, LB345, and LB472 as indefinitely postponed. Mr. President, an announcement that the Retirement Systems Committee will have an Exec Session today at 10:30 in Room 2022; Retirement Systems at 10:30. That's all that I have, Mr. President. (Legislative Journal pages 627-629.) [LB52 LB89 LB90 LB142 LB151 LB167 LB231 LB379 LB356 LB94 LB63 LB144 LB277 LB345 LB472]

SPEAKER FLOOD: Thank you, Mr. Clerk. While the Legislature is in session and capable of transacting business, I propose to sign and do hereby sign LR31. (Visitors introduced.) Mr. Clerk, we now move to the first item on the agenda, an introduction of new bill pursuant to Rule 5, Section 4(c)(1), at the request of the Governor. Members,

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this bill was brought to me by the Governor. It addresses the repayment of property taxes following a court's decision that a property tax or any tax has been ruled unconstitutional. It was introduced by me as my role as Speaker. It will be referred to a committee for a hearing pursuant to the process in our rules. Mr. Clerk. [LR31 LB681]

CLERK: Mr. President, new bill, LB681. (Read by title for the first time.) (Legislative Journal page 629.) [LB681]

SPEAKER FLOOD: Thank you, Mr. Clerk. We now proceed to General File, 2009 senator priority bills. The first bill on the agenda is LB260. [LB260]

CLERK: Mr. President, LB260 by Senator Rogert. (Read title.) The bill was discussed yesterday, Mr. President. At that time Senator Ashford presented the Judiciary Committee amendments. Senator Rogert then presented AM545 as an amendment to those committee amendments. Those two amendments are pending. (AM456, Legislative Journal pages 571-575. AM545, Legislative Journal page 617.) [LB260]

SPEAKER FLOOD: Senator Rogert, I'd like to recognize you to give us a brief three minute summary of the bill that you have on General File. You may proceed. [LB260]

SENATOR ROGERT: Thank you, Mr. President. Members of the body, good morning. I don't think I'll need three minutes to summarize where we're at but I'll start with here so far. LB260 is a bill that brings the Wrongful Conviction and False Imprisonment Act. And we would...had...having some good discussion about the process. And once again, that's what this bill does, it brings a process or an avenue for those who have been wrongfully convicted, imprisoned, to make a claim against the state for restitution. There were committee amendments, AM456, from the committee that changed the process from the green copy to the State Tort Claims Board, through the State Tort Claims Act which would appeal to a district court then upon...if necessary. AM545 further clarifies some of the language and smooths it out into a more readable more clear form. And I think we have some more amendments that are pending. And we can sure look forward to the discussion of that as we move forward. Thank you, Mr. President. [LB260]

SPEAKER FLOOD: Thank you, Senator Rogert. When we left yesterday, discussion was pending on AM545 to AM456. We will begin discussion on these amendments. Senator Price, you are first and recognized. [LB260]

SENATOR PRICE: Mr. President, members of the body, thank you. I rise in support of the underlying concepts that have been outlaid in these bills and the amendments. However, as many members have mentioned, we would like to polish the rock, so to speak, and tighten it up a bit. And to that end, I had a couple of questions that I would like to ask or actually I'll just talk about it in general and then maybe perhaps direct one. We see in the bill that they're covering dental work. And it was understanding dental

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work is covered while you're incarcerated. After you leave, you're going to continue to get the dental work and you're going to have the compensation there. So, I believe, that's our question then that could possibly use some explanation at some point in time this morning in discussion. And then a question. Senator Rogert, would you yield to a question, please? [LB260]

SENATOR ROGERT: Yes, I will. [LB260]

SPEAKER FLOOD: Senator Rogert, will you yield for a question from Senator Price? [LB260]

SENATOR ROGERT: Yes. [LB260]

SENATOR PRICE: Thank you, Senator Rogert. Question for you. What would happen in the event of the passing of one of these individuals? Would benefits be handed down to dependents? [LB260]

SENATOR ROGERT: Not the way the bill is written. They would have to make...what kind of benefits? [LB260]

SENATOR PRICE: I suppose the annual stipend or however we decide...if we decide not to do it in one lump sum, as we heard some people discussing might not be advantageous for the individual, would there, of course, just be a payout and any future benefits that could be, I don't know if the right word is bequeathed or moved... [LB260]

SENATOR ROGERT: Well, I understand your question. I don't think we've decided anything about that yet. If we got to that point where we wanted to address some sort of staggered payment, that would be totally...we could design that however we want it, I guess. So we could make it available to dependents, or them only, I think. [LB260]

SENATOR PRICE: All right, thank you. And let me ask you another question. What if one of these individuals was later convicted of a felony? Would they continue to receive the benefits? [LB260]

SENATOR ROGERT: It would be my understanding that they would. That that wouldn't have any bearing on their...or the past situation. [LB260]

SENATOR PRICE: Okay, great. Thank you very much. I was wondering, would Senator Lathrop yield to a question? [LB260]

SPEAKER FLOOD: Senator Lathrop, will you yield to a question from Senator Price? [LB260]

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SENATOR LATHROP: Yes, I will. [LB260]

SENATOR PRICE: Okay, thank you, Senator Lathrop. And again, my ignorance knows no bounds, so I ask this purely out of ignorance and hopefully you can help me out here. Is it the purview of a Pardon Board or a judge to establish innocence? [LB260]

SENATOR LATHROP: Well, that isn't their primary function. But in the course of granting a pardon, they can make that determination if that's the basis for the pardon. Or a judge, addressing the question of whether or not to vacate a judgment and the subject matter is actual innocence, will in the course of discharging his duties and ruling on the motion to vacate, necessarily decide that issue. [LB260]

SENATOR PRICE: Okay, because I didn't know whether it was a...you know, in weather we use it...we define high pressure as an area surrounded by low pressure. So I didn't know, in court we say by determining that you weren't guilty, you're kind of... [LB260]

SENATOR LATHROP: I think maybe what you're driving at, and it's a good point, and people ought to keep this in mind, is that we're not talking about folks that have been acquitted. Being acquitted means that somebody just couldn't prove that you were guilty. That's different than being innocent, which is a finding by a Parole Board or by a judge that you actually didn't do it,... [LB260]

SENATOR PRICE: Okay, great. [LB260]

SENATOR LATHROP: ...not that there wasn't enough evidence to convict you of it. [LB260]

SENATOR PRICE: Okay, thank you so much because you know as you read this, there's so much to be read. And I hope all the members are taking this time to carefully read it. We want to make sure that when we do this, we get this right, because it is right there. I think Senator Rogert's comments about a person's life being just totally upended... [LB260]

SPEAKER FLOOD: One minute. [LB260]

SENATOR PRICE: ...are nothing short of exactly right and we need to do something to compensate. I appreciate the opportunity to get up and talk about this and the opportunity to make this right. And I'll sit here and listen carefully to a debate to ensure that we all are doing our best for the individuals. Thank you. [LB260]

SPEAKER FLOOD: Thank you, Senator Price. Senator Wightman, you are recognized. [LB260]

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SENATOR WIGHTMAN: Thank you, Mr. President, members of the body. I was gone yesterday during a lot of the debate. I do have some questions with regard to the bill. So if Senator Rogert would yield to some questions, I would have some questions. [LB260]

SPEAKER FLOOD: Senator Rogert, will you yield to a question from Senator Wightman? [LB260]

SENATOR ROBERT: I'd be happy to. [LB260]

SENATOR WIGHTMAN: Senator Rogert, I know you and I have had some of these discussions off the floor and you may have answered most of them yesterday, I don't know. But since I wasn't here most of the morning session I didn't hear the answers to them. One of the questions I'd have is right now you provide the method of going before the Claims Board, then the claim would be allowed with a \$25,000 minimum, assuming they met all the thresholds. Is that correct? [LB260]

SENATOR ROBERT: That is correct. [LB260]

SENATOR WIGHTMAN: And then they would have a right of appeal. And, of course, the state could...the State Claims Board could grant a lot more than \$25,000. And you set out the criteria for determining how much that should be. [LB260]

SENATOR ROBERT: That's correct. [LB260]

SENATOR WIGHTMAN: And I think there was some discussion yesterday about whether that could be paid partly up front and then maybe some of it paid on an annual basis for some time after that. Was that discussed yesterday? [LB260]

SENATOR ROBERT: Yes, Senator Harms brought up that concern and we talked a little bit back and forth about that. [LB260]

SENATOR WIGHTMAN: And I really think that would be very helpful because I know we've had some experience in our office with young people, mostly young men, receiving a big accident award or a substantial accident award and two years later it's all gone. And I think that might be particularly likely to happen in the case of somebody who had been incarcerated for 10 or 15 or 20 years, and then really didn't have very much knowledge of business and economics. At least they would have a second chance. I do have some other questions. This would not be...it's an exclusive remedy as far as going before the Claims Board, is that correct? [LB260]

SENATOR ROBERT: It would be the exclusive remedy because right now we don't have an avenue for making a claim for this type of matter against the state. So this would be the only avenue for doing that. I think some people may have some concerns

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that they may try to make further claims, and I think we're actually working on an amendment to say that if they accept settlement or accept payment, that they would waive rights for further claims. [LB260]

SENATOR WIGHTMAN: Yeah. I would be more interested in it if it was an exclusive remedy and that there wasn't a right to appeal. And I'm assuming in the right to appeal, that would include the right to a jury trial if you appealed this from the State Claims Board. Is this correct? [LB260]

SENATOR ROBERT: No. The way the process goes, if the State Claims Board denies your claim to begin with, which oftentimes they do, it is appealed back to the district court in the county in which the tort was made. So then it would just be a trial by judge. [LB260]

SENATOR WIGHTMAN: Let's say, for example, Senator Rogert, that the State Claims Board came in for \$35,000 per year, and I don't know that they have to do this on an annual basis as long as it meets the minimum of \$25,000 per year. I assume they could give them a...allow their claim in gross, say, allow it for \$2 million. And I know there has been some attempt to place a cap on this. But as long as that was more than \$25,000 would that be error for the Claims Board to grant them a lump sum as opposed to so much per year? [LB260]

SENATOR ROBERT: Yes, it would. They could do that because it would...it would definitely be...it would be a lump sum anyway, basically, based upon circumstances in the past which would be a per-year type of situation. [LB260]

SENATOR WIGHTMAN: Let's say, for example, the State Claims Board granted them \$35,000 a year, thinking that it was more egregious than \$25,000 to satisfy them. Could they then appeal just on the amount of the, say, the \$35,000, if that was what the Claims Board had allowed, and ask for \$100,000 per year? [LB260]

SENATOR ROBERT: I believe they could and that's where it would go, to the district court in the county where the tort was made and that district judge would hear the appeal. [LB260]

SENATOR WIGHTMAN: And this is part of the problem that I would have with it, if that can go up on appeal and be substantially larger. I don't know if an amendment has been drafted yet that would place a cap on that. I understood that maybe there was an amendment being considered. [LB260]

SPEAKER FLOOD: Time. [LB260]

SENATOR WIGHTMAN: That's time? Thank you, Mr. President. Thank you, Senator

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Rogert. [LB260]

SPEAKER FLOOD: Thank you, Senator Wightman. Senator Pirsch, you are recognized. [LB260]

SENATOR PIRSCH: Thank you, Mr. President and members of the body. I was presiding yesterday and didn't have the opportunity to weigh in on this matter. I guess, in looking at the language I do have a number of questions. In concept I have no problem with this bill whatsoever. If those who are actually innocent, imprisoned, and I think, you know, there's been a lot of discourse here on the amount of money and whether, you know, this amount or that amount is enough and too much, I don't really care about that. I want to focus the body's attention rather to the procedure for determining guilt or, I'm sorry, the innocence in this case. And really the money is a secondary matter to me. In looking at this language here of the amendment, AM456, that becomes the bill, I have a number of questions. I wonder if Senator Lathrop might yield to a number of questions? [LB260]

SPEAKER FLOOD: Senator Lathrop, will you yield to a question from Senator Pirsch? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR PIRSCH: Along the lines of the question that Senator Price had, I can tell you as a prosecutor in ten years courts are geared towards always answering the same question, looking and analyzing cases, only along the lines of has the...there's testimony by live witnesses, there's exhibits that are offered, you know, cases can be as short as a day or last several weeks. Upon the end of that, the judge weighs the totality of the evidence as presented and decides that my standard here is beyond a reasonable doubt, did the prosecutor surpass that level with the evidence that he produced or did he not? And today we're looking...and if he doesn't, it doesn't mean that he's not...it doesn't mean that he's actually innocent, but it does mean that the judge will acquit the defendant. That the amount of proof was insufficient. And so when you look at, say, the O.J. Simpson case you find a case where the judge said, given this high burden, I find...I acquit O.J. Simpson, he is not guilty beyond a reasonable doubt. However, to interpret that then to mean that O.J. Simpson is actually innocent in fact is incorrect as a later civil court came along and determined that O.J. Simpson was in fact, given the preponderance of the evidence that is a different standard employed in civil courts, that that...that O.J. Simpson was indeed responsible for taking the life of the two victims there. And so the question is along the lines of Senator Price's, which is you are using as a springboard or a mechanism to proceed...a gatekeeper, I think, somebody referred it to, one of two processes. One is that the Pardons Board declares you to be actually innocent, not just not guilty beyond a reasonable doubt, but actually innocent and pardons you based on that. And the second springboard would be that a court declares

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you to be not just not guilty beyond a reasonable doubt but actually innocent. Is that...so far have I given a correct...is my understanding correct, Senator Lathrop? [LB260]

SENATOR LATHROP: The question has to do with the last part of your comments? [LB260]

SENATOR PIRSCH: Right,... [LB260]

SENATOR LATHROP: And that is? [LB260]

SENATOR PIRSCH: ...is there two springboards that a court or the Pardons Board have to find you actually innocent, not just not guilty beyond a reasonable doubt. Correct? [LB260]

SENATOR LATHROP: Yeah,... [LB260]

SENATOR PIRSCH: Okay. [LB260]

SENATOR LATHROP: ...either the Pardons Board or in a judicial proceeding. And as you know, it is... [LB260]

SPEAKER FLOOD: One minute. [LB260]

SENATOR LATHROP: ...not a simple, easy process to persuade a court that you should have your conviction vacated because you were not guilty. [LB260]

SENATOR PIRSCH: But courts are not normally in the business, are they, to determine actual innocence. They only look at grounds for unfair trials before. And other than the standard of guilty beyond a reasonable doubt, are courts, in your estimation, in the business or have they ever declared anybody actually innocent? [LB260]

