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Judiciary Committee
March 04, 2011

[LB276 LB300 LB668]

The Committee on Judiciary met at 1:30 p.m. on Friday, March 4, 2011, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB668, LB300, and LB276. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Colby Coash; Brenda Council; Burke Harr; Tyson Larson; and Scott Lautenbaugh. Senators absent: Amanda McGill.

SENATOR ASHFORD: Good afternoon, everyone. Welcome to the Judiciary Committee. We have three bills today. Speaker Flood is going to introduce the first bill, and I don't have the number right off the top of me. LB668. Why don't you go ahead?

SENATOR FLOOD: Good afternoon, Chairman Ashford, members of the committee. My name is Mike Flood, F-l-o-o-d. I represent District 19, which is all of Madison County. The bill is straightforward; it's not going to take a lot of the committee's time. It would provide for increased penalties: a Class IV misdemeanor for the first offense, and a Class III misdemeanor for each subsequent offense for the acquisition of meth precursors, pseudoephedrine or phenylpropanolamine in excess of the 24-hour limit in Section 28-456. It would also provide the penalty for the acquisition of these meth precursors in excess of the 30-day limit in 28-456. Here today is Mike Bowersox. He's an investigator with the Madison County Sheriff's Office. He's also a State Deputy Sheriff for the SNARE Drug Task Force, which is responsible for the 23-county area covered by Troop B of the Nebraska State Patrol. Investigator Bowersox can provide further background for the proposed changes in the bill. But briefly, the main reason law enforcement in my district brought this idea to me is that when Sections 28-456 and 28-456.01 were changed in '09 to mirror the federal pseudoephedrine limitations for daily and 30-day purchases, a 30-day penalty provision was not included. In other words, this section contains a 30-day prohibition but not a penalty for its violation. Investigator Bowersox and other law enforcement officers give good reasons for making the penalty a misdemeanor rather than an infraction. With that, I'd like to thank the committee for your consideration, and I'd like to give the committee a heads up that if you're favorable to this, I'd like to amend it into LB20, which I believe deals with pseudoephedrine. It is currently waiting on Select File, so. Thanks. [LB668]

SENATOR ASHFORD: Thank you, Speaker Flood. Any questions? None? Thank you. [LB668]

SENATOR FLOOD: And I waive closing. [LB668]

SENATOR ASHFORD: Thank you. Proponents? [LB668]

MIKE BOWERSOX: (Exhibit 1) Good afternoon. My name is Mike Bowersox, B-o-w-e-r-s-o-x, and I'm here as a proponent of LB668. As Senator Flood said, I am an

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investigator and State Deputy Sheriff for the SNARE Drug Task Force. I'm also assigned to the northeast Nebraska Clandestine Lab Team. We are responsible for the 23-county area serviced by Troop B of the Nebraska State Patrol in the northeast corner of the state. I have been assigned to the SNARE Drug Task Force since approximately 1998, and have been serving with the Clandestine Lab Team since 2002. I've been involved in over 300 investigations of methamphetamine ranging from lab warrants to conspiracies to manufacture. Nebraska Revised Statute 28-456 has been an incredible tool for law enforcement since its introduction in 2005. It has allowed us as law enforcement officers to monitor pseudoephedrine buying patterns. It has also aided us in cases where suspects were intentionally going to other cities, counties, and even crossing state lines in an effort to thwart enforcement efforts. The statute was changed in 2009 to mirror the federal pseudoephedrine limitations for daily and 30-day purchases. It however did not include the 30-day penalty provisions. This was a loophole that was quickly exploited. LB668 remedies this. The enhancement from an infraction to a misdemeanor will also help curtail pseudoephedrine shoppers. Shoppers are individuals paid by methamphetamine manufacturers that are known as cooks to go to multiple pharmacies and buy the daily limit of cold pills needed to make methamphetamine. Shoppers are usually paid with methamphetamine. I have interviewed several cooks and shoppers, and they have told me that the current infraction penalty for buying too much pseudoephedrine was simply a cost of doing business. Thank you for your time. [LB668]

SENATOR ASHFORD: Any questions of Michael? Yes, Senator Coash. [LB668]

SENATOR COASH: Thank you, Chairman. Are you...how many successful prosecutions of going over the buying limit have you had? Are you prosecuting a lot of folks with this, or are you having trouble? [LB668]

MIKE BOWERSOX: In Madison County, I know that they... [LB668]

SENATOR COASH: Yeah, yeah, in your experience. [LB668]

MIKE BOWERSOX: They have been 90 percent successful in getting those filed. [LB668]

SENATOR COASH: How many? [LB668]

MIKE BOWERSOX: I don't have an exact number of how many cases we've filed over the years. [LB668]

SENATOR COASH: I mean, I'm just... [LB668]

MIKE BOWERSOX: It would be... [LB668]

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SENATOR COASH: Dozens, hundreds, thousands? [LB668]

MIKE BOWERSOX: Hundreds. [LB668]

SENATOR COASH: Hundreds. Okay, so there's plenty of people out there with a conviction on their record for buying too much meth at once. [LB668]

MIKE BOWERSOX: Yes. [LB668]

SENATOR COASH: Okay, thank you. [LB668]

SENATOR ASHFORD: No other questions. Thanks, Michael. [LB668]

MIKE BOWERSOX: Thank you. [LB668]

SENATOR ASHFORD: (See also Exhibit 2) Other testifiers on this bill? Proponents or opponents or neutral testifiers? Speaker Flood waives closing. All right. Senator Coash, can you...? [LB668]

SENATOR COASH: Yes. Senator Ashford, here to open on LB300. [LB668]