SENATOR LATHROP: There's a process for courts to reconsider a conviction. And as you know from reading the reported cases, it is a very, very difficult burden to meet. [LB260]

SENATOR PIRSCH: Right. [LB260]

SENATOR LATHROP: Most of the time, once we employ the system, they find somebody guilty, they are very reluctant to go back and find that they are not guilty of that offense. [LB260]

SENATOR PIRSCH: But the question isn't...I mean they can give relief on the specific grounds this fair procedure wasn't followed. [LB260]

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SPEAKER FLOOD: Time. Thank you, Senator Pirsch. [LB260]

SENATOR PIRSCH: Thank you. [LB260]

SPEAKER FLOOD: Senator Adams, you are recognized. [LB260]

SENATOR ADAMS: Thank you, Mr. President and members of the body. I don't have a lot to add to this discussion but I recall at the end of the morning yesterday, Senator Lathrop, and properly so, charged us to, if we have an issue with this bill, to stand up and say what it is. And I'm going to do that. I'm still wrestling a little bit with the underlying bill itself, but I'm getting to the point where I can probably accept LB260. And the reason that I'm wrestling with it, at first, has nothing to do with numbers. It has to do with the fact that we recognize that our judicial process is a human process and therefore an imperfect one. We are not going to always get it right. DNA and all the advances we make help move us more comfortably in a direction that we ought to be going in but we're not always going to get it right. And so on the one hand, I get a little uncomfortable with saying we're going to compensate all of these folks that our judicial system made a mistake with, and that bothers me a bit. Yet on the other side of this, if we did make a mistake then I'm concerned about the child support for those kids that didn't get paid; potentially the educating of these folks so that they can integrate back into society and be productive. And quite pointedly, I'm very concerned about \$25,000 and no cap on this thing because our system is not perfect. And I don't come up here to the microphone, and I shouldn't have done this, but I don't come up here to the microphone and I shouldn't have done this, but I don't come up here to the microphone with solutions either. I'm not here to offer you the number that I'm willing to go with. I'm simply getting to the point where I think I can go along with LB260 because I understand the intent of it. But the money is just too much for a system that's not perfect. Thank you, Mr. President. [LB260]

SPEAKER FLOOD: Thank you, Senator Adams. Senator Lautenbaugh, you are recognized. [LB260]

SENATOR LAUTENBAUGH: Thank you, Mr. Speaker and members of the body. It's always difficult getting up after Senator Adams, but at least everyone is paying attention as they always do whenever Senator Adams speaks. He raised a lot of good points. I again continue to support this bill. And I think it's good that we're working through this because this is something that's new, something that's new to all of us, and we're all struggling with how to make it acceptable and how to make it right. And it's taking time but it should take time. And we have amendments to amendments at this point out there, and there are probably going to be some other amendments coming. I think, as Senator Rogert mentioned, we're going to be talking about making this the exclusive remedy, meaning if these individuals avail themselves of these funds, there is no

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possible way they can then piggyback some sort of a federal claim on top of it. This is what they get and all they get. We may be looking at possibly removing all the various things the judge should consider as elements of damages, because honestly, judges do this kind of thing, day in, day out, every day. That may again extend to the differential between someone who's been incarcerated and someone who's been incarcerated on death row, because once again that's probably a factor a judge can weigh and does weigh a lot with a lot of other decisions day in, day out. We may even be addressing the lump sum nature of this, although I'm still not convinced that individuals who have been wrongfully incarcerated are less able to deal with a lump sum of money than individuals who have been horrifically injured in a car accident. I don't know that there's a difference there worth us setting up some additional structure. But these are all things we continue to deal with. And we struggled with this bill in Judiciary too. So all I'm asking is that we continue to have this good discussion that we're having, that we continue to be patient. I appreciate Senator Rogert's willingness to continue to work on this. Senator Lathrop has done a great job. There are a lot of questions to answer. All of you have a lot of questions to answer and we're working on them to get something that all of us can support and that is fair to these individuals as well. So please continue to bear with us. [LB260]

SPEAKER FLOOD: Thank you, Senator Lautenbaugh. (Doctor of the day introduced.) Senator Mello and myself would like to recognize the Clerk of the Legislature, together with the rest of the Legislature. He is celebrating his birthday today. Please rise and recognize yourself. Continuing on with discussion of AM545 to AM456, Senator Haar, you are recognized. Senator Haar, you are recognized. [LB260]

SENATOR HAAR: Mr. President and members of the body, I want to thank Senator Rogert and the Judiciary Committee for tackling this very difficult issue. And I'd like to go on record of supporting the concept. I can't think of anything worse than being put away, having my life taken away by serving in prison when I was innocent. I do have some questions and I'd like to ask Senator Rogert some questions. [LB260]

SPEAKER FLOOD: Senator Rogert, will you yield for a question? [LB260]

SENATOR ROBERT: Yes, I will. [LB260]

SENATOR HAAR: Just some curious questions here. Would this be grandfathered, I mean so that people from the past who had been found innocent, would they get it or is this just an ongoing into the future kind of thing? [LB260]

SENATOR ROBERT: No, it would be retroactive to those that have been exonerated in the past. [LB260]

SENATOR HAAR: Do we know how many people that is? [LB260]

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SENATOR ROBERT: Six. [LB260]

SENATOR HAAR: Oh, six. Okay. And have other states...what has been the example of other states when they've done this sort of thing. [LB260]

SENATOR ROBERT: We talked about this a little bit yesterday. There's 25 or 27 states that have done this specifically. And some are more, some are less. This is pretty close to the middle of the road and seems to be sort of an average of what everybody has done. [LB260]

SENATOR HAAR: Okay. Well, as I got to thinking about this, I mean...especially being incarcerated for a long time, there are a lot of things in life that change not only that you lose part of your life but you lose things like the ability to earn Social Security through various jobs. And I'm sure there's no way to change that. So the amounts sound rather high, but when you look at the implications of a lifetime, it makes a lot of sense to me. [LB260]

SENATOR ROBERT: Yeah, if I could elaborate just a little bit on that, Senator Haar, for a second. If you think about somebody who's been in there for 20 years, that's a good point to make. They haven't paid any Social Security and they won't have any retirement. So if you get let out at age 50 or 60, you're going to have to work the rest of your life just to make things work. And you know, that's not possible. So this is kind of a, you know, a retirement fund as well. [LB260]

SENATOR HAAR: Yeah, thank you. And I agree with Senator Lautenbaugh. I'm not sure that saying to these people they can't handle their money is any different than saying to anyone of us we can't handle our money. Because I think the assumption there is made that this would basically be poor people who didn't know how to handle money. Well, it could be someone with some kind of white collar crime, for example, as well, somebody who was convicted of white collar crime. And so if we went down that path I think it would get really difficult because you'd have to somehow make a determination of what kind of experience does this person have with money and that sort of thing. So again, thank you very much. [LB260]

SPEAKER FLOOD: Thank you, Senator Haar. Continuing on with discussion, Senator Pirsch, you are recognized, followed by Senators Lathrop and Carlson. [LB260]

SENATOR PIRSCH: Thank you, Mr. President and members of the body. And again, I am not against the concept of this bill. I think that, of course, anyone who is wrongly incarcerated should be, you know, I've got no problem and so I'm not looking towards the dollar argument on this at all. That is a secondary thing. My concern is on good process, good procedure, and if it...I do have a lot of questions with regard to the area.

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And it seems as though that there's a springboard in all that I've heard, a mechanism that must be met for someone to have a successful recovery. Two elements, one or the other must be met. One of which is that a court must declare that a person is actually innocent. A second springboard that must be met, if it's not a court, is that the Pardons Board must declare a person actually innocent, not just not guilty beyond a reasonable doubt, that high standard not being met, but a different thing, actually innocent. And those two springboards, those two mechanisms, neither courts nor pardon boards right now are in that business. And so when you hear higher courts reverse, remand, or vacate, they don't at the same time ever, to my knowledge, in the history of humankind has the court declared anyone actually innocent. They may remand down to the lower court and say a good process, a fair process that the constitution demands has not been followed, and so we're vacating the decision and, you know, prosecutor can refile. And next time use the good process that the constitution demands. They may say that given the elements of the crime, you cannot establish as a matter of law that this person was guilty beyond a reasonable doubt, that high level of proof, but courts have never ever to my knowledge been...have ever declared that somebody was actually innocent. They're just not in that business. I don't know what that process would look like. Would they have to have another trial with witnesses, exhibits? What would the standard of proof be? Innocent beyond a reasonable doubt? Innocence by a preponderance of the evidence? It just doesn't go on. And so I'm trying to wrap my arms around this, what's envisioned by the sponsors of this bill. But I still have yet to hear that. Similarly, the second mechanism of which I speak is the Pardons Board. The Pardons Board is not a board again designed and has ever to my knowledge been...declared people actually innocent, even with the Beatrice Six that we're talking about here. The Pardons Board is created and views itself as a board committed to mercy, saying that despite...they don't contradict courts finding of guilt. They don't say, we go in on cases where we think the people are actually innocent. They say, notwithstanding the fact that we believe you're guilty, that you've been convicted, and that we believe that in certain cases clemency or mercy is in order; you've served 30 years in jail, you've led an exemplary life in prison, and given that fact we are going to grant an act of mercy. But to my knowledge, they have never declared as a board, the Pardons Board, anyone actually innocent. Even in the case of the Beatrice Six, there may be members of the Pardons Board who make statements to the press that they believe they're actually innocent in fact, but as a board there's nothing to my knowledge that would be in writing, that would be a springboard for this bill to work that would say, we as a board find this person actually innocent. And so to go into these...to use this as a springboard would involve these two institutions--the Pardons Board and courts--to enter into new types of activities that they have never entered into... [LB260]

SPEAKER FLOOD: One minute. [LB260]

SENATOR PIRSCH: ...entered into before. So that's what I wanted to put out there for discussion, how would this work. I'm trying to wrap my arms around this, how would

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people being declared actually innocent occur? Would that involve a new...some sort of a hearing? And so I would be interested in hearing some comments on...again, I am not against the concept of, you know, I think we all are, you know, the hair on the back of our necks stands up when we hear about people who are, you know, innocent being jailed. But how do we determine that as a matter of law? How do we set up that procedure? [LB260]

SPEAKER FLOOD: Time. [LB260]

SENATOR PIRSCH: That's what I'm concerned about. [LB260]

SPEAKER FLOOD: Thank you, Senator Pirsch. Senator Lathrop, you are recognized, followed by Senator Carlson. [LB260]

SENATOR LATHROP: Thank you, Mr. President and colleagues. Good morning. I thought I'd take an opportunity this morning to give you a little preview. Those of us that have been involved in this bill, trying to help Senator Rogert with a good concept, Senator Lautenbaugh and myself in particular, have discussed various amendments. And today there's been a lot of discussion about money, about damages, about the different things, whether we ought to have a cap or not. Let me give you a little bit of a preview if I can because I am familiar with amendments that are coming that should make you feel a little more at ease with what we're doing and a little more comfortable so that we can go back to looking at the process and talk about the value or the damages and a cap in a moment. I have offered an amendment that will be taken up after AM545 is adopted, assuming that it is, that will change and respond to the concerns people had over the burden of proof. It will take the burden of proof from preponderance back up to clear and convincing. That's the heavier burden. That was a concern that people expressed. So understand that after we vote on AM545, we'll have an opportunity to change that burden of proof up and that will come in the form of an amendment from me. I also had conversations with Senator Fulton who has an amendment, that if he hasn't offered, he will, that caps the damages. So we'll have an opportunity after AM545 is adopted to address whether we should have a cap, and if we do, how much that should be. So we're going to have that conversation. Please be assured that that's going to happen. Senator Lautenbaugh has offered two amendments to address concerns people also had. One related to the damages. We had in the bill, have in the amendment medical expenses, lost wages, loss of earning capacity, and a number of different items that are generally found in a tort action. Senator Lautenbaugh has an amendment to AM545 that's going to address that and perhaps make you more comfortable with the idea that we are going to go back to simple tort principles, we're not creating any particular kind of damage in those three sections that will be omitted from the amendment. So that's in response to concerns that you've expressed. And the last one, last night we had somebody...or yesterday afternoon had somebody express concern about whether somebody can get done with these cases and then run over to

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federal court and file something else. So that you will be comfortable with what we are doing when we get done with this process, Senator Lautenbaugh has an amendment to make clear that you get one crack at it. You can't come into state court in Nebraska and then leave here and go into federal court or run down the street into district court in another county. I think that's probably true before these amendments. But just to make sure that the folks on the floor are comfortable with what we're doing, he's offered that amendment and I'm going to encourage you to adopt it in time. Let me suggest one more thing. And that is, you probably can tell 30-some days into the session and from our debates that Senator Lautenbaugh and I frequently have, that we are on two different sides of the practice of law. We both are trial lawyers, which we both practice law and we try cases in Nebraska. Scott Lautenbaugh typically defends them and I typically file them. Both of us are on the same page on this. And to the extent we have somebody who defends these cases... [LB260]

SPEAKER FLOOD: One minute. [LB260]

SENATOR LATHROP: ...and somebody that brings them intimately involved in making changes to Senator Rogert's bill, I think you can be assured that when we get done with this process we'll have a bill you can feel comfortable with. Please again, if you have questions, turn your light on and ask us. Either one of us would be happy to answer them. We want you comfortable with what we're doing here today because both of us agree that Senator Rogert is onto something here, that perhaps the devil is in the detail but I think we can work those out with some thoughtful questions and some amendments coming from those of us that are involved. So thank you very much, Mr. President. [LB260]

SPEAKER FLOOD: Thank you, Senator Lathrop. Senator Carlson, you are recognized. [LB260]

SENATOR CARLSON: Mr. President and members of the Legislature, it's good to stand here and listen to Senator Lathrop and Senator Lautenbaugh and just what was expressed. They do come from two different sides of issues frequently. And so this is giving good balance, I think, to this discussion. Again, as I said yesterday, I do support the underlying attempt at LB260. But as I said also yesterday, this is such an issue that we need to take our time on it, we need to get it right before we go forward. Senator Adams in his testimony talked about the fact that we do not have a perfect system. And that gave him some reservations. I can understand that. However, if we had a perfect system, we wouldn't have need for this bill. So it's by the fact that we're not perfect that we're addressing this issue. I want to preempt Senator Fulton and whoever else has amendments concerning caps and limits on this thing. And I'm going to give my view and this will probably be the last time that I speak on this issue at least this morning. We talk about \$25,000 per year for wrongful conviction or \$50,000 per year if it's on death row. I would like to suggest for the compensation amount a cap of \$500,000. If I would

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ask for a show of hands, I think it would be a pretty slim number here in this body, even if I'd say before the stock market tanked, how many of you had \$500,000 net after taxes in your retirement plan. I don't think it's 1 percent of the people in our country. And \$500,000 is a lot of money when you consider it's damages and therefore it's tax free. I'd like to see a cap of \$500,000 on compensation. I'd like to see another cap of \$500,000 taking care of the other issues--health insurance, health treatment, education, vocational preparation, child support, legal expenses. So I realize I'm preempting some people that have specific amendments. And any of the rest of you that look at some of these limitations might be in the ballpark that I am. But as we can hash these things through and come to agreement I think that we'll fulfill the intent of this bill and put it into effect and address the wrongs that have been done to people in our state. Thank you, Mr. President. [LB260]

SPEAKER FLOOD: Thank you, Senator Carlson. Senator Pirsch, you are recognized. [LB260]

SENATOR PIRSCH: Thank you, Mr. President and members of the body. Again, I would urge you to focus. And I understand and I appreciate the concern about the financial aspect of this, the dollars. But I'd also urge you, and I know that it's conceptually difficult at times because...well, I think I'm the only one who comes from a background in criminal justice. But I'm telling you that you need to start to wrap your arms around the procedure, the language at the same time that you're looking at the dollar implications of this. And again, I have not yet heard an answer to my question which is to...if this bill is to be invoked, if restitution, so to speak, is to be imposed, we've heard the Speaker say that one of two things has to happen. Even the Pardons Board, which is by the way composed of the Governor, the Attorney General, and the Secretary of State, those three individuals, they have to declare somebody actually innocent in their pardons, which they have never done. That's not what the Pardons Board is in the business of doing. What the Pardons Board is in the business of doing is assuming that the court conviction is correct and saying instead of innocence, we look at mercy. Yes, you did it, but you've been exemplary since you've gone to jail, that kind of thing, turned your life around. And so it doesn't seem that institution is not set up and has not ever operated in the, and I posit would not be an institution that would ever engage in the business of saying we declare you actually innocent. Now individual members of the board, to the media not as the board united, may have specific feelings about that. But...and say, I believe in my heart, individual members. But that's not an action of the Pardons Board. And even with the Beatrice Six and the board did grant a pardon, they did not as a board indicate that there was actual innocence that attaches to the individuals that they pardoned. They just...and so you couldn't interpret that to mean they believed that they may have done it, but there was mercy or they may have...you may interpret that to believe they felt that there wasn't proof beyond a reasonable doubt, which is that high level of proof that's required in criminal cases. And so I have...that's what I want to understand, is how that institution then would be utilized for that. The

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second again springboard is that a court, a judge would indicate in a ruling that the defendants not only were not guilty beyond a reasonable doubt but that they have concluded that there was actual innocence. And courts never do that. That's not a purview of the court, anymore than it is for the state Legislature to, in the course of their business, decide that. And so I'm trying to figure out how this would work given that these two institutions don't engage in those activities. And so I would like to have some answers with respect to that. I wonder if Senator Ashford might yield to a quick question regarding the Judiciary Committee amendments. [LB260]

SENATOR CARLSON PRESIDING []

SENATOR CARLSON: Senator Ashford, would you yield, please? [LB260]

SENATOR ASHFORD: Yes, sir. [LB260]

SENATOR PIRSCH: With respect to my...the Pardons Board element of that. On...and I have some of the information, the petition so to speak that you fill out when you're seeking a pardon. They do put a... [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR PIRSCH: ...a reason for requesting a full pardon and that the petitioner fills out. Is that what you're suggesting then is in all cases adopted by the Pardons Board if a pardon is granted? In other words, they say... [LB260]

SENATOR ASHFORD: You don't know...I don't...the answer to the question, I don't believe that the Pardons Board necessarily, in looking at opinions of the Pardons Board in the past, I don't believe that you can ascertain specifically the grounds necessarily in all cases for the pardon. But it's just...I think it's simply, in most cases, the pardon is granted or denied, I think that's how it works generally. There are not, I don't recall a situation where there may be a series of findings. [LB260]

SENATOR PIRSCH: Yeah. Would the Pardons Board have to specifically find then that they're actually innocent for them to be eligible to collect? [LB260]

SENATOR ASHFORD: I don't think that's one of the findings that they make. I think the Pardons Board in effect finds that they are pardoned. I think...and I don't have the... [LB260]

SENATOR CARLSON: Time. [LB260]

SENATOR ASHFORD: ...the actual finding in this case. I wouldn't mind getting a copy of it though. [LB260]

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SENATOR PIRSCH: Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senator Pirsch and Senator Ashford. (Visitors introduced.) Senator Price, you're recognized to speak. [LB260]

SENATOR PRICE: Thank you, Mr. President and members of the body. In a couple quick questions I have here, again to the interest of educating myself, I was wondering is Senator Lautenbaugh, would he yield to a question? [LB260]

SENATOR CARLSON: Senator Lautenbaugh. [LB260]

SENATOR LAUTENBAUGH: Yes. [LB260]

SENATOR CARLSON: Would you yield? [LB260]

SENATOR LAUTENBAUGH: Yes, I will. [LB260]

SENATOR PRICE: Senator Lautenbaugh, thank you. To AM545, page 3, line 13, would you describe to me please how reasonable attorney fees are determined. [LB260]

SENATOR LAUTENBAUGH: You'll have to forgive me, I'm getting to the proper line here. I'm sorry, what page am I? [LB260]

SENATOR PRICE: That would have been page 3, line 13. It talks to reasonable attorneys fees, how are those determined by the court? [LB260]

SENATOR LAUTENBAUGH: Well, there are a lot of ways under the law that can be done. Looking at the amount of time spent on the case, the amount of expertise involved, the amount of recovery. That's kind of an unanswerable question because there are a lot of different measures to do by which a court could employ. [LB260]

SENATOR PRICE: Oh, okay great. I just want to make sure that we, you know, again we had talked about all those different things. Thank you very much, Senator Lautenbaugh. And then I have another question here about a benefit. Perhaps Senator Lathrop would yield to a question. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield to Senator Price? [LB260]

SENATOR PRICE: All right, thank you, sir. It just says here that the claimant would qualify for public benefits like...which one would they qualify? Medicaid, TANF, the... [LB260]

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SENATOR LATHROP: I think you may be reading the original copy. And the amendment, AM545 changes all of that. [LB260]

SENATOR PRICE: Okay. [LB260]

SENATOR LATHROP: So if you...you've brought up a couple of things like the dental care or whatever that is. [LB260]

SENATOR PRICE: Right, exactly. [LB260]

SENATOR LATHROP: That's not in...that's in this amendment. [LB260]

SENATOR PRICE: All that would be...okay, okay. But in general, would that still be in the bill though without... [LB260]

SENATOR LATHROP: No, no, what basically happens now in terms of what's this about, they have...we put a set amount which we can talk about for somebody's loss of freedom. And right now we chose, arbitrarily or otherwise, \$25,000 a year. Then a person would receive whatever benefits, and that's the Lautenbaugh amendment,... [LB260]

SENATOR PRICE: Okay. [LB260]

SENATOR LATHROP: ...one might get by way of damages for a tort action, a normal tort action. And then we have a couple of more things that are like the cost of vocational rehabilitation which is, if a guy goes in, a truck driver and he's ten years in prison and he needs to go back to truck driver school and get a CDL, that would be part of his damages. [LB260]

SENATOR PRICE: Okay, great. I just want to make sure that...I hadn't followed the linkage there between the amendments and everything going forward and things that are supposed to come out later on to cover all of this. [LB260]

SENATOR LATHROP: Right. [LB260]

SENATOR PRICE: So I appreciate that and... [LB260]

SENATOR LATHROP: I'm glad you asked the questions, happy to answer them. [LB260]

SENATOR PRICE: All right, thank you very much. I have nothing further. And I would yield any time, if Senator Lathrop would like it. [LB260]

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SENATOR CARLSON: Senator Lathrop, there is 1:50, if you would choose. [LB260]

SENATOR LATHROP: Maybe just briefly to respond to Senator Price's question. And maybe again to give the lay of the land to where we're at. We had a bill that originally came into the committee, that was followed by the Judiciary Committee amendment. And Senator Rogert and I, it's a Rogert amendment which is AM545, it's a simplification of even the good work done in the Judiciary Committee, to try to make it easier to understand, simpler in its approach. And that's what we're on today. After we move, assuming we do, AM545 then we're going to take up these amendments that I recited the last time I was at the mike that deal with the burden of proof, and deal with the damages, and deal with the fact that this will become the exclusive remedy of anyone who elects to proceed. So... [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR LATHROP: ...look forward to that. Thank you. [LB260]

SENATOR CARLSON: Thank you, Senator Lathrop and Senator Price. Senator Nelson, you're recognized to speak, followed by Senator Hansen. [LB260]

SENATOR NELSON: Thank you, Mr. President, members of the body. I've been doing a great deal of listening here. We've been asked to stand up and speak to some of the concerns that we have. I guess like most of the other members of this body, I am supportive of the basic principle in here. I'm concerned a little bit about the process. I think Senator Pirsch has asked some good questions. I happen to have some reservations on page 2 of AM545, line 20, where it talks about awarding damages for "Physical and emotional pain and suffering experienced by the claimant to date and reasonably certain to be." I think if Senator Lathrop is available for a question, I would ask that he yield to a question. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR NELSON: Did you hear my concerns, Senator Lathrop? [LB260]

SENATOR LATHROP: I think you asked if I...I was talking to Senator Council at the same time, but I think you were asking about physical pain and suffering and emotional pain and suffering. [LB260]

SENATOR NELSON: Right, right. [LB260]

SENATOR LATHROP: That will be...that's one of the Lautenbaugh amendments. We

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will take out (b), (c), and (d), and simply substitute for those three "any damages available in tort." We're not trying to create compensation for something somebody didn't go through. What they'd have to establish is any physical pain or emotional pain and suffering... [LB260]

SENATOR NELSON: Um-hum. [LB260]

SENATOR LATHROP: ...that they went through. Those are things that typically happen... [LB260]

SENATOR NELSON: Um-hum. [LB260]

SENATOR LATHROP: ...in every tort case, Senator, but they're all subject to proof. And instead of delineating them in a manner that's become concerning, we're simply going to amend that, Senator Lautenbaugh is, to say "anything available in tort,"... [LB260]

SENATOR NELSON: All right. [LB260]

SENATOR LATHROP: ...subject to proof. [LB260]

SENATOR NELSON: Thank you. Then I'm premature in my questions about that. I should take a look at that amendment because that may very well satisfy my concerns. Right above that, in subparagraph (a), we have established or are attempting to establish an arbitrary standard of \$25,000, whether--a year--if they are shown to be innocent. That can run up into a lot of money and maybe there should be some adjustments on that. But I guess the question I pose, if we're going to...if someone is innocent and they've spent all this time in prison, why can't we just determine a figure, an award of some sort here for the number of years, and let it go at that, whether it comes to \$500,000 or \$1 million, and not get into all these other things or tort claims and actions. Could I hear a response to that. [LB260]

SENATOR LATHROP: Certainly. I think it goes back to the idea that each person's claim is going to be unique to them and their circumstance. And if you incarcerate, wrongfully incarcerate somebody who had a minimum wage job and alongside of them you incarcerate an engineer who was making \$150,000 a year, their losses are going to be significantly different. And we could do anything we want, as you know, because we're talking about waiving a piece of sovereign immunity and so we can set it up anyway we want. But the only advantage in that would just be simplicity, it really wouldn't...and we deal in trial work every day with the complexities of and the uniqueness of each person's claim. So everybody that gets a herniated disk in their lumbar spine doesn't get the same amount of money in any kind of a tort action. And that's...so it's designed to be consistent with the tort law that we have, a body of law that's been around forever. [LB260]

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SENATOR CARLSON: One minute. [LB260]

SENATOR NELSON: All right. And under our process the Claims Board would set that and it could be appealed. And then a judge, not a jury, would make these determinations. Is that correct? [LB260]

SENATOR LATHROP: You're exactly right. In the first instance, the State Tort Claims Act says you have to file a claim with the State Claims Board. They get six months to consider it. During that time they can do an investigation, settle the claim, or do nothing with it. After six months the claimant is then free to file a claim in the district court. And because it's against the state, under the State Tort Claims it's heard by a judge and not a jury. [LB260]

SENATOR NELSON: And finally very briefly, we have some language here about costs incurred for that person's criminal defense. And then later on I see something here about if you find that there's a lien against property. When is that going to occur? I mean, if there's defense provided by the state, when does the lien come against the property? [LB260]

SENATOR LATHROP: That was something that was in the bill before I got to it. And I assume that means that if you had a public defender and somebody said, you know, we're going to give you a public defender, but we're going to put a lien against whatever interest you have in your house to pay for him. I'm not really sure myself. [LB260]

SENATOR NELSON: I'm just not aware that that ever happens. [LB260]

SENATOR LATHROP: It's a little bit of a confusing...yeah. It's a... [LB260]

SENATOR CARLSON: Time. [LB260]

SENATOR NELSON: Thank you very much, Mr. President. Thank you, Senator Lathrop. [LB260]

SENATOR LATHROP: Certainly. [LB260]

SENATOR CARLSON: Thank you, Senator Nelson and Senator Lathrop. Senator Hansen, if you can hear this, you are recognized to speak. I don't see Senator Hansen. Senator Rogert, there is another speaker. All right. Senator Wightman, you are recognized to speak. [LB260]

SENATOR WIGHTMAN: Thank you, Mr. President and members of the body. If Senator Lathrop would yield, I would have some questions of him. [LB260]

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SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR WIGHTMAN: Again, having been gone yesterday, I'm not sure what all may have been discussed previously. But as I read the damage section, we first have the \$25,000 award under Section 4(a). Is that right that that's a minimum? [LB260]

SENATOR LATHROP: That's true. [LB260]

SENATOR WIGHTMAN: Then under (b), in addition to that, and we will be stacking these on top of each other, we would have "Physical and emotional pain and suffering experienced by the claimant to date and reasonably certain to be experienced in the future." Is that still...is there an amendment that would cover that.... [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR WIGHTMAN: ...that will...is yet to be filed? [LB260]

SENATOR LATHROP: Yes. Senator Wightman, the Lautenbaugh amendment, which you'll see shortly, will take out (b), (c), and (d). And in their place we will have a (b) and renumber the remaining paragraphs. That new (b) will say any damages available and customarily available in a tort action. [LB260]

SENATOR WIGHTMAN: So, in effect, wouldn't we be putting (b), (c), and (d) back in through that (c) or (d) or whatever it may be? [LB260]