SENATOR ASHFORD: Members of the committee, my name is Brad Ashford. I represent Legislative District 20, and I'm here to introduce LB300. LB300 is a bill that would revise the Community Trust that was created under LB598 in 2009. The purpose of the Community Trust is to create a nonprofit entity that would be able to receive and distribute charitable donations after a tragedy or a natural disaster. The idea of this concept was given to us by the United Way after the Von Maur tragedy. The Community Trust is housed now under the Crime Commission for administrative purposes and was made a part of the Crime Victim's Reparations Fund for purposes of oversight and implementation of the Community Trust. And there is an expectation that the Crime Commission will provide administrative assistance. As the Crime Victim's Reparations Committee has set about creating the trust and identifying individuals to serve on the board, there have been several obstacles that we are seeking to address. The bill would allow the Community Trust board of directors to be represented by the Attorney General's Office if sued in their official capacities. A major concern here is that as a hybrid government public entity, it is unclear that the directors who are not appointed by the Crime Victim's Reparations Committee would automatically receive representation. Two, it would provide that the Community Trust board of directors shall be indemnified against loss if sued while acting in their official capacity. It is believed that if we do not address indemnification, obviously it will be difficult to find directors to serve. The bill provides that the potential for lawsuits by the Community Trust be assessed by the Risk Assessment Office. There's also a provision that would allow for the director of the trust

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to hold closed door meetings when they are discussing actuarial information. It changes the response time for the trust for the receipt of donations from two weeks to as soon as reasonably possible; it changes the time frame for disbursement of all funds received by donation from six months to as soon as reasonably possible; and it would allow the Community Trust to use up to 10 percent of its donations received for administrative purposes, and an appropriation of \$10,000 to assist the trust with its up-front costs such as the fee to be submitted when seeking the 501(c)(3) designation and so forth. Rand Hansen from the Crime Victim's Reparations Committee is here to testify, I believe. He's a certified public accountant and has worked on the implementation. This is obviously a very technical corrections bill. At the time the bill was passed, there was quite a bit of discussion in the Omaha community about the difficulty that the United Way had in distributing funds that they received for victims of the Von Maur shootings. This was a, I think, good work by the United Way, a responsible way to address the issue. But these technical problems have arisen, so that's what the bill is about. [LB300]

SENATOR COASH: Thank you, Senator Ashford. I've got another question or two questions: The part on the bill where you'll close the door to discuss actuarial data. [LB300]

SENATOR ASHFORD: Right. [LB300]

SENATOR COASH: Can you talk a little bit more about that? What does that data relate to, and why is it important to close the door during that part of the discussion? [LB300]

SENATOR ASHFORD: I believe, and I'm going to defer to Mr. Hansen on that. [LB300]

SENATOR COASH: Okay. That's fine. And then my second question... [LB300]

SENATOR ASHFORD: I can take a guess, but I'm not going to do that. [LB300]

SENATOR COASH: Okay. My second question has to do with the 10 percent that is used to administer the trust, the 10 percent of the donations. Is that up to 10 percent or is it 10...? [LB300]

SENATOR ASHFORD: Yes, up to 10 percent. [LB300]

SENATOR COASH: Okay. So if it can cost less to administer the fund... [LB300]

SENATOR ASHFORD: I'm sure they will try to have it be less. [LB300]

SENATOR COASH: Okay, all right. I don't have any further questions. Senator Harr. [LB300]

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SENATOR HARR: Thank you, Senator Coash. And I just want to, more than anything, for legislative intent: the change of disbursement from six months to "as soon as reasonably possible." The reasoning or the logic behind that is to get more than six months if it's, obviously, reasonably possible, though? [LB300]

SENATOR ASHFORD: Right. And I think it was a reaction to what happened at the Von Maur... [LB300]

SENATOR HARR: Injuries that may take more than six months. [LB300]

SENATOR ASHFORD: Yes, may take more than six months to resolve themselves. [LB300]

SENATOR HARR: Okay. Thank you. [LB300]

SENATOR COASH: Thank you, Senator Harr. Any other questions for Senator Ashford? [LB300]

SENATOR ASHFORD: I'll waive. [LB300]

SENATOR COASH: Okay. Thank you. We'll take the next testifiers in support of LB300. Come on up. Welcome. [LB300]

RANDALL HANSEN: (Exhibit 3) My name is Rand Hansen. I'm a CPA from Omaha. I am a member of the Crime Victim's Reparations Committee. The original enabling legislation for the Community Trust mandated the addition of two members to the Crime Victim's Reparations Committee: one from the not-for-profit sector; one from the business sector. I am that representative from the business sector. I want to thank you for the opportunity to testify on behalf of LB300. Senator Ashford did a good job in running down that, so I'm going to try and not repeat everything he said. Basically we're asking for three kinds of adjustments to the original legislation. The first kind is just for some efficiencies in reporting and such, that we feel we're going to be able to do a better job of managing from within the trust itself. Some of the deadlines that were in the original legislation were somewhat arbitrary. Secondly, we're trying to correct some situations that could cause the trust not to function at all: one of them being the inability to get directors if we don't provide liability of coverage for them; the second being there's a provision in the original legislation that would allow the Crime Victim's Reparations Committee to direct a distribution by the Community Trust--and, in my opinion, that would probably violate 501(c)(3) regulations. Lastly, there are two provisions on funding: one that would allow us to take up to 10 percent of the contributions. I should warn you in response to what you had said, that that is, in many cases, at least for the foreseeable future, going to be pocket change. Somebody gives us a \$10 contribution, and we have to give them a receipt. That receipt is going to cost

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no less than 60 cents to send out, so our \$1 that we get for the 10 percent isn't going to go very far. The second one is a request for \$10,000 up front. The problem that we have there is that until we are known in the community, we will not receive donations. We will not be known in the community until we can get our name out and do our marketing. We cannot do our marketing until we have money. We won't get money till we get donations, so we are on a vicious circle. [LB300]

SENATOR ASHFORD: Senator Council and I understand that problem, but go ahead. That's... [LB300]

RANDALL HANSEN: So we have a long laundry list of expenses that we will incur. Many of them we think we can do with volunteer help or we can do by finding volunteers. Some of them just are...we would be unable...we can't go buy a domain name from a volunteer, things like that. I'd be happy to entertain any questions. Thank you very much for your consideration. [LB300]

SENATOR ASHFORD: And the reason for that, you have to receive this authority to do that. Otherwise, all the money needs to be distributed essentially. Is that correct? [LB300]

RANDALL HANSEN: Actually, we need the domain name to have a Web site. We... [LB300]

SENATOR ASHFORD: No, no. But I mean, the reason you need the \$10,000... [LB300]

RANDALL HANSEN: Oh, yes. [LB300]

SENATOR ASHFORD: ...you have to have the authority to do that. You do not now have that. [LB300]

RANDALL HANSEN: That's correct. [LB300]

SENATOR ASHFORD: Okay. I don't see any questions. Good work on getting this thing going. [LB300]

RANDALL HANSEN: You had a question about the closed door. [LB300]

SENATOR COASH: Yes. [LB300]

SENATOR ASHFORD: The actuarial issue. [LB300]

RANDALL HANSEN: Yes. In this, we will have...for example, in the case of in some tragedies, we will have young victims and old victims. Somewhere in the committee we

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have to determine who gets how much money. So to put it bluntly, we will be discussing the relative merits of a young life versus an old life or a man's leg versus a woman's life. Those are not things that I want to have Mike McKnight come ask me about on camera as to how we weighed those. [LB300]

SENATOR ASHFORD: And that's what happened with the United Way donations. [LB300]

RANDALL HANSEN: Yes. [LB300]

SENATOR ASHFORD: Okay. [LB300]

SENATOR COASH: Thank you for answering it. [LB300]

SENATOR ASHFORD: Thanks a lot. Thanks for what you're doing on this. [LB300]

RANDALL HANSEN: Thank you. [LB300]

SENATOR ASHFORD: It's good work. Okay. Any other testifiers on this bill? Senator Council. [LB300]

SENATOR COUNCIL: Thank you, Chairman Ashford. Fellow members of the Judiciary Committee, as you know, I am Brenda Council. For the record, last name spelled C-o-u-n-c-i-l, and I am the senator representing the 11th Legislative District. I appear before the committee this afternoon in hopes of convincing the committee that now is the time to end state-sanctioned homicide in Nebraska. LB276 provides for the repeal of the death penalty. LB276 also provides for life imprisonment without possibility of parole as the sentence to be imposed when someone is convicted of first-degree murder. At this point, I must point out that although legislation has been advanced to remove the reference to the lack of parole possibilities, that removal is being done in full recognition of the fact that a life sentence in Nebraska is a life sentence without possibility of parole, and LB276 would be amended accordingly. LB276 further holds the offender accountable through restitution to the family of the victim. I introduced LB276 knowing full well that there are many who believe that the death penalty issue was settled in Nebraska in 2009 with the passage of LB36, which substituted lethal injection as the means of carrying out executions in this state. Notwithstanding the passage of LB36, the propriety as well as the legality of the administration of the death penalty in this state is far from settled, in my opinion. By way of background, LB36 was enacted after our Supreme Court declared that execution by electrocution was cruel and unusual punishment and, thus, unconstitutional. In arriving at that finding of unconstitutionality, our Supreme Court applied the same standard that the U.S. Supreme Court would apply in determining whether a punishment was cruel and unusual under the Eighth Amendment of the Constitution, and that standard is the evolving standards of decency

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that mark the progress of a maturing society. Those standards are to be discerned from legislative enactments and state policies and practices. I submit to you that the landscape has and is changing to the point of establishing that the death penalty is, in fact, cruel and unusual punishment, and thus, unconstitutional. When LB36 was passed, 13 states, including the District of Columbia, did not have the death penalty. Since the passage of LB36, New Mexico, New York, and New Jersey have all repealed the death penalty. The Illinois legislature recently passed death penalty repeal legislation after operating under a death penalty moratorium for a decade. The Illinois death penalty repeal legislation is currently sitting on the governor's desk awaiting his signature. Additionally, both houses of the Connecticut legislature passed death penalty repeal legislation; Colorado came within one vote of doing the same; and the Montana senate recently passed death penalty repeal legislation. In addition to those states who have passed legislation, outright repealing the death penalty, a number of other states, including our neighbor Kansas, have enacted legislation mandating studies of various aspects of the death penalty, including its cost. And for those of you who were in the body last year, know that a bill was introduced and advanced to the floor calling for a study of the cost of the death penalty in the state of Nebraska, and it failed to advance by only one vote. What this legislative action in other states demonstrates is that the evolving standard of decency supports repeal of the death penalty in Nebraska. We should not wait until we are the odd state out before repealing our death penalty. Instead, we should be in the forefront of this humanitarian movement. Of even greater significance is the fact that unless we repeal the death penalty, we will again find ourselves in the position of having a statutory penalty without any means of carrying out that penalty. Nebraska's current lethal injection protocol is based upon the three-drug protocol utilized by the state of Kentucky, which protocol the U.S. Supreme Court found to be constitutional. And, in fact, LB36 was patterned after Kentucky law to incorporate that three-drug protocol. And for those of you who do not know what the protocol consists of, it consists of sodium thiopental, pancuronium bromide, potassium chloride, to be administered in that order. Some of you may be aware of the fact that there is a shortage of the drug sodium thiopental. It is no longer available from U.S. manufacturers or distributors, and, as a result, those states who rely on that drug in their lethal injection protocol have been forced to look outside the United States to obtain sodium thiopental, including the state of Nebraska. Again, some of you may know that myself, Senator Conrad, and Senator Nordquist made a Freedom of Information Act request to the Department of Corrections to find out how the Department of Corrections was able to obtain a supply of sodium thiopental. This binder represents the response to that Freedom of Information Act request. Some of you may have read the newspaper article that revealed that the state Department of Corrections, because it is not authorized under DEA as an importer of this controlled substance, had to go through an importer to obtain the sodium thiopental that we have. And that importer obtained the drug from India. Now, the problem arises, because sodium thiopental has not been approved by the Federal Drug Administration, so there is a lawsuit currently pending that the importation of sodium thiopental and the FDA's allowing the importation of that