SENATOR LATHROP: It's an attempt to simplify it and give people a sense of we're not doing anything new with those sections. [LB260]

SENATOR WIGHTMAN: But at any rate, you would be able to litigate those issues either before the Claims Board or later in district court, if you felt that the award was insufficient in addition to the \$25,000. [LB260]

SENATOR LATHROP: Yeah. If you go before the Claims Board they may do nothing with your claim, and that happens a lot. The Claims Board typically deals with the smaller claims. And we've given them authority recently to write checks for \$5,000 or less. They can also settle some more significant cases but historically don't. And what they do is deny the claim. It then turns into a lawsuit and it's decided by a district court judge, typically. [LB260]

SENATOR WIGHTMAN: So the district judge could grant \$25,000 or a higher award under (a), and yet they could grant all of those issues in (b), (c), (d)--(b) and (c) primarily are the ones I'm concerned with--as part of what you could litigate in a tort claim. Is that

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correct? [LB260]

SENATOR LATHROP: That's true. In other words, there are different elements of damages. And a court could go through each element of damage and say, I'm going to find...you know, you were in jail for two years, so you get \$50,000, under (a); I'm going to award \$15,000 for emotional, physical pain and suffering, lost wages and medical expenses. And they add those up, and the verdict is arrived at by adding up each of the elements of damage, as we do in virtually every civil trial that takes place every day in our courtrooms. [LB260]

SENATOR WIGHTMAN: And I understand that, Senator Lathrop. But what concerns me here is we're waiving the sovereign immunity and opening somewhat the floodgates in that a person could be in two years, as I understand it, even under Senator Fulton's cap, which would be \$1 million as I understand it, in the event of someone who was not on death row and a \$2 million cap if they were on death row, and they could recover that for being in the penitentiary for two years, couldn't they? [LB260]

SENATOR LATHROP: Unlikely, unlikely. What we...the one safeguard we have in this is that district court judges sit for retention. Generally speaking, we use district court judges and we don't try cases to juries because the likelihood of something out at either extreme, either something that's way too high that you might get from a jury or way too low that you might get from a jury. You're more likely to have something that is rational, reasonable, and conservative, which is typically what you get... [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR LATHROP: ...when a judge, as I just stated... [LB260]

SENATOR WIGHTMAN: I agree with that, that you probably wouldn't get the variation you would with a jury award. But by the same token, I think judges tend to be liberal and conservative the same as individuals and jurors. And as a matter of fact, in the larger counties there is some forum shopping, isn't there, by attorneys trying to make sure that their case gets tried by one who is liberal if he's a fairly liberal (inaudible). [LB260]

SENATOR LATHROP: Well, they might have done that at one time, maybe during my dad's period. But now the computer selects who your judge is so it's pretty hard to forum shop in Douglas County, for example. [LB260]

SENATOR WIGHTMAN: But if you could, you would try to get it in front of some judges who you know to be more liberal than others. Is that correct? [LB260]

SENATOR LATHROP: Well, I suppose if I had a plaintiff in one of these cases and I thought a judge might be more inclined. But the court administrator is already ahead of

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you on that one. They decide those. When you file your case, you're randomly assigned the district court judge, so there really isn't any forum shopping... [LB260]

SENATOR CARLSON: Time. [LB260]

SENATOR LATHROP: ...anymore. [LB260]

SENATOR WIGHTMAN: Thank you, Senator Lathrop. Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senator Wightman and Senator Lathrop. Senator Janssen, you are recognized to speak. [LB260]

SENATOR JANSSEN: Thank you, Mr. President, members of the body. I rise today about as neutral as I can be on LB260. Right now, I agree with Senator Price. I like the underlying concept and I kind of want to see the rock get polished more. I'm sitting here quietly and I'm hearing that happen and I want to watch that a little bit more. And with that, I would like to yield the balance of my time to Senator Pirsch. [LB260]

SENATOR CARLSON: Senator Pirsch, you have 4 minutes and 30 seconds. [LB260]

SENATOR PIRSCH: Thank you, Mr. President, members of the body. I wonder if Senator Lathrop might yield to a quick question. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR PIRSCH: And if you could, step me through the process. I had assumed, based on what I heard yesterday, that there were two ways in which, as I mentioned the two springboards. But are there other ways in which a person might find relief under your bill? [LB260]

SENATOR LATHROP: First of all, it's Senator Rogert's bill. I'm happy to answer questions. [LB260]

SENATOR PIRSCH: I'm sorry, your amendment. [LB260]

SENATOR LATHROP: But...yeah, okay. Look at it this way, because that's the way the bill is structured and it's sort of the way we approach civil cases. Maybe it's kind of the way you approach a criminal case. The bill sets forth the elements that have to be proven in order for a person to make a recovery. They have to have been convicted of a felony and actually incarcerated, and they have to be exonerated in one of two forums.

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That forum can be a court which would vacate a conviction based upon the fact that the person didn't do it and some new evidence has come forth, can demonstrate that. [LB260]

SENATOR PIRSCH: Can I stop you here, since it's my time. Might a court vacate a decision for other than...for reasons other than actual innocence? [LB260]

SENATOR LATHROP: Sure they can. But that's not one of the recognized...that's...you haven't met one of the conditions of the bill if they vacate the judgment for a reason other than actual innocence. [LB260]

SENATOR PIRSCH: As a practical matter, has to your knowledge a court ever vacated a decision based on actual innocence? [LB260]

SENATOR LATHROP: Don't know. I can tell you it will be rare with this bill. It is a rare occurrence, and if you read the reported cases, as I'm sure you have, the standard or the measure for whether somebody can reverse a conviction that's already been appealed and finalized is very, very high. It's very, very difficult and the standard is such that those who get a vacated conviction in a court deserve one. [LB260]

SENATOR PIRSCH: How would...this would be after somebody began serving their jail time, correct? So you would petition a court...so we would open up courts now as we do, either would create a cause so courts would be able to respond. You could petition if you're in jail and say, I request the court to vacate my jail sentence based on actual innocence notwithstanding my conviction and placement in jail. Correct? Is that how you see it? [LB260]

SENATOR LATHROP: You can do that now. That happens before you ever get to one of these claims. [LB260]

SENATOR PIRSCH: Well, not based on actual innocence. That's based on the fact that the...you have to prove a constitutional...if you're convicted and serving, you have to allege some sort of constitutional right was violated, such as...I think the typical one is ineffective assistance of counsel. [LB260]

SENATOR LATHROP: That's different than what we're talking about. You'd have to ask the court to vacate your conviction because of newly discovered evidence. The newly discovered evidence, in turn, would demonstrate that you weren't there. It could be DNA. It could be, you know, the Archbishop...you were having lunch with the Archbishop and, you know,... [LB260]

SENATOR CARLSON: One minute. [LB260]

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SENATOR LATHROP: You have something new and it establishes to the court's satisfaction with a high standard that you were actually not there. [LB260]

SENATOR PIRSCH: Right. [LB260]

SENATOR LATHROP: That you didn't commit the crime. [LB260]

SENATOR PIRSCH: But the higher court wouldn't try that itself. It may reverse and remand for a lower court to hear. Is that what you're saying? [LB260]

SENATOR LATHROP: No. If I represented somebody, and they said: Mr. Lathrop, I didn't do it, and by the way I've had the crime scene evidence "DNAed," and my DNA isn't there; somebody else's is; and by the way, that guy is in jail in Florida. And somebody goes down to Florida and talks to the guy, and he says, yep, it was me. Well, now you got a guy that's actually innocent. His process is to go and ask the district court to vacate his conviction because he's actually innocent. He's got some newly discovered evidence. Or he can go to the Board of Pardons, I believe, and... [LB260]

SENATOR PIRSCH: You're not talking about... [LB260]

SENATOR LATHROP: ...do (inaudible). [LB260]

SENATOR PIRSCH: ...this doesn't affect an (inaudible). [LB260]

SENATOR CARLSON: Time. [LB260]

SENATOR PIRSCH: Okay, thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senators Janssen, Pirsch and Lathrop. Senator Council, you're recognized. [LB260]

SENATOR COUNCIL: Thank you, Mr. President. I just want to kind of weigh in on the last conversation between Senators Lathrop and Pirsch. And in terms of what and how these cases would come before a court, they would come before a court, the typical route, which is a post conviction appeal. And as Senator Lathrop correctly stated, a post conviction appeal can be on the basis of newly discovered evidence. And in fact, the situation involving the Beatrice Six was on the basis of newly discovered evidence, that evidence being DNA that established that they were not, in fact, involved in the commission of that crime. I think probably one of the errors here is this focus on innocence. The question is whether or not the individual committed the crime that he or she has been convicted of. And if the court finds that an individual did not commit the crime, ergo they are innocent, the court will not specifically say Joe Blow was innocent. What the court will find is that the evidence presented establishes that Joe Blow did not

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commit the crime. If I did not commit the crime, I am innocent. And it is that finding, and it's not until that finding that, under my reading of this legislation, would the Pardons Board ever become involved in the matter. Quite frankly, more often the case would be once a court vacates the conviction, that's when those individuals are going to file the claim. I don't think it is necessary that the Pardons Board issue a pardon. What the pardon does is just remove the fact that a conviction did occur and removes that conviction from your record. The determination of whether or not the individual committed the crime or not will be determined by a judge in a court of law. So in terms of trying to address some of these issues, perhaps the committee was being more considerate of the concerns of the body by adding the language with regard to the Pardons Board, because the Pardons Board is not going to make a determination as to whether or not an individual committed a crime or not. They're going to make their determination based upon the evidence that that individual brings before the Pardons Board. And in these cases what that person is going to bring before the Pardons Board is an order of a court vacating or reversing that conviction. And it's going to be on that basis that the Pardons Board is going to grant a pardon. And that's all the Pardons Board is going to do in those instances. And with regard to the discussion about damages, I think again Senator Lathrop accurately described the process here. This would be no different than any other tort claim. And an individual would have to provide evidence and the requisite amount of evidence to recover any of the items that are listed in the bill. And finally, with regard to the issue of caps, I think the body should be considerate of the fact that we're talking about having deprived individuals of their freedom and trying to place a value on that deprivation. And quite frankly, to set a cap, notwithstanding the length of time that an individual has been deprived of that freedom, I think operates in and of itself as an injustice. To put a cap on the basis of you tell me that 20 years is worth so much, but potentially I could reach that cap if I've only been deprived of my freedom for five years, because as I understand how the cap is operating, it would cap both the base payment for deprivation plus any damages. So I think we need to be really careful with regard to that whole issue of capping and also with regard to the whole issue of whether or not the individual would be entitled to receive the full recovery at the time of the entry of that order. We have already in these cases, if the individual meets the standards set forth in the legislation, we have already admitted that we have... [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR COUNCIL: ...deprived this individual of their freedom. And then to again come in and try to deprive them of their freedom again by setting limits on how they utilize the money that we award them for having deprived them of their freedom. Here again, we're trying to correct the deprivation of freedom by imposing another condition on their freedom. And I would urge the members of the Judiciary Committee who are working to try to address these issues to please take that into consideration. [LB260]

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SENATOR CARLSON: Thank you, Senator Council. Senator Ashford, you're recognized. [LB260]

SENATOR ASHFORD: Well, I just...thank you, Mr. President. I just, from the view...from our committee's view of this, we are having meaningful discussion around the damages issue. And that is a meaningful discussion. The process that we have placed in the bill, the process of how do you determine the damages, to us I think, is really the only legitimate way to determine the damages. In the case of the...in the Beatrice case there were court determinations in all six cases. In four of those cases the individuals were no longer incarcerated, and in two of those cases they were. And one of them, I believe all but one had pled, doesn't really matter. But prior to going to the...it does matter to them, obviously. But the process was that they went to the Pardons Board and they had, with the support of the Attorney General, and there was...had been exculpatory evidence that suggested or that they were not guilty, that in fact someone else had committed the crime. Senator Adams gave an interesting comment at the beginning of this discussion and that comment was: We never know for sure. And, of course, we don't ever know for sure. We are human beings and we make mistakes. And when we get into the criminal justice system, those mistakes, especially when we talk about life imprisonment or the death penalty as the one gentlemen was convicted and sentenced to, these mistakes become glaring and they become amplified. What we were trying to do here in the committee, I think, and we did the right thing, we took it...we looked at all the potential processes that these particular claimants could utilize prior to being awarded damages. And we came up with the...really, and we looked at all the different ideas. And the tort claims board really is the only one that makes any sense. And there...and the Pardons Board in this case pardoned the six individuals. That doesn't necessarily mean that they were 100 percent sure that these six individuals were innocent. It simply means that every human participant that could be...that was involved in the prosecution of this case, the prosecutorial side felt, the law enforcement side felt that these six individuals were innocent. You can't get much better than that. The question then becomes, what is the appropriate damage? And Senator Harms, Senator Adams, and so many of you here today have given some very good comments, Senator Wightman. This is really the issue. The issue is not the procedure. The procedure is an established, well established state claims process with court review. The standard of proof, as Senator Lathrop has suggested, is clear and convincing evidence, and that will be applied to the total procedure. All the procedures that are gone through under this bill must be established by clear and convincing evidence. There are safeguards here to ensure that the amount of damage is responsibly ascertained. We can add to that with some of these amendments that Senator Fulton suggested and some of the others and Senator Wightman about...you know, or Senator Wallman, about should we get more engaged in determining the amount of damage or should we leave it to the... [LB260]

SENATOR CARLSON: One minute. [LB260]

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SENATOR ASHFORD: ...Tort Claims Act. Those are very legitimate discussion points because...and this, by the way, is a very, very good discussion, because we're going to continue to be debating crime and punishment throughout this session. These same issues of crime and punishment and rehabilitation are going to be in front of us for days and days and days, so I think this discussion is exceedingly important. But again, the committee, I believe, has landed on the right process. To the best of human ability we are going to be able to ascertain when damages should be granted. And certainly in the Beatrice cases there may be those out there who believe they are not innocent. That may be so. And we heard some discussion in the hearing about that, but every institutional... [LB260]

SENATOR CARLSON: Time. [LB260]

SENATOR ASHFORD: ...group involved felt that they were exonerated or should be exonerated. Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senator Ashford. Senator Janssen, you're recognized. [LB260]

SENATOR JANSSEN: Thank you, Mr. President and members of the body. I really appreciate the discussion on the amendments. I would like to discuss some of the other amendments yet this morning, but I feel for the benefit of people here I yield the balance of my time to Senator Pirsch. Since I get to hear him on Government all the time, you should get to hear, as well, on the floor debate. Thank you. [LB260]

SENATOR PIRSCH: Well, thank you there, Senator Janssen. [LB260]

SENATOR CARLSON: Senator Pirsch, you have 4 minutes and 30 seconds. [LB260]

SENATOR PIRSCH: Thank you very much. I wonder if Senator Lathrop might yield to a question or two on his amendment. [LB260]

SENATOR LATHROP: Sure. [LB260]

SENATOR PIRSCH: Assuming the following hypothetical...one of the...well, it says if...in (c) and (d), the judgment of conviction was vacated or a judgment of conviction was reversed; and then in 3, "If there was vacatur or a reversal, either the information or indictment was dismissed or, if a new trial was held, the defendant was found not guilty." Assuming the following hypothetical, the most... [LB260]

SENATOR LATHROP: I don't think you're reading it (inaudible). [LB260]

SENATOR PIRSCH: Oh, and that language has been changed? Is that the copy of the

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amendment? [LB260]

SENATOR LATHROP: It is. [LB260]

SENATOR PIRSCH: Okay. Well, I'll check with that. Let me just ask you then with respect to the amendment then that has been proposed, AM545, how does that then vary with the language that I've just read from AM456? [LB260]

SENATOR LATHROP: I thought that the original language that was in the amendment you just referenced was cumbersome and confusing. And what Senator Rogert did with AM545 is to simplify it to say, before you get to first base on one of these claims, you have to be exonerated by the Pardons Board or by a district court judge. [LB260]

SENATOR PIRSCH: Okay. [LB260]

SENATOR LATHROP: That seemed to be a cleaner, more sure approach. It also means that the claimant is going to have to establish a greater burden to clear that first hurdle than probably was available under the previous amendment. [LB260]

SENATOR PIRSCH: Thank you for explaining that. And let me hand you that. If you could speak to the relative...the passages or sections that deal with...not with the Pardons Board, but rather the judge exonerating someone. [LB260]

SENATOR LATHROP: Sure. When you... [LB260]

SENATOR PIRSCH: What sections are those? [LB260]

SENATOR LATHROP: In Section 3, Senator Pirsch, it establishes what we would call the elements of liability. In order for a person to get to the place where they're allowed to be awarded damages, you have to establish liability. [LB260]

SENATOR PIRSCH: Okay. [LB260]

SENATOR LATHROP: Section 3 sets out three elements, right? And those are essentially two elements, and the third element addresses what happens if the person plead guilty or gave an admission that was coerced. So there's really two elements. One, you're convicted and sentenced to prison and you've done some time, and two, you've been exonerated--I'm doing this in shorthand--you've been exonerated by the Pardons Board or by a judge who's vacated your conviction. [LB260]

SENATOR PIRSCH: Does the fact that...is it dispositive then that if a judge vacates your conviction, is that dispositive, illustrative of actual innocence? Is it in all cases... [LB260]

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SENATOR LATHROP: No. No, no, no. It's not. And I think that's where the confusion is or where your questions might be creating confusion, which I'd be happy to clarify. A judge can vacate a sentence for a number of reasons. A judge can vacate a sentence for a conviction because the judge determines that the search and seizure was unconstitutional. The judge can do it because they had a bad confession. [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR LATHROP: Those are... [LB260]

SENATOR PIRSCH: Let me stop you there. [LB260]

SENATOR LATHROP: Let me...well, I don't want to...I know it's your time, but I don't want to mislead anybody. Those aren't reasons that will get you to a recovery (inaudible). [LB260]

SENATOR PIRSCH: And what is the language that disallows that as being a reason, a basis for it? [LB260]

SENATOR LATHROP: Section 2, "That the Board of Pardons has pardoned the claimant or a court has vacated the conviction...based upon a finding the claimant was innocent..." [LB260]

SENATOR PIRSCH: And does that mean that the court has to make a finding, a specific finding that the person is actually innocent, not just (inaudible)? [LB260]

SENATOR LATHROP: The court has to make a finding that specifically finds that the person was innocent or by implication in the order finds that the person was innocent. [LB260]

SENATOR PIRSCH: Implication would be not expressly written then, correct? [LB260]

SENATOR LATHROP: Well, I have an application, for example, for a full pardon. In there you have to say these are my reasons why I think I should be pardoned. In the case of these people in Beatrice, presumably they wrote in there: It wasn't me; there's DNA evidence that shows it wasn't me; give me a pardon. If they just... [LB260]

SENATOR CARLSON: Time. [LB260]

SENATOR PIRSCH: Thank you. [LB260]

SENATOR CARLSON: Thank you, Senators Janssen, Pirsch, and Lathrop. Senator

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Nantkes, you're recognized. [LB260]

SENATOR NANTKES: Question. [LB260]

SENATOR CARLSON: The question has been called. Do I see five hands? I do. The question is, shall debate cease? All those in favor vote aye; all those opposed vote nay. Are there others wishing to vote? Senator Nantkes. [LB260]

SENATOR NANTKES: Mr. President, I rise as a point of information. Can you tell me, does this motion require a majority of those voting or a majority of members? [LB260]

SENATOR CARLSON: Twenty-five members. [LB260]

SENATOR NANTKES: Thank you. I'll request a call of the house. [LB260]

SENATOR CARLSON: There has been a request for a call of the house to place the house under call. The question is, shall the house go under call? All those in favor vote aye; all those opposed vote nay. Record, Mr. Clerk. [LB260]

CLERK: 29 ayes, 0 nays to place the house under call. [LB260]

SENATOR CARLSON: The house is under call. Senators, please record your presence. Those senators outside the Chamber please return to the Chamber and record your presence. All unauthorized personnel please leave the floor. The house is under call. Senators Nordquist, Pankonin, and Stuthman, the house is under call. Senator Stuthman, the house is under call. Senator Nantkes, would you take call-in votes? [LB260]

SENATOR NANTKES: Yes. [LB260]

SENATOR CARLSON: Call-in votes will be accepted. The question is, shall debate cease? [LB260]

CLERK: Senator Heidemann voting yes. Senator Flood voting yes. Senator Mello voting yes. [LB260]

SENATOR CARLSON: Record, Mr. Clerk. [LB260]

CLERK: 26 ayes, 5 nays to cease debate, Mr. President. [LB260]

SENATOR CARLSON: Debate does cease. Senator Rogert, you are recognized to close. [LB260]

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SENATOR ROBERT: Thank you, Mr. President and members of the body. Thanks for coming back. AM545 is what we're voting on right now to the committee amendment AM456. We're going to have plenty of opportunity for further discussion. There are five more amendments filed at this time. Each of you will have plenty of times to get up and ask questions and discuss this more. They are all to the committee amendments. We need to adopt this one so that we can go on to the next thing. The next amendments that are going to come up from Senator Lathrop, he is going to talk about changing the burden of proof to clear and convincing from preponderance of evidence. That's one thing that concerns for the body and that's what we're aiming for. There's another one from Senator Wallman that lowers the yearly amount. We can definitely talk about that. Then there's one that talks about a cap from Senator Fulton and we can talk about that. And then Senator Lautenbaugh has two things that address the concerns from the body. One of them talks about removing the list of damages to consider and just have a straight line consideration of normal tort claim damages, and then the last one says this will be the only course of action that you will have against the state. So I ask for your support to AM545 to the committee amendments AM456, and then we'll go on and discuss some other stuff. Thank you, Mr. President. [LB260]

SENATOR CARLSON: Thank you, Senator Rogert. You have heard the closing on the amendment. The question is, shall AM545 be adopted? All those in favor vote aye; all those opposed vote nay. Have all voted that wish to vote? Record, Mr. Clerk. [LB260]

CLERK: 42 ayes, 0 nays on adoption of Senator Rogert's amendment. [LB260]

SENATOR CARLSON: The amendment is adopted. Mr. Clerk, items for the record. We raise the call. [LB260]

CLERK: Mr. President, your committee on Agriculture, chaired by Senator Carlson, reports LB241 to General File with amendments; and LB389, General File with amendments. Health and Human Services Committee, chaired by Senator Gay, reports LB346 to General File with amendments; LB367, General File with amendments; LB603, General File with amendments; and LB275, indefinitely postponed. Natural Resources, chaired by Senator Langemeier, LB209 to General File; LB54, General File with amendments; LB477, General File with amendments. I have a Reference report referring LB681. New resolution, LR42 by Senator Dubas, an interim study resolution. That will be referred to the Executive Board. (Legislative Journal pages 630-640.) [LR42 LB54 LB209 LB241 LB275 LB346 LB367 LB389 LB477 LB603 LB681]

Mr. President, next amendment to the committee amendments: Senator Lathrop, AM549. (Legislative Journal page 624.) [LB260]

SENATOR CARLSON: Senator Lathrop, you are recognized to open on your amendment. [LB260]

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SENATOR LATHROP: Thank you, Mr. President. This amendment is the amendment promised to change back the burden of proof. In most civil cases, and I think virtually every civil case, the measure of proof is a preponderance of the evidence; that is, the greater weight of the evidence. We have, up here in the criminal world, beyond a reasonable doubt. That's the greatest measure of proof required of someone who has the burden of proof. We've chosen clear and convincing. Clear and convincing is a recognized standard in the law. It is placing upon those who make a claim under this act a significant burden, not just to prove more likely than not, but to prove by clear and convincing evidence the elements of liability. The burden of proof with respect to the damages will remain as it always is in the civil law. But the liability issues--that is was the person exonerated--and more importantly, and where this is particularly important I think is in the third element of one of these claims, which is that they didn't commit perjury or fabricate evidence that resulted in their own conviction. They would have to establish, if they did plead to the offense, that they were coerced into that plea, and they would have to prove that coercion by clear and convincing evidence. So we are today with this amendment building in a significant safeguard that makes proving one of these claims a very difficult process. I want to remind you of a couple of things. One is the process of coming to the court and asking the court to vacate your sentence because of newly discovered evidence. That's out there. We're not creating it. We're not going to get a flood of people that are asking for it, because that's been in place forever as far as I know. So we're not creating more--more people are going to file claims in the district court. We're not going to clog the court because this is here. Ultimately, what we're doing is important because it's going to be important to a few people. But what is important to know is that as we create this cause of action for the wrongly convicted, few people will ever qualify for it. Few people will ever be able meet the standard of proof. Few people will make a recovery. This is not going to be a raid on the treasury. It is going to be something that is employed very infrequently. And let me suggest something else to you. That now that DNA is a part of our criminal investigation technique--it is now accepted widely in criminal investigations--we're not going to have a number of the wrongful convictions that we will later identify because of DNA. So the likelihood is that this bill, while important to a few people, is only going to be employed by a few people because we now have investigative techniques that include DNA, and it is less likely that we will wrongfully convict someone. So rest assured, we're not creating a cause of action that's going to be filed frequently. It'll probably be filed very infrequently; but nevertheless, it's important. My amendment provides an important safeguard. It makes it difficult to prove one of these cases, which I hear people on the floor say we want it difficult. We want to make sure that we're not awarding anybody damages under this new act that doesn't truly, honest to goodness, have it coming. And this is the first safeguard and we have others in the form of additional amendments that are coming. I would ask you to adopt AM549. Thank you. [LB260]

SENATOR CARLSON: Thank you, Senator Lathrop. You have heard the opening on

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AM549. There are senators wishing to speak. Senator Howard, you are recognized. [LB260]

SENATOR HOWARD: Thank you, Mr. President. I offer my time to Senator Pirsch. [LB260]

SENATOR CARLSON: Senator Pirsch, you have 4 minutes and 50 seconds. [LB260]

SENATOR PIRSCH: Thank you, Senator Howard and Mr. President. I wonder if Senator Lathrop might yield to a quick question. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Okay. [LB260]

SENATOR PIRSCH: Currently...I'm not sure if I'm on. Am I on, as well? Can you hear me? [LB260]

SENATOR LATHROP: I think Senator Pirsch needs his mike turned on. [LB260]

SENATOR PIRSCH: There we go. I guess, Senator Lathrop, I'll just ask you quickly. Are you familiar with the distinction between the statutory DNA Act that we added, that the Legislature added, as opposed to...as a grounds for vacating as opposed to the regular grounds for vacating? [LB260]

SENATOR LATHROP: No. [LB260]

SENATOR PIRSCH: Okay. I might ask Senator...let me see. I'll ask Senator Council, then, since she's commented a little bit...if she is...Senator Council, are you familiar with the DNA statute that the Legislature added in recent years with respect to postconviction relief? [LB260]

SENATOR COUNCIL: I'm only familiar with the legislation that has been offered this session, Senator Pirsch, with regard to the DNA statute. [LB260]

SENATOR PIRSCH: Okay. Well, then I won't ask that specific question, but...it is...I guess on a different question, I wonder if, Senator Council, you might yield to a different question then? [LB260]

SENATOR CARLSON: Senator Council, will you yield? [LB260]

SENATOR COUNCIL: Yes, sir. [LB260]

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SENATOR PIRSCH: Is it your understanding the normal...first of all, one of the...under the amendment if a sentence is...if a court has vacated a conviction of a claimant based upon a finding that the claimant was innocent of the felony crime, that's one basis. Another is the Board of Pardons, if they pardon the claimant based on a finding that the claimant was innocent of the felony crime. I asked Senator Ashford if his understanding of that meant then, would there have to be an explicit written finding by the Board of Pardons that we're not only pardoning them, but, by the way, we're pardoning them expressly for the purpose that because of the innocence of these individuals. Do you concur with that? [LB260]

SENATOR COUNCIL: Well, I think I answered that question previously, Senator Pirsch. I don't even think you get to that level without a finding by the court in the first instance that... [LB260]

SENATOR PIRSCH: This would be the Board--I'm sorry, I should have clarified--this would be the Board of Pardons fund? [LB260]

SENATOR COUNCIL: No. No, you've clarified it. And my point is, I don't even believe you could get to the Board of Pardons level without a court first having exonerated an individual, finding that he or she has not committed the crime. In my opinion, the provision for a pardon is just an additional, but not necessary. You're not even going to get to a Pardon Board considering... [LB260]

SENATOR PIRSCH: I see. [LB260]

SENATOR COUNCIL: ...unless you have a court that has made a determination that an individual did not commit the felony crime he or she was incarcerated for. That is my opinion and I have shared that opinion with Senator Lathrop. I think that that provides an extra level of proof for an individual who wants to take his or her claim to the Tort Claims Board. But I don't even think you get to the Pardons Board consideration until you've had a court determine that someone was not... [LB260]

SENATOR PIRSCH: So it's not needed. You're saying the Board of Pardons, because you...necessarily, you said, as a predicate step, would have to have a court say that they're innocent,... [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR PIRSCH: ...and that alone would justify a basis under this act for seeking really. Is that your... [LB260]