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drug is an absolute violation of FDA regulations. Now, while there is evidence that shows that a laboratory in the U.S. tested the product that is being imported from India, that test was solely for the purpose of determining whether it was sodium thiopental. It does not test to determine the safety of that particular drug, and that is the absolute obligation of the Federal Drug Administration. Now, for those of you who may think that the lawsuit that is currently pending--in fact, it was just filed last month--was being filed by some left-wing bleeding heart law firm and group, I want to commit to you the fact that the lawsuit is being filed and prosecuted by one of the largest and most respected law firms in the United States--Sidley Austin LLP--and they are asserting that FDA is required to deny admission to any drug that is unapproved, misbranded, or adulterated. And based on their complaint, they are asserting that with respect to sodium thiopental, that it fails to satisfy any of the requirements for importation; that is, that it's not approved, misbranded, and we don't know whether it's been adulterated. Now, in view of this shortage of sodium thiopental, a number of states are looking to substitute another drug, pentobarbital, instead of sodium thiopental. But you need to know that pentobarbital has rarely been used in humans, and the American Society of Anesthesiologists has stated that if Departments of Corrections are moving towards pentobarbital, they're moving away from the expertise of anesthesiologists. Now, another problem with pentobarbital is that the only...there's only one U.S. manufacturer of that drug, and they, upon being advised that the drug is proposed to be used for execution, have stated that that is not what the company intended and it goes against everything they're in business to do. And I have every expectation that this company, like companies who previously manufactured sodium thiopental, will go out of the business of providing that drug. A number of countries absolutely prohibit the export of a drug when they know that that drug is going to be used to carry out executions. So with the current state of the industry in terms of access to one of the three drugs in the Nebraska three-drug protocol, I again submit to you that if we are not now, we will soon be found to be in a position as we were with electrocution--providing for a death penalty with no constitutional means of carrying out that penalty. And finally, I believe that this again is the appropriate time for this body to consider repeal of the death penalty, as we are looking at the budget shortfalls and the deficits that the state is experiencing at this point in time, and as with any other public policy, I believe that questions must be raised as to whether the death penalty is a wise and efficient use of taxpayer dollars. As is the nature of public opinion polls, the results are driven most often by how the questions are posed. And if the public doesn't know what the cost of the death penalty is, it should be no surprise that they are quick to say they favor continuation of the death penalty. We have no idea of how much it costs, actually, to carry out the death penalty in the state of Nebraska, because we failed to take advantage of the opportunity to conduct a study to give us current and accurate data, so we are forced to rely on data that is approaching a decade in its age. But if we look back at some data that was collected back in 1999, based upon that data it would be costing taxpayers of Nebraska nearly \$45 million to carry out the death penalty. I know that there are some speakers who are coming to testify in support of LB276, who can give you a better feel for what we're talking about in

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terms of costs, what we're talking about in terms of finality. Because I think the other misconception when this body approved LB36 was that there would be a movement towards actually carrying out executions, and that executions would be expedited, but I suggest to you that we will be seeing more and more and longer appeals, increasing the cost of carrying out the death penalty, particularly in view of the current state of the market with respect to lethal injection drugs. And on that final note, I would again commit to any of my colleagues who would want to wade through this information. But I think it's worthy to note that in view of the short supply of sodium thiopental, the Nebraska Department of Corrections paid over \$2,000 for the order that it received, and that order would provide enough sodium thiopental to carry out 166 executions, although we have less than 25 percent of that number currently on death row. But I think the more significant fact is, the expiration date on that unapproved drug is 2012. So, long before we would be at a point to carry out an execution, that drug would no longer be effective for use. It would have expired. And at this point in time, again we don't know whether or not there would be any supplier of sodium thiopental, and it's questionable whether the use of pentobarbital would be found to be an effective and appropriate drug to use in executions. And with that, I'll answer any questions. [LB276]

SENATOR ASHFORD: I don't see any, Senator Council. Thank you. [LB276]

SENATOR COUNCIL: Thank you. [LB276]

SENATOR ASHFORD: How many proponents do we have today? Okay. How about opponents? Okay. Alan, do you want to come first? I know most of you from past years, and I just--those who haven't been here--and I certainly...well, you know the light system. Those that don't, we would ask you to confine your comments to three minutes, and when the yellow light goes on, we'd ask you to sum up what you're saying, and then we'll open it up for questions for each person. Alan. [LB276]

ALAN PETERSON: (Exhibit 4) Thank you. Chairman Ashford and members of the Judiciary Committee, I'm Alan Peterson, A-l-a-n P-e-t-e-r-s-o-n. I am an attorney who's been involved in death penalty litigation for a long, long time, and I am a registered representative of ACLU Nebraska. I'm here to support LB276. I've learned by now that in three minutes, if you can get one decent piece of information across to the committee, you're doing well, and I'm limiting my testimony to one point for that reason. There is no end in sight to the costly and extremely expensive and frustrating litigation over the death penalty just as to the people currently on death row. As Senator Council suggested, some might have thought resolution was getting closer because of changing to lethal injection. I've prepared a list of the issues, just part of the issues that have arisen because of this change in method of execution--and these will be litigated. Lawyers like myself who get appointed to do this work can't waive the issues as a matter of ethics. If it's a nonfrivolous issue, you've got to bring it. I wrote them out on one page, but let me just very quickly say, number one, when this Legislature repealed

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electrocution after it was held unconstitutional, it repealed language in the Nebraska Statute that says specifically, if you're going to kill people for homicide in order to teach others not to commit homicide, then you must use electrocution. And that seems pretty positive. But then it went on and said "and not otherwise." That raises an ex post facto issue, because that protection "and not otherwise" was repealed. Secondly, there's a serious jurisdictional question. What court can now change those sentences which are final orders in several of the existing cases where the sentence says electrocute? It doesn't just say kill them; it says electrocute. Third, there's some cases where the Attorney General's Office missed the deadline for resentencing after a sentence was reversed. Carey Dean Moore's is one. There are Administrative Procedure Act violations, possibly. The lack of FDA approval for importing from India the sodium thiopental is another issue, and that's being brought by a really prestigious big firm and would affect all of Nebraska's death penalties. Sixth, there's a cruel and unusual punishment aspect still; and there's two more listed on my list here. But all I'm saying is, there's no end in sight to the litigation point, and there shouldn't be. Thank you. [LB276]

SENATOR ASHFORD: Thank you, Alan. Next proponent. Jim. [LB276]

JIM CUNNINGHAM: (Exhibit 5) Senator Ashford and members of the committee, good afternoon. My name is Jim Cunningham, C-u-n-n-i-n-g-h-a-m. I'm the executive director of the Nebraska Catholic Bishops' Conference. Thank you for the opportunity to once again testify on the record in support of repealing the death penalty; in this case, in support of LB276. I want to apologize to you, Mr. Chairman, and to others on this committee who have heard from me numerous times on this issue. I recall those situations when we had a packed hearing room and a lot of attention. And if I noticed, there weren't any hands raised in opposition to this bill today, so I hope you'll take that into account. The teaching of the Catholic Church does not condemn the use of the death penalty in principle. It is not regarded as intrinsically immoral. The state has a legitimate purpose in punishing criminals and the right and duty to defend society from unjust aggressors, and this does not, in principle, exclude recourse to the death penalty. Nevertheless, Catholic teaching also applies an extremely important condition to the use of the death penalty; namely, if nonlethal means are sufficient to defend the innocent and preserve public order and safety, then public authority must limit itself to such means, as they are more in keeping with the common good and more in conformity with the inherent dignity of each human being. Mr. Chairman and members, the Nebraska Catholic Conference urges you as policymakers to consider LB276 within the framework of a test of absolute necessity, and that test is this: Is the death penalty, given its ultimate consequence and finality, absolutely necessary? That is, are there absolutely no other means by which to defend society from the unjust aggressor? We think the proper response to this test of absolute necessity is unambiguously no; of course not. The death penalty fails the test. We understand and respect the fact that many people have legitimate concerns and fears about violence and the frequency of heinous crimes in their communities. Just retribution is a legitimate desire. Nonetheless,

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it cannot be truly achieved under the veil of vengeance and its own form of violence. In our view, all Nebraskans, personally and collectively, face the challenge of rejecting a culture of death and embracing a culture of life. This means overcoming all ways in which killing is proposed as a solution to a problem. We urge the committee to advance LB276 so that the full Legislature can continue to debate this important issue. Thank you for your attention and consideration. [LB276]

SENATOR ASHFORD: As always, thanks, Jim, for your thoughtful presentation. Any comments or questions of Jim? Seeing none, thank you. [LB276]

JIM CUNNINGHAM: Thank you. [LB276]

SENATOR ASHFORD: Next proponent. [LB276]

KURT MESNER: (Exhibit 6) I'm Kurt Mesner, M-e-s-n-e-r. I always hear it stated that the death penalty is for murder victim family members, but my family never felt that way. We felt that the state was punishing us for losing a loved one to murder. We'd have been much happier if my sister's killer had been given life imprisonment without parole from the very beginning. Instead, we had to read about it one to two times a year for 20 years. We were prevented from getting full closure because of the death penalty, and that is not any way to treat a family that's had a murder in their family. I have no understanding why the state would have a law that would punish us for wanting the cycle of violence to stop. I keep hearing that the death penalty is a deterrent to violence, but wonder how an act of violence can be a deterrent. I'd like to encourage you to advance LB276 to stop the cycle of violence that the death penalty has created. Thank you. [LB276]

SENATOR ASHFORD: Thank you. Any questions? Thank you. Amy. [LB276]