SENATOR COUNCIL: That's my opinion. [LB260]

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SENATOR PIRSCH: Okay. Thank you for that. And I'd ask Senator Lathrop then to yield to a question, if he would. [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Sure. [LB260]

SENATOR PIRSCH: Senator Lathrop, with respect to the Board of Pardons which can pardon the claimant based on the finding that the claimant was innocent of the felony crimes, would that require...and I think...were you the one who said that could be implicit; that they would not to have to expressly state that we're not just pardoning them, we're pardoning them because they're innocent. Is that not needed in your...necessarily, that express statement? [LB260]

SENATOR LATHROP: Well, I have to tell you that I've never been before the Pardons Board to represent somebody, so I don't know if they say in their order what the reason is. But someone handed me...Senator Ashford handed me an application for a full pardon. I'm looking at the application. In the application you have to give the Pardons Board the reason why you believe you ought to be pardoned. [LB260]

SENATOR PIRSCH: So you're leaving up to the person... [LB260]

SENATOR CARLSON: Time. [LB260]

SENATOR PIRSCH: Thank you. [LB260]

SENATOR CARLSON: Thank you, Senators. Senator Rogert, you're recognized. [LB260]

SENATOR ROGERT: Thank you, Mr. President and members. Thanks for your support on AM545. I rise in support of AM549 for Senator Lathrop and Senator Lautenbaugh. This is a collaboration and what we're doing is...I'm in full support of. I think maybe we're getting...well, regardless, I think we're focusing on a couple of things and I want everybody to remember still, we're bringing an avenue, we're bringing a process. And I think we've moved forward to a good decision on the last amendment. We've got a lot of good things to discuss yet. I was going to yield my time to Senator Lautenbaugh if he wishes; I think he's good to go. So I'll conclude with there right now, Mr. President. [LB260]

SENATOR CARLSON: Senator Lautenbaugh, do you wish to speak? Okay. Thank you. Senator Nelson, you're recognized. [LB260]

SENATOR NELSON: Thank you, Mr. President and members of the body. Would

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Senator Council yield to a question or two, please? [LB260]

SENATOR CARLSON: Senator Council, would you yield? [LB260]

SENATOR COUNCIL: Certainly. [LB260]

SENATOR NELSON: Senator Council, I appreciate your comments on how things work with the Board of Pardons. I have a concern. Do you have...and since we're still talking really about process, whether it's clear and convincing evidence or not, do you have AM545 which we just passed there? And I'm looking at the top of page 2. [LB260]

SENATOR COUNCIL: Yes, sir. [LB260]

SENATOR NELSON: All right. You'll see there, right at the very top, subsection (2), "the Board of Pardons has pardoned the claimant or that a court has vacated the conviction of the claimant based upon a finding that the claimant was innocent..." etcetera. Do you read that to say that that finding would be by the court, or does the Board of Pardons also have to do a finding that the claimant was innocent? [LB260]

SENATOR COUNCIL: Again, Senator Nelson, it is in the vast majority of cases that this legislation will apply to, you're going to have a court finding in the first instance. [LB260]

SENATOR NELSON: That's going to be ahead of time. All right. So once that has taken place and there's been a finding by the court, why, then they could go to the Board of Pardons and get a pardon and that's something else that they have to show as part of the evidence. [LB260]

SENATOR COUNCIL: Well, excuse me, I don't think they have to show it. It's an either/or, that they have a pardon or they have an order of the court vacating. [LB260]

SENATOR NELSON: Well, then you're saying that there wouldn't be any finding of innocence on the part of the Board of Pardons? That there again, that that would just be implicit if they were pardoned? [LB260]

SENATOR COUNCIL: I think what I'm saying is, is that the Board of Pardons' decision will be based upon the evidence presented in the application, and more often than not the evidence that's going to be presented in the application is that there's been a vacation or a reversal by a court order. [LB260]

SENATOR NELSON: Well, then why would it be necessary then, as far as the Claims Board, to even deal with the Board of Pardons or get a pardon? [LB260]

SENATOR COUNCIL: I think I asked that question. [LB260]

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SENATOR NELSON: All right. And we didn't an answer, is that correct? [LB260]

SENATOR COUNCIL: Correct. [LB260]

SENATOR NELSON: You made reference to the Beatrice Seven...or Six, rather. Their sentences were vacated, is that correct? [LB260]

SENATOR COUNCIL: That is my understanding. [LB260]

SENATOR NELSON: All right. Do you happen to know whether there was a finding by the court in vacating those sentences, that they were innocent, or were they just simply vacated? [LB260]

SENATOR COUNCIL: I have not read the order that issued in those cases, so I cannot respond to that question. [LB260]

SENATOR NELSON: All right. All right. Thank you very much, Senator Council. I would yield the rest of my time to Senator Pirsch, if he's available. If not, I would thank you, Mr. President and members of the body. [LB260]

SENATOR CARLSON: Thank you, Senator Nelson and Senator Council. Senator Pirsch, you have 1 minute and 40 seconds. [LB260]

SENATOR PIRSCH: Thank you. Senator Lathrop, would you yield to a question then? [LB260]

SENATOR CARLSON: Senator Lathrop, would you yield? [LB260]

SENATOR LATHROP: Yes. [LB260]

SENATOR PIRSCH: Very good. I guess we were talking about the petition to have a Pardons Board review yours. And you're saying that if the petitioner alleges, the claimant alleges on the petition that he was innocent, if the Pardons Board in fact does pardon, you're saying that's implicitly a statement by the Pardon Boards that the individual was in fact innocent as claimed, correct? [LB260]

SENATOR LATHROP: I think it can be. You know what? I've never seen one of their orders so I can't tell you if they detail in their order. [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR LATHROP: But you and I have both seen judgments from courts that say

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"judgment reversed" and no explanation. What I don't want to do is the idea...I don't want to stick so much language in this provision that it becomes unworkable. But when I look at--and I'd be happy to share this with you--an application for a pardon, it says tell me your story and give me a reason why you think you ought to be exonerated or why you want to the pardon. [LB260]

SENATOR PIRSCH: Well, and I had the actual pardon petitions of the so-called Beatrice Six. The majority of the petition deals with non...the crime related, but just general, you know, dealing with...you know, what have you done while you're in...were you in the military, what was your prior record, those kind of things. And so you would be...wouldn't you be implicitly...is there a pardon petition that's put forward in which the individual doesn't allege that they're actually innocent? [LB260]

SENATOR CARLSON: Time. Senator Pirsch, you have...you're recognized for the next light. [LB260]

SENATOR PIRSCH: Good, then we'll carry on with that. And that's what I'm wondering. Would in all cases then every pardon request carry with it the...I mean since...do you have an understanding of the percentage of pardon petitions that come forward that do have this allegation that they're in fact innocent? [LB260]

SENATOR LATHROP: No, and I don't think it matters how many of them come forward. I think what matters is how many of them are granted, and I would say it is darn rare. [LB260]

SENATOR PIRSCH: Okay. [LB260]

SENATOR LATHROP: Darn rare. [LB260]

SENATOR PIRSCH: But is your understanding...and maybe you don't know, but is there an actual...I guess in the decision are there ever any kind of...is there just a certificate of pardon that is granted, or is it your understanding that there is actually a decision written by the members of the Pardons Board that would allow them to go into detail and give the statement then that we've found them actually innocent? [LB260]

SENATOR LATHROP: I'm sorry. I thought I just got done saying that I've never seen one of their orders. I have their application here. [LB260]

SENATOR PIRSCH: Okay. [LB260]

SENATOR LATHROP: Number 35 in the application says: Why should we pardon you? And that's where the person gets to say: Because it wasn't me and we have DNA evidence that proves it and I have four witnesses that will say I was somewhere else.

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And then the Pardons Board can consider that material and decide yes or no. Now, do they actually put forth, in detail, their reason, or does the court when they're vacating the judgment based on the same rationale? I don't know the answer to that. But I think if that is the basis of their application or the basis of their petition to vacate, and it is granted, then it has satisfied this provision. [LB260]

SENATOR PIRSCH: But I'm assuming that they just grant a certificate of pardon and nothing more, no information more or less. Assuming that the petition held--as it does and I'm reading from it--reason for requesting full pardon and a short statement then included by the person, would that be adopted under your bill as the dispositive and allow them for recovery? [LB260]

SENATOR LATHROP: I have to go back and repeat myself. There is an application or a petition in which you petition or apply to the Pardons Board or a district court. The reason you give is that it wasn't you and there's newly discovered evidence. After that's considered, if it is granted, then it would qualify as one of the events that must happen in order for you to have a claim under this act. [LB260]

SENATOR PIRSCH: Okay. It would constitute the Pardons Board finding you actually innocent. [LB260]

SENATOR LATHROP: If that's what they addressed in their proceedings. [LB260]

SENATOR PIRSCH: Well, if all that is handed down...if all we know is that they hand down a certificate of pardon, I guess the world wouldn't know that. That's all we have is the certificate of pardon. [LB260]

SENATOR LATHROP: We would know more than that because we would have their application that sets forth their reason. [LB260]

SENATOR PIRSCH: Okay. And I'm saying... [LB260]

SENATOR LATHROP: And we would have a proceeding. We would have some proceeding where they took up the reason they are granting a pardon and the subject matter. And if it has to do with vacating because of a constitutional challenge over a stop? No. It's about whether the proceeding was over demonstrating that they were actually innocent. [LB260]

SENATOR PIRSCH: But the purpose of a Pardons Board isn't to determine guilt or innocence. It's to grant mercy, clemency. And so they don't really...is that not true? [LB260]

SENATOR LATHROP: Well, yeah, that would be one of their...they have a lot of

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different purposes, I suppose. One of the things that they can do is listen to somebody who explains that they have newly discovered evidence which definitively shows they weren't the perpetrator of the crime for which they've been convicted. And for that they can pardon the person. [LB260]

SENATOR PIRSCH: Wouldn't that ordinarily occur to the court so that the court would remand it? Wouldn't the Pardon Board say,... [LB260]

SENATOR CARLSON: One minute. [LB260]

SENATOR PIRSCH: ...with new evidence you'll want to take the court procedure and introduce that new evidence? [LB260]

SENATOR LATHROP: You're asking me a hypothetical. I don't know what they'll do in any particular case, Senator Pirsch. A person could certainly petition the court for postconviction relief and demonstrate that they have newly discovered evidence which exonerates them. That would begin with a petition that would set forth those allegations. Then there would be a proceeding and then there would be an order. And if the proceeding was about their innocence and the judgment is vacated, it would qualify. [LB260]

SENATOR PIRSCH: Thank you. Do you know what type of proceeding follows then for the Board of Pardons? Is that like a trial hearing? [LB260]

SENATOR LATHROP: I don't know how the Board of Pardons functions. I've never practiced before them. [LB260]

SENATOR PIRSCH: Very good. I appreciate that. I guess that is... [LB260]

SENATOR CARLSON: Time. Senator Pirsch, your light is on. This is your second time. [LB260]

SENATOR PIRSCH: I guess...and I'll just leave it. I think I've exhausted the line of...but I think that that is one of my concerns that I'd like to have addressed is...and there's differing views on this. I don't think that even the members of the committee view it necessarily the whole way. One views it...Senator Council views it as duplicative and not necessary, and Senator Ashford said, I think that it has to be explicitly a finding of the Board of Pardons. Senator Lathrop said it's implicit, it doesn't have to be expressly stated that this person was not just pardoned, but pardoned because of actual innocence. The problem with an implicit, it seems...in almost every pardon request, or the majority I would assume, that they...at the same time that they say, hey...I mean, they basically make an appeal on many fronts. One front being I'm actually innocent, but another front being even if you don't believe I'm actually innocent, guess what, the thing

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I did was I was young and, you know, I did these good things while I was incarcerated and I've been a model prisoner. So notwithstanding, even if you believe that I've committed the crime, the amount of time that I've served, etcetera, the things I've done deserving mercy should grant me mercy. And if all that comes down is a certificate of pardon just saying this person is pardoned, you don't know what reason really worked with the Board of Pardons, whether it was based on actual innocence or not. And so I would suggest that if you're going to utilize that, that you want to have an actual statement by the Board of Pardons. I would also suggest that if you don't, if it is inherent, you're going to have the Board of Pardons virtually deny all appeals because it would be de facto a payoff in all cases...if you were to show mercy and say, you know, the guy has committed a minor crime, or gal, years and years ago; has been a model prisoner; I think he's deserving of mercy; he did it but we think he's paid his time. To allow for an inherent reading then of actual innocence would mean the Pardons Board, which would ordinarily grant mercy in that case, would say we can't afford to grant mercy in that case. We have to deny, because the second that we don't deny it's going to be viewed as us acquiescing to his claim that he was in fact actually innocent. And so I think unintended consequences have to be guarded against, so. You know, I think that that should be addressed. But again, I do appreciate the conversation with respect to that particular element and I'd yield the balance of my time. [LB260]

SENATOR LANGEMEIER PRESIDING [LB260]

SENATOR LANGEMEIER: Thank you, Senator Pirsch. Seeing no other lights on, Senator Lathrop, you are recognized to close on AM549. [LB260]

SENATOR LATHROP: Thank you, Mr. President and colleagues. I do need to close because I need to respond to Senator Pirsch. I would say that if you have a concern that the language might not address a particular circumstance, offer an amendment. What I heard was concerns about a hypothetical that assumed that an order might be prepared in a particular way that wouldn't be clear enough, and the circumstances wouldn't be clear enough to satisfy this. If that's something that might happen or could happen in the pardons process, then I think we ought to deal with it. But to ask a hypothetical question without regard to whether it is possible or could happen or might happen, or even is in the realm, isn't helpful. I've encouraged people to ask questions. I'm happy to answer any question people have and I'll stand here until this bill is perfect because I believe in what we're doing. The first step in improving the bill and being responsive to the concerns of the members here in the body is to enhance the level of proof to clear and convincing on the issue of liability. That's what this amendment does. I would encourage you to support the amendment so that we can then go on to address those other matters which will be raised by amendments from Senator Fulton and Senator Lautenbaugh. Thank you. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Lathrop. You have heard the closing on

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AM549 offered to the committee amendments. All those in favor vote yea; all those opposed vote nay. Have all those voted that wish to? Record, Mr. Clerk. [LB260]

CLERK: 27 ayes, 0 nays, Mr. President, on the adoption of Senator Lathrop's amendment. [LB260]

SENATOR LANGEMEIER: AM549 is adopted. Mr. Clerk. [LB260]

CLERK: Mr. President, Senator Wallman would move to amend with FA15. (Legislative Journal page 625.) [LB260]