AMY MILLER: (Exhibit 7) Good afternoon. My name is Amy Miller. It's A-m-y M-i-l-l-e-r, and I'm board president of Nebraskans Against the Death Penalty. I am also legal director for ACLU Nebraska. As the people in support of LB276 spoke, we decided to break out who was talking about what, and I was given the social taboo of talking about money. It is perhaps the topic that is one that is not as important for many people's emotional realities, such as Mr. Mesner's, or the clients that Mr. Peterson represents, or the faith communities that Mr. Cunningham spoke of. I want to talk about money, because this is one where it's no question. Every cost study that has been done about the death penalty in America has produced the same result. It is more expensive to execute a prisoner than it is to keep them alive, in prison, for the rest of their natural life. This seems counterintuitive, but every study done by state governments, done by the federal government, done by private research organizations, has come to that same conclusion. I've given you three of the most recent studies because those are the three that look the most like Nebraska. I figure there's no point in talking about California and

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Texas. They have huge death rows. So I suggested we look at Maryland, at the state of Washington, and New Jersey. We currently have 12 men on death row in Nebraska, another awaiting arrival there; so a total of 13 potential death sentences. Maryland had five; the state of Washington has nine; and when they abolished the death penalty in New Jersey, they had eight people on death row. In Maryland, they learned, as a result of their study, that it costs on the average \$1.9 million more per death sentence than it costs to sentence the same person to life without parole. That's because of the additional investigation, trial appeal, and incarceration costs that come with a death case. So at every phase of the case, the Maryland study determined that capital murder cases cost more than noncapital cases. The state of Washington concluded that it's \$470,000 at the trial phase alone, per case, and in New Jersey, they determined that it cost so much that the state of New Jersey ultimately abolished the death penalty. As one New Jersey prosecutor said, "It's a savings of \$11 million a year. And if you were to ask me how \$11 million a year could best protect the people of New Jersey, I'd tell you by giving law enforcement community more resources. I'm not interested in hypotheticals or abstractions. I want tools for law enforcement to do their job, and \$11 million can buy a lot of tools." In Nebraska, with the money we could save by abolishing the death penalty, we could have improved forensics labs, improved techniques for law enforcement and for prosecutors. We would also ensure that we will never have another tragedy such as what happened in Beatrice where six men and women, innocent of a crime, were sentenced to do many years behind bars. It cost them their lives. It's costing the county of Gage County tens of thousands of dollars to pay for those mistakes. This is a failed economic experiment, and the death penalty should be abolished. Thank you, Senator Council, for bringing the bill again this year. [LB276]

SENATOR ASHFORD: Thanks, Amy. I would just pick up on one point, this last point that you made there, I think we need to underline, and that is the...we have difficulty...develop the statewide coroner's office. We have difficulty figuring out who's going to take DNA samples of people who are on probation. We can't...so, I mean, at its most...and, of course, we've had these difficulties in certain jurisdictions over tampering with evidence, and it seems to continually come up. I think that argument is not a new argument but is an argument that needs to be part of the debate, is if we can't do those things right--because of money, primarily--then you're right. I mean, we're going to continue to have challenges not only on those issues that Senator Council has raised, but other issues as well relating to just not having the tools to have a fair trial or get the right guy or the right woman, whomever it is so... [LB276]

AMY MILLER: Yes. I think at this point,... [LB276]

SENATOR ASHFORD: I don't need to belabor it, but go ahead. [LB276]

AMY MILLER: At this point, I think I've talked to many people who now tell me that they support the death penalty, because they think some people deserve to be killed for their

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crimes,... [LB276]

SENATOR ASHFORD: Right. [LB276]

AMY MILLER: ...but they're fiscally responsible, and so they can't support the death penalty any more as a government program, even if in the abstract they don't have those same objections. [LB276]

SENATOR ASHFORD: Well, even if...and my point is, even if it costs \$10 million to carry out the death penalty, if we don't even have the tools in place to get the right person, in the first place, you know, it doesn't really...I mean, it's an argument. It's a new argument...it's not a new argument, but it is a part of the debate that I hadn't heard much before, so thank you. [LB276]

SENATOR COUNCIL: Just one question of Amy. And because, Amy, you are addressing that point about better uses of the dollars that are currently being expended to maintain a death penalty, are you familiar with the legislative action in Colorado where the Colorado legislature came within one vote of repealing? [LB276]

AMY MILLER: Yes, especially as to cold case investigations as well as victim support. Mr. Mesner didn't have a chance to comment on it, but in talking to him as well as other victims of the death penalty, they don't automatically have any care or support after they've lost a loved one. There isn't sort of an automatic support system. And further, there are many people who, after the murder of their loved one, the murderer is never caught. I think at the last count, and I could get the numbers and circulate them, I believe the Nebraska State Patrol indicated we have several hundred open cold case murders; there's also kidnappings and rapes that are unsolved. But the State Patrol cold case unit has one staff person who is supposed to take care of all open cold cases with a very small budget that I understand originally came as a grant from the federal government, and to sustain that staff person's work, they've going to have to look at additional state funding. So, yes, in Colorado it came very close, because it suddenly became apparent, if we had more manpower hours to catch more bad guys and put them in prison, then we don't need to execute the few guilty that we caught. We would prefer to have more guilty behind bars where they belong. [LB276]

SENATOR COUNCIL: Thank you. [LB276]

SENATOR ASHFORD: Thanks, Amy. Thank you. And I just...go ahead. But I just...Senator Lautenbaugh has made a great point on this committee about the issue of this DNA testing. And it's just amazing to me how we are still in a situation where we can't advance a bill off of General File because the state can't seem to pay for DNA sampling. I mean, Senator Lautenbaugh has made a great point on that, and I appreciate him bringing it up. And it just...it seems to go on and on and on. We're trying

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to do justice. In order to do justice, we have to do justice at all levels of the process, so I appreciate Senator Lautenbaugh's involvement in that issue. Any other proponents?
[LB276]

LELA SHANKS: (Exhibit 8) Good afternoon. My name is Lela Shanks, L-e-l-a S-h-a-n-k-s. And Mr. Chairman and members of the committee, I respectfully urge you to support LB276 which changes the death penalty to life imprisonment without possibility of parole. I'd like to talk about the children. I urge you to support this bill so that our state can change the present legacy that we're leaving for our children and grandchildren, from one of vengefulness based on an eye for an eye and a tooth for a tooth, to one of compassion and mercy and charity and forgiveness. I have had young people to ask me: If killing is wrong, then why does the state kill? How do we answer our children and our grandchildren? How does executing someone for a heinous crime make lethal injection by Nebraska less heinous? There is no question that society must be protected from some among us who are dangerous offenders; and for those individuals, there's life without parole. I also ask you to consider, and this may seem farfetched, but it may not be, that Nebraska is not an island unto itself. We are interdependent. We are part of the whole world, and we rely on interstate commerce and trade with the rest of the world. And most of the industrialized countries have moved on from the death penalty in an effort to become a more humane and civilized society. It is possible that having the death penalty could affect us adversely economically. It already affects us adversely economically as some of the speakers have stated, simply because of the costs. I respectfully urge you to support LB276, because in the course of human history, it has been compassion and nonviolence that have moved the human race forward, not vengefulness and violence. Thank you.
[LB276]

SENATOR ASHFORD: Thank you. Thank you so much. Yes, Senator Harr. [LB276]

SENATOR HARR: And this is more of a comment than a question. But we had, on Wednesday, we...Senator Lautenbaugh wasn't here. We had a person come in here--you're talking about commerce in the part of the world--who testified for LB48. But one of the reasons...he brought a picture and he held it up, and it was a picture of his nephew. His brother, the nephew's father, had been killed and was down in Mexico. And the brother's killer couldn't be brought back to the United States because Mexico won't extradite back to Nebraska--because we have the death penalty. And so I think that proves your point there that we are part of a world community and that the fact that we do have a death penalty does affect our ability to prosecute crimes. So thank you very much. [LB276]

LELA SHANKS: Thank you. [LB276]

SENATOR ASHFORD: That's a great comment. Thanks, Lela. Next proponent. [LB276]

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COLEEN NIELSEN: Chairman Ashford, members of the Judiciary Committee, my name is Coleen Nielsen, spelled C-o-l-e-e-n N-i-e-l-s-e-n, and I am the registered lobbyist for the Nebraska Criminal Defense Attorneys Association. We would like to thank Senator Council for bringing this bill. I'm testifying in support. I would be happy to answer any questions. [LB276]

SENATOR ASHFORD: Thanks, Coleen. Next proponent. [LB276]

ROBERT BOYCE: My name is Robert Boyce, R-o-b-e-r-t B-o-y-c-e. I wasn't going to speak today, but I felt I needed to. My wife Barbara was on the jury which found Robert Williams guilty some 20 years ago or so. Because she and the other members of the jury felt he was guilty, she voted to find him guilty. That decision, and the fact that he was then executed, haunted her all the rest of her life. This decision doesn't just affect the person who's executed. It doesn't just affect the person and the family. It affects others as well. That's all I have to say. [LB276]

SENATOR ASHFORD: It's plenty. Thanks, Robert. Thank you very much. Any other proponents? Any opponents? Joe. [LB276]

JOE KELLY: Mr. Chairman, members of the committee, my name is Joe Kelly, K-e-l-l-y. I'm the Lancaster County Attorney, 575 South 10th. I'm here today on behalf of the Nebraska County Attorneys Association to appear in opposition to LB276. It's a fairly consistent position that the County Attorneys Association has taken over the last...as long as I've been a county attorney, I guess. I have a few quick comments to make about costs and deterrence and the litigation. But sometimes--and this is personal--I think that nibbles around the issue, so I think I'm one of what I believe is the majority of prosecutors who feel that it is just and proper to have the death penalty as part of the continuum of our sentencing, and that we've worked hard to make it as fair as we possibly can, and that for those very, very few crimes that fit, it is appropriate to have it there. I would say, with regard to costs, it's no surprise to me that the costs for the highest penalty, or the most severe, result in the most appeals and the most costs--and that will be exactly the case if you were to say that life without parole is the toughest penalty that can be inflicted. Then that's where you'd see the most litigation. Deterrence is always an issue we talk about in the criminal justice system, but the more serious the crime, the less we talk about that. We don't hear much about that as we get into serious bank robberies, sexual assaults, and we do talk more and more about...and the judges at the time of sentencing talk more and more about just sentencing...or excuse me, punishment and public safety. And with costs, I would just say, most certainly, as Mr. Peterson has pointed out, a lot of litigation that they anticipate with this new method of execution, that's no surprise. Again, I think that goes hand in hand with whatever is the most severe punishment within the continuum of your penalty system. [LB276]

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SENATOR ASHFORD: Yes. Senator Coash. [LB276]

SENATOR COASH: Thank you, Chairman Ashford. Mr. Kelly, something you said, I just want to make sure I heard this right. If you got a group of defendants who are facing the death penalty, and then...say, like, ten defendants who were facing the death penalty and ten defendants who were facing life without the possibility of parole. Do you think you'll get the same amount of appeals from the defendants who know they're going to live as the defendants who know that they're going to die? [LB276]

JOE KELLY: I have no way of knowing, and intuitively, I'd say probably not. I'm simply saying that whatever the most severe penalty is within the continuum of your system, that's where you're going to draw the most appeals. [LB276]

SENATOR COASH: Okay. Thank you. [LB276]