SENATOR LANGEMEIER: Senator Wallman, you are recognized to open on FA15. [LB260]

SENATOR WALLMAN: Thank you, Mr. President. And my amendment would simply reduce the damages here. A claimant would...instead of \$25,000 would be to...18, I think that's on line 18, page 2...and it would reduce the damages from \$25,000 to \$10,000. Thank you, Mr. President. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Wallman. You have heard the opening on FA15 offered to the committee amendments. The floor is now open for discussion. Senator Lathrop, you're recognized. [LB260]

SENATOR LATHROP: Thank you, Mr. President, and thank you, Senator Wallman. Senator Wallman, I've worked with him on a number of things. He's a very, very thoughtful senator, and he's offered an amendment that gets to, I think, what a lot of people have concerns with, which is are we doing something that's getting a little bit more rich than we're comfortable with. And it's a legitimate and fair amendment and it's something that we ought to discuss. I will tell you that the Judiciary Committee, we were at \$50,000 and \$100,000 a year if you were on death row. Ultimately, it's for us to decide. And Senator Wallman has put a number out there for our consideration to move the number from \$25,000 down to \$10,000, and let's have that discussion. Let's talk about what the amount should be for compensation for somebody's freedom. And let me talk about that for a second, because before we decide on Senator Wallman's amendment I'd like you to stop for a second, stop for a second and think about this. Think about you or somebody you care about, your son or daughter, the wrong place at the wrong time and they're now wrongfully convicted. Not they did something wrong and they're getting away with it. This is somebody who did not commit the crime and they're going to sit in penitentiary for, we'll say five years. Okay. Five years of their life. And this isn't a hotel. And they are going to leave their family. They are going to be taken from their job. They're going to be taken from their responsibilities. They're going to be taken from and have their freedom taken from them for a period of time. Now, ask yourself this: At what point do you think it's a fair trade between the money and a year's worth of

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your liberty? I don't think \$10,000 would be fair compensation for taking my liberty for a year. Now, we can consider, at the same time, fiscal considerations, and I grant you that ought to be part of this. But at some point, damages become a lot because something very, very important has been taken from somebody. And when we talk about somebody's liberty, we make it a significant felony to kidnap. When we talk about taking somebody's liberty, understand these are people who have established their innocence. They didn't belong there and now the question is: What's fair compensation? And don't just look at it like it never happened to you or wouldn't happen to your family. We ought to consider and be compassionate when we decide on what a fair number is. Maybe it's \$25,000, maybe it's \$10,000, maybe it's back to \$50,000. That's a fair discussion and I look forward to the debate on Senator Wallman's amendment. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Lathrop. Those wishing to speak, we have Senator Rogert, Harms, Wallman, and Lautenbaugh. Senator Rogert, you're recognized. [LB260]

SENATOR ROBERT: Thank you, Mr. President, and thank you, Senator Lathrop, and Senator Wallman for bringing this amendment. I agree with Senator Wallman that we need to discuss where we put this. We did start at \$50,000 plus \$50,000 on death row. We went to \$25,000. And I keep going back. I hear once in a while somebody says, you know, teachers may not make \$25,000 a year. And I said, that's right, but they weren't in prison. And so the biggest question does remain: What is freedom worth to you? And I don't know that you could put a price on that. I can kind of run down what some of the other states do. Alaska is \$50,000; California is \$36,000; Connecticut has no limit; Florida is \$50,000; Louisiana is \$15,000; Iowa is \$25,000; \$50 a day for Missouri, which is about \$20,000; \$100 a day for California, which is about \$36,000; Ohio is \$40,000; Texas is \$50,000 plus another \$50,000; Vermont, \$30,000 up to \$60,000 for increased aggravators. I think it is a tough place to put a dollar figure on. Do you...maybe you can't. Maybe it's nothing. Maybe it's nothing a day, that's just a maximum amount of what you consider you want to be there for, maybe it's \$100,000. I don't know and I support whatever the body does on this. Once again, this bill is the avenue for a claim and it will allow for folks to get restitution for a horrible wrongdoing of being put in prison when you didn't deserve to be there. And I look forward to a little further discussion on where we end up with this dollar figure, but I'll give the rest of my time to Senator Wallman to add a few points, if he wants. [LB260]

SENATOR LANGEMEIER: Senator Wallman, 3 minutes. [LB260]

SENATOR WALLMAN: Thank you, Senator Rogert. I have to agree with Senator Rogert. It's hard to put a dollar figure on somebody incarcerated. I don't think we can. And what are the circumstances? You know, are you in the wrong place at the right time or right place at the wrong time? Some of these scenarios are going to play out what's the percentage of guilty, what's the percentage of innocence. I have a friend who got

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pardoned in Texas. Does he have the rights to...he got pardoned from a death sentence by Governor Richards, and he admits he did it. So you know, if you have good attorneys and good people, maybe you weren't represented right the first time, but the second time you were. I know some awfully good attorneys that could maybe get you off the hook or look at somebody's trial book and is this retroactive, is this going to open Pandora's box. There's lots of issues, but we cannot put a figure on a person's life. It's not possible. So this is some compensation even though I have...Senator Rogert, I hate to be against something he proposes because he is a very social person who cares about people, and wrongly incarcerated people at that, and so do I. Our judicial system should pay very good attention to what we're doing if we're putting innocent people on death row. That's our fault. But should we be compensated for that? I don't know. We should fix the problem. And do we compensate the victims? Somebody is always a victim. Who's the victim? Do they get compensated? Did the Stock family get compensated? Did the Wilson family get compensated? No. [LB260]

SENATOR LANGEMEIER: One minute. [LB260]

SENATOR WALLMAN: Does that bother me? Sure it does. We can never seem to get compensation bills through for victims because you can't put a dollar amount on a person's life. That seems to be the argument and I agree. Thank you, Mr. President. Thank you, Senator Rogert. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Wallman and Senator Rogert. (Visitors introduced.) Continuing on discussion of FA15. Those wishing to speak, Senator Harms, you are recognized. [LB260]

SENATOR HARMS: Thank you, Mr. President and colleagues. Senator Rogert, would you yield, please? [LB260]

SENATOR LANGEMEIER: Senator Rogert, would you yield to a question from Senator Harms? [LB260]

SENATOR ROGERT: Yes, I will. [LB260]

SENATOR HARMS: Senator, yesterday when we were having this conversation in regard to the base \$25,000 and you, as you did today, listed out all the other states, what criteria did you use to choose the \$25,000 for...what criteria did you use? [LB260]

SENATOR ROGERT: Well, Senator Harms, I actually chose \$50,000 and then we came out of the committee at \$25,000. And, you know, I don't know that there's a real scientific method to where I chose it except I looked at where...\$50,000 is about the top per year that most of these things have, and I said, well, let's start there and work into something that the body wants to end up with. We came down to \$25,000 because it

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seems to be a reasonable amount and it seems to be about the average of what most of the states have used all the way across the country. [LB260]

SENATOR HARMS: Senator Rogert, what do you think a person's life is worth here? [LB260]

SENATOR ROGERT: (Laugh) I cannot say. I mean... [LB260]

SENATOR HARMS: Yeah. [LB260]

SENATOR ROGERT: ...if it was me, \$1 million a year would be not out of the question. [LB260]

SENATOR HARMS: Yeah. See, that's the very point I'm at, I want to talk a little bit about is the fact that it's very hard for us to measure what someone's life is worth. Just stop for a moment and think. If you were placed into prison wrongfully and you were in there for five years or two years, you lost all your freedom, you've not had a chance to see your children grow up or you've not had a chance to take a walk. You've not had a chance to go fishing or hunting or go to concerts or do whatever you like to do. You've lost all of that. And now we're debating what it's worth. I don't know if you can put a figure on it. But I think my life would be worth more than \$10,000. I think the compensation would be worth more than \$10,000. Just the embarrassment of being put into prison and the stigma that that carries for the rest of your life doesn't go away. People will still have doubt about you. People will still question whether or not you committed this crime or not, even though the evidence may lead us there, you were there. That doesn't go away. So how do you measure this? I think it's wrong by trying to say that our life is only worth \$10,000. And I'm not picking on my good friend Senator Wallman. I'm trying to get to the issue of measurement and what your life is worth. I think it's worth a lot more than that, but I also am realistic in trying to understand that we don't have the dollars to do all this. But what I would tell you is that I think we have to think about our own lives and where you would want to be and how you would be considered because it's a stigma you'll carry for the rest of your life. And so, Senator Rogert, I appreciate what you've done here with this bill. I struggle a little bit with the \$25,000. I think I mentioned that yesterday. I think that we need a cap on the bill. I also have a concern in regard to the legislation, as I mentioned yesterday, about giving someone \$1 million or \$2 million, not that they're not worth it, but in many cases how to handle that, how to financially address that issue having that money given to you all at once. How do you handle it? How do you manage it? If you look at the people that this has occurred in regard to winning a lottery and you follow through with it, many of those people go broke. Many of those people lose the money very quickly because they don't know how to manage it. And I realize we have...I've already heard this argument and I've heard that...we had the discussion with Senator Lathrop yesterday in regard to this issue, and I've had some of the aides talk to me that we don't do this anywhere else in

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any other payment plan or program that we have. [LB260]

SENATOR LANGEMEIER: One minute. [LB260]

SENATOR HARMS: I'm just telling you the people that are going to come out of prison are going to be confronted with issues that you and I are not used to, are going to be confronted with making decisions that you and I would automatically make but they've not had the background nor the experience of having the dollars. And so I guess as I see this, this still is an issue for me. We may not resolve this issue. I still support LB260. That's not my problem. But I'm just concerned what will happen to the people who come out of prison and are given the amount of money. I still feel like 30 percent or 40 percent or 50 percent and then spread it out over five or ten years in payment so you can teach them and help them learn how to handle the money that they have received. So thank you very much, Mr. President, and thank you, colleagues. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Harms. Senator Lautenbaugh, you're recognized. [LB260]

SENATOR LAUTENBAUGH: Thank you, Mr. President and members of the body, and thank you, Senator Harms, for those thoughtful comments on this. We are struggling with a question that we can never answer to anyone's complete satisfaction. Consider if we weren't talking about people who were wrongfully imprisoned, consider this was a wrongful death case. We still in the end have to put a value on that person's life. The loss that, you know, time with his children, the loss of everything, the loss of income his family would have had from him, everything goes into there. And somehow at the end of the day either the jury or often a judge makes a determination as to what that wrongful death was worth. And that sounds cold and it sounds callous, but that's the current state of the law for wrongful death. There is a determination made and a number is picked and that's the end of it. It's at least possible on this bill we may have made a mistake in that we got hung up on trying to put a value on freedom. And no one wants to lose freedom unwarrantedly, but I would submit that it's not as bad as losing your life unwarrantedly. But we struggled in committee with how do we put a value on freedom. And we talked about, well, what if, say, this person was a professional athlete or a doctor or something and this other person was just a couch potato. And I pointed out that, you know, your freedom to be a couch potato for that individual is just as important as your freedom to be a doctor if you can, because we're talking about freedom, not earning capacity and social utility, which I hope we never start talking about for people. But that said, we're getting hung up on this. Now, what should the limit be for freedom, for the loss of freedom as a floor to recovery? And then we've tacked on other elements. This may very well be evolving to the point where people who are wrongfully imprisoned and jump through all the other hoops at the beginning of this, Senator Lathrop has been discussing at length, they just get damages in some amount. And we may very well put a cap on it and we probably should. But when we try to assign a particular dollar amount

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to freedom, someone is always going to disagree and say my freedom isn't worth \$10,000 a year, my freedom isn't worth \$50,000, it's not worth \$25,000. Of course it's not because we're trying to answer the unanswerable. And we may very well be heading down a road where this bill just simply says you're entitled to damages and there's a cap in X amount. Leaving aside Senator Harms's concerns, and I've had some conversations with Senator Wightman, as well, regarding and will this money be frittered away in the first six months to a year if we give a lump sum to someone. That's possible. I have an inclination against setting up some sort of an ongoing state involvement to monitor those funds, but at least I can understand how it's possible that someone coming out of a period of incarceration might be particularly unable to deal with a windfall, perhaps more so than a lot of personal injury plaintiffs. I don't know the answer to that for sure, but at least I can understand the argument of the possible distinction. I just don't know if we want the ongoing state involvement. But please continue to keep an open mind as we work through this. And once again, like I said, we may be getting distracted on just the value of this floor element of the value of freedom which we struggled with in committee and now we're struggling with on the floor. And we'll work through it and this is still a good bill with merit, but we need to answer these questions to the majority's satisfaction and I think we will. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Lautenbaugh. Those wishing to speak, we have Senator Karpisek, Gay, and Wightman. Senator Karpisek, you're recognized. [LB260]

SENATOR KARPISEK: Thank you, Mr. President, members of the body. I understand what Senator Wallman is doing here and I think if we all think about Senator Wallman, the Beatrice Six is his district. I'm having a hard time keeping the Beatrice Six out of this conversation, and I think we need to, to think about the next time this happens. However, it's hard for me to keep them out of it because I could see that it'd be the first place that it's used. They've been pardoned. In my opinion, they were involved somehow. And I know some of this has been brought up before, but where do we draw the line on not helping someone get away from a murder, the victim, to just standing by idly or actually being involved, being the driver of a getaway car or actually being the one doing the murder or the supposed murder? And that's where I'm having my hardest time on this, is where do you fall in that? Were you involved in some way or were you out of the state at the time? I feel that those people were involved some way. Did they just not help? Did they help? I don't know. I think some of that was a knee jerk reaction. The DNA came out and all of sudden they're just out, pardoned. So that's what's making me really try to think this out. I do agree that these people probably do need something--form of rehabilitation, education. It is...so what I'm trying to say is, I'm trying to separate that from someone that we don't even know yet, someone five years in the future that gets out of jail, it's proven that they were nowhere near the crime. That makes it a lot easier for me to vote for this bill. I do think we're working through the amendments and I thank Senator Rogert and Lathrop and everyone else involved. It is

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touchy. I hope everyone remembers that Senator Wallman has that case right in his backyard and it butts up right against mine, too, and a lot of people that we know have been touched by it. So there's a lot of hard feelings that it wasn't just innocence, but maybe they were involved somehow. Anyway, I just wanted to say that. I appreciate how we're moving through it. I think we're going slowly, thoughtfully, and I think we'll get through it just fine. In the beginning I thought there was no way I'll vote for this. We keep working through it. I'm still not sure that I will, but I think we're getting a lot better. I will vote for Senator Wallman's amendment. I think \$10,000 is all right. That's the other problem, if we make it too high, do people say they committed a crime just to get thrown in jail, and then ten years later, five years later say, oh, well, let's find out I wasn't guilty, but now I'm going to get paid \$100,000? I know that's a stretch. But I don't know, some people get thrown in jail on purpose just to get out of the cold, maybe not as far as to say they murdered someone. It's a tough thought, so. Thank you for the good conversation today, and I know a lot of us have our ears open and our mouths shut and that's what I'm going to try to do from now on. Thank you, Mr. President. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Karpisek. Senator Gay, you're recognized. [LB260]

SENATOR GAY: Thank you, Mr. President. I agree with Senator Karpisek. I've had my ears open and my mouth shut pretty much up to this point and then Senator Lautenbaugh just made a statement that I think hit the nail on the head. I think--and I'm going to summarize--he goes: Maybe we're getting to the point where the bill says you're entitled to some damages, here's the amount, and let's move on. And when I'm talking to members, that's what I'm hearing. And I appreciate those who are trying to add amendment after amendment after amendment to make this a better bill, and that's fine, but here where we're out on the floor, I'm getting a little worried. I think we're all looking at the fairness of the bill. You know, we want it to be legally correct. No problem with that. But these continuous amendments and tweaks gives me some worry, and I'm afraid that when we have a bill that everyone wants to vote for, but in the very end we're somewhat very uncomfortable with the bill as it exists. Now, maybe I'm wrong and maybe we'll get to this point. And, you know, I've got other things, we're all working on it and I do appreciate the members participating in this, but I think at the end of the day if we get a bill that is somewhat very lukewarm and I kind of like it but I don't, but, gee, I better hit my light and we need to do something--those are never good situations, I don't think. So I think we need to look at this. I'm going to vote for Senator Wallman's amendment and listen to the different amendments. When we're talking a cap of \$1 million here and this and that, you know, \$1 million tax-free income is a lot of money. Senator Carlson, I heard him earlier saying, you know, how many of us walk away and say, well, here's what I've got? It is a...I don't know how I could put it into words how bad it is for these people who would be wrongly convicted, and we're going to find out. The idea that we can't look at the people at Beatrice, which I think helped bring this bill or bring some urgency to the this situation, I think we need to pay attention because

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they're rightfully going to probably be using this bill. And it better be done right because you know they're going to be...I asked Senator Ashford yesterday, would they be eligible for this? And they would. So we need to get a bill that works, not just 10 years, 15 years and gee, maybe it'll never be used because the judicial system will be so well. As long as there's human element involved, there's going to be mistakes. So I think...and I applaud--and this is not criticism--I think what we're doing here is trying to just massage this thing so much, but I'm afraid at the end of the day we're going to have bill that, like I say, everyone's kind of lukewarm on it and I'm not so sure it will be the very best bill we had. This came out of committee and then 8-0 on the AM456 amendment. Now we're adding an amendment, another amendment, another amendment. So maybe the parties need to get together, draft something after talking much more to their colleagues, and say here's the bill we have. Tighten it down. But like I say, I think Senator Lautenbaugh is right. I think most of us--and I can't speak for everyone--but I think what we say, you're entitled to damages, here's the amount and here's the bill. I think everyone would be much more comfortable with that. But that's my view and I'd like to hear what others have to say. Thank you, Mr. President. [LB260]

SENATOR LANGEMEIER Thank you, Senator Gay. Those wishing to speak, we have Senator Wightman, Nelson, Lathrop, Carlson, and others. Senator Wightman. [LB260]

SENATOR WIGHTMAN Thank you, Mr. President and members of the body. Frankly, I first thought that I probably could not support Senator Wallman's amendment. I've kind of switched around to where I really think that we really need to have a fairly low minimum on this and I think maybe \$10,000 is better than \$25,000. I think of the wide range of wrongfully convicted felons that might fit under this act. And I can see people who maybe have spent half of their life in the penitentiary system and maybe are out, but the odds were high that they probably were going to spend a good deal of the rest of their lives behind bars. In that case, I don't think freedom...and I think Senator Lautenbaugh addressed this very ably, that what is freedom worth? Well, freedom to that person may not be worth a whole lot and I suspect it isn't. You know, he's lived a life of crime. I don't see anything in the proposed legislation, as we're looking at it right now, that would limit him. He obviously has to prove he was innocent of the particular crime of which he was convicted and for which he's been serving time. But that person is going to fit under this minimum, and \$25,000 a year seems like an awful high minimum for a person in that situation, to me. So I think, first of all, I will support the \$10,000 minimum rather than the \$25,000 minimum. I certainly think that Senator Fulton is on the right track as far as having a cap on this. I probably would support a lower cap for that person who's on death row than the \$2 million--perhaps \$1.5 million. I do think that he has suffering, emotional suffering probably beyond that of a person who is not under the imminent threat of the death penalty. Quite frankly, and I think Senator Gay may be kind of on the right track on this, I would rather see something that just set a minimum and a maximum and everything is included. We talk about exclusive remedies and I mentioned this before when I spoke, workmen's comp is an exclusive remedy.

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You don't stack various elements of damage. In other words, we have an element of damage for loss of freedom. Now we're going to stack on top of that emotional and physical suffering. And then we're going to tack loss of wages on top of that. Now, we aren't specifically saying that because I think the amendment says that they would have those causes of action that they would have under a tort claim, but certainly these are probably all elements of a tort claim. So I frankly would rather see something with a minimum and a maximum and that includes everything that they're going to get, and not this stacking by providing something, some compensation for the loss of their freedom and then on top of that we're going to stack everything that they would have under a normal tort claim. So I support the concept of LB260. Whether or not a bill is going to come out of this that I can support, I'm not sure, but for right now I think I will support the \$10,000 minimum for loss of freedom. I think for somebody who has lived a good life and hasn't been behind bars a lot of his life, that maybe \$25,000 is a proper amount, but it seems to me we're not limiting it in that respect, and I think we do have to look at probably a lower minimum than \$25,000. I hate to see somebody get \$25,000 a year for the time he spent if the likelihood would have been that he would have spent most of those years behind bars anyway. [LB260]

SENATOR LANGEMEIER: One minute. [LB260]

SENATOR WIGHTMAN: Thank you, Mr. President. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Wightman. Senator Nelson, you're recognized. [LB260]

SENATOR NELSON: Thank you, Mr. President, members of the body. Senator Wightman has ably covered, I think, a lot of the points that I was going to make, and I think Senator Lautenbaugh and Senator Gay as well. It seems to me that we have two directions here, two alternatives. One is that for the loss of liberty we establish a fairly high amount, \$25,000, \$50,000, whatever it is, and let it go at that as the measured damages that someone is going to receive for having been wrongly incarcerated. The other way is to set a very low amount here because it's so difficult to arrive at a figure, and then let them go with the damages section here. We have amendments to that effect. And recover actual damages for loss of wages, all the things that they've suffered because they've been incarcerated in prison, and then still put a cap on it so we don't get way out of hand. If you're talking about mental, physical damages, psychiatric, that sort of thing, you can get way up there. So I think we need a cap and we have had some caps suggested here by amendments. So I think the better way to go, personally, is that we set just a minimum standard of, say, \$10,000, and then let them also supplement that with damages through a court of law. And for that reason I think I feel compelled to support Senator Wallman here on his \$10,000 per year minimum amount. It could amount to \$100,000. If you're in for 40 years before DNA shows that you were innocent, you've got \$400,000 plus the ability to get even more damages up to a certain

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point. Thank you, Mr. President. Thank you, members of the body. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Nelson. Senator Lathrop, you're recognized. Senator Lathrop waives. Senator Carlson, you're recognized. [LB260]

SENATOR CARLSON: Mr. President and members of the Legislature, I'm going to respond a little bit to some comments that I've heard in the last few speakers. First of all, I will say that I am not in favor of Senator Wallman's amendment and I will be voting against it. Senator Gay indicated that he's concerned about we tweak too much and we end up with nothing. I think thus far the procedure that we're going through on an item like this is the way we're supposed to do things, and we stay here and we talk about it until we have something that the majority agrees upon. And I think it's better that we spend the time now than to put something into effect and then find out that we didn't really make the right decision. I think of a statement that Senator Council made earlier, and it's a pretty strong statement: If I did not commit the crime, I'm innocent. Now, I have to swallow hard on that statement but I think it's true in what we're talking about. We're not going to assess levels of guilt or levels of innocence. We have a bill here that if I did not commit the crime, I'm innocent. And so I stand more in supportive of the \$25,000 and \$50,000 levels that have been indicated in the bill itself. I still want to see a cap and I'll wait for Senator Fulton's amendment. I have one that's being worked on that would lower the caps yet from what Senator Fulton is going to recognize, but I still think that it addresses the problem and puts it into a realm that we could live with and yet address those issues of lost wages and the price of freedom. So let's talk about this until we've all expressed what we want to express, and let's continue to work to make this the best bill that we can make it. Thank you, Mr. President. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Carlson. Senator Gloor, you're recognized. [LB260]

SENATOR GLOOR: Thank you, Mr. President, members of the body. I appreciate Senator Gay's comments and I am in agreement that we are drifting towards some sort of common ground here. I am one of those multitude of amendments that is out there. My amendment specifically speaks and ask us to take a look at the whole concept of, as we talk about, what is the price of freedom or what is the loss of freedom worth. My amendment very specifically would, in fact, come up with a dollar amount of \$50,000. Forget the laundry list, the compensation for lost wages, child care, education, and pick a set dollar amount that is good for anybody who's been incarcerated inappropriately, inaccurately. The \$50,000, a number that I came at trying to do some rough calculations of a degree of reasonableness that's out there, knowing that we were working originally with \$25,000-plus, thinking \$50,000 ought well cover somebody getting their life back to order again. I do this because I had a degree of concern, without appropriate caps, that if a professional, white-collar worker were to be inappropriately imprisoned for a period of time, somebody who had earnings of \$200,000 for 20 years, we could be talking

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about \$4 million in lost wages, plus whatever we decide to pay them. The price tag ran up very quickly, plus looking at the issue of the winds of fate are kind of interesting. The fact that you are a professional making a nice income doesn't mean that you weren't going to, in fact, fall into difficult times. Perhaps fall into a degree of disrepute within your own profession, watch your profession drift away, and also take into consideration the fact that you may be somebody who's a struggling blue-collar worker, somebody on welfare who turns their life around and finds themselves with a good income. Your income prior to your incarceration may not look like much, but in fact you may have done very well for yourself had you stayed out of jail. Looking at a set dollar amount appeals to me and getting rid of the laundry list appeals to me and that's the basis of my amendment, although I am open to withdraw that based upon what the discussion brings us to prior to my amendment coming up for consideration. Thank you, Mr. President. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Gloor. Senator Price, you're recognized. [LB260]

SENATOR PRICE: Mr. President and members of the body, thank you very much. In listening to comments and everything this morning, it just now dawned on me if you would that we tend to look at this in light of the situation in Beatrice. But...and not really to interject levity, but I was just now thinking of the movie the Fugitive where we saw a professional, a doctor who had this happen to this fictitious character. And we're talking about limits on their earnings and things of that nature, so I just wanted to add that to the mix of things as we think about this. Not prejudice our thoughts to a certain social economic status that it could quite well be very broadly applied throughout our society. So that's...I just want to bring that as quick thought and I appreciate the time, Mr. President, and thank you. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Price. Seeing no other lights on, Senator Wallman, you are recognized to close on FA15. [LB260]

SENATOR WALLMAN: Thank you, Mr. President, members of the body. I just have a letter here from one of the great-granddaughters from Helen: The day that she died is etched in my memory. I was almost nine years old when she died. I remember running down the hall of her apartment building to see her only to be stopped by police barricades. Isn't it ironic as I felt confused at that moment in time as to why I was directed to go to my great aunt's apartment that lived next door? The reality is that I am only even more confused now at 32. So it's very hard for us to understand death. But the reality is that when someone that you love is murdered, it becomes confusing. So she's writing in hope that we will truly look at this bill and pay attention to what we're doing. And it's not about compensation really. I think it's about how we look at justice. Do we have justice? What is truth? What is justice? The man that actually did this crime, supposedly, was in Kansas. So I urge you to vote for this amendment. Even though I

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have trouble with the bill, I told Senator Rogert I would vote for this bill. And thank you, Mr. President. [LB260]

SENATOR LANGEMEIER: Thank you, Senator Wallman. You have heard the closing on FA15 offered to AM456. All those in favor vote yea; all those opposed vote nay. Have all those that voted that wish to? Senator Wallman requests a call of the house. The question before the body is, shall the house go under call? All those in favor vote yea; all those opposed vote nay. Record, Mr. Clerk. [LB260]

CLERK: 34 ayes, 0 nays, Mr. President, to place the house under call. [LB260]

SENATOR LANGEMEIER: The house is under call. Senators, please return to the Chamber. All unauthorized personnel please leave the floor. The house is under call. As we wait for the people to arrive, Senator Wallman, how do wish to proceed? A roll call vote in regular order? [LB260]

SENATOR WALLMAN: Yes. [LB260]

SENATOR LANGEMEIER: Thank you. The house is under call. Senators outside the Chamber, please return to the Chamber and record your presence. Senator Adams, would you please check in. Senator Lautenbaugh, would you check in. Senators McGill, Cornett, Nantkes, please return to the Chamber and record your presence. All members are present and accounted for. There has been a request for a roll call vote. The question is, shall FA15 be adopted to AM456? Mr. Clerk, please call the roll in regular order. [LB260]

CLERK: (Roll call vote taken, Legislative Journal page 640.) 20 ayes, 24 nays, Mr. President, on the amendment. [LB260]

SENATOR LANGEMEIER: FA15 is not adopted. With that, I raise the call. Mr. Clerk, items for the record. [LB260]

CLERK: I do, Mr. President. Hearing notice from the Revenue Committee. Senator Howard has selected LB346 as her priority bill for this session. Senator Karpisek would like to print an amendment to LB403; and Senators Fulton, Lautenbaugh, and Gloor, and Pirsch, amendments to LB260. Announcements, Mr. President. The Executive Board will meet in Executive Session today at noon in Room 2102, Exec Board at noon, Room 2102. And Senator Ashford would like to announce the Judiciary Committee will meet in Exec Session tomorrow morning at 8:00 in Room 1113, Judiciary, 8:00 tomorrow morning. (Legislative Journal pages 641-643.) [LB403 LB260 LB346]

Priority motion, Mr. President. Senator Cornett would move to adjourn until Wednesday morning, March 4, at 9:00 a.m. []

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SENATOR LANGEMEIER: You have heard the motion to adjourn. All those in favor say aye. All those opposed say nay. The ayes have it. We stand adjourned. []