SENATOR ASHFORD: Yes, Senator Harr. [LB276]

SENATOR HARR: And I just want to follow up on Senator Coash's questioning. Thank you, Mr. Chairman. Mr. Kelly, I have a little bit of an issue with that comment, because appeal of life without parole, you can...you have your immediate appeal and then you would have, maybe down the road, an appeal for inadequate assistance of counsel. What additional appeals would you have? [LB276]

JOE KELLY: Well, you could file postconvictions for the remainder of your incarceration; the same with habeas on the federal level. [LB276]

SENATOR HARR: We're working on the postconviction part. Okay. All right, thank you. [LB276]

SENATOR ASHFORD: And Joe, maybe there is...there are death penalty appeals that are singular, are there not, to the death penalty? Aren't there appeals that are only applicable to death penalty appeals in the state system? I thought there was an automatic appeal. [LB276]

JOE KELLY: Yes, for...yes. [LB276]

SENATOR ASHFORD: For... [LB276]

JOE KELLY: It's an automatic appeal, but that's your direct appeal which you get for a burglary or anything. [LB276]

SENATOR ASHFORD: But isn't there a...and then you have a three-judge panel, and none of that would exist if you had a...I mean, I get your point. I'm just trying to figure

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out. I mean, you wouldn't have appeals based on cruel and unusual punishment, probably, if the death penalty wasn't...you might. But it would be less... [LB276]

JOE KELLY: No, you'd go back to...I agree with you. You'd go back to the general garden variety of appeals. [LB276]

SENATOR ASHFORD: Right. You'd still have appeals, obviously, but they would not be... [LB276]

JOE KELLY: Yeah. Wrongfully convicted, ineffective counsel, etcetera. [LB276]

SENATOR ASHFORD: If I could...you know, if there was...it seems to me that...and I've heard this, I don't know how many times, the testimony on this bill. And, you know, I started in total support of the death penalty to total opposition to the death penalty in my career, and it's not because I think that we should be easy on people that commit heinous acts. I just don't see--I get your point. I just don't see what impact it has on violence or making the public safer. And if I could convince myself that the public was safer, I'd maybe look at it and go back to my original position on the death penalty when I first ran in 1986. But, I mean, you do a great job every day of your life in the County Attorney's Office, trying to make the public safe. And it just seems to me that it's that work you do every day, you know, getting bad guys off the street and getting them in prison so they don't hurt somebody else, that's what makes us safer. The next step, to put somebody to death who is a real bad guy or a person, I don't know how that makes us any safer. But that's just my little brain here, my little simple (inaudible). [LB276]

JOE KELLY: And I don't think I'd argue that it makes us safer. I wouldn't. [LB276]

SENATOR ASHFORD: Yeah, yeah. And so then the... [LB276]

JOE KELLY: Like I said, I think you nibble around the edges with some of those issues. [LB276]

SENATOR ASHFORD: Right, and then...yeah, and then the problem is, if it doesn't make us safer as a society, then I think the point that Amy brought up is...and it's great to have this conversation about it. I think the more community conversation we have about issues, like ultimate issues like this, the better we are as a society just to have the conversation. But if there is this risk of making a mistake...Beatrice is an obvious example of what the potential is for mistakes, and mistakes are made because this is a human system. And if there's any risk of that, and we aren't any safer...and Mark Young gave the same comments that you've given--and I respect him a great deal, as I do you--in support of the death penalty, but not...but still suggesting that public safety is not necessarily enhanced by having that particular penalty for that particular crime. I have a lot of respect for prosecutors who give that opinion because I think that's a candid

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opinion. You can fall on either side whether you want the death...or you think the death penalty is good public policy. But for me, it's the fact that there isn't...that we're not safer, and then there's an opportunity for mistakes. And the cost thing doesn't really move me that much personally. And I don't know why I have to give you my little...give everybody my little speech on what I think about the death penalty, but I certainly have gone from being supportive to being opposed, by listening to lots and lots of people, even those who are very good at what they do, like yourself, who for policy reasons believe we ought to have it in the continuum of sentencing, and listening to everyone. But for me it's...if there's a way to enhance public safety, let's do it. If there isn't, let's not do it. And so it's simple. But I appreciate your comments and the job you do every day. Any other questions of Joe? Thanks. Seeing none, any other opponents? Senator Council. [LB276]

SENATOR HARR: Neutral? [LB276]

SENATOR ASHFORD: Neutral. Sorry (laugh). [LB276]

SENATOR COUNCIL: Thank you, again, Chairman Ashford, and I will be brief. I want to begin by thanking everyone who appeared this afternoon to testify on LB276. And I just think the number of people who testified and the issues about which they testified, clearly it demonstrates that the question of whether we should or shouldn't have a death penalty in the state of Nebraska is not settled, and that it is worthy of further consideration by this legislative body. I want to begin by just responding briefly to the comments of my friend and fellow member of the bar and someone who serves the court, Joe Kelly, and he talked about the continuum and the death penalty of being a part of the continuum, and in response to the question about cost that Senator Coash posed. All I would suggest to you, Senator Coash, because as Mr. Kelly correctly and aptly stated, I don't know that we know. We don't know, because we didn't take the step of finding out the costs when we had an opportunity to do so. So we don't really know how much more costly trying someone when we have death penalty as the ultimate punishment as opposed to trying someone with life without possibility of parole. But I submit to you that you can kind of infer that the costs associated with appeals of life sentences, because we talk a lot about life without possibility of parole, you know, and we think that by adding without possibility of parole, you know, that changes the punishment when we all know that a life sentence in Nebraska is a life sentence. But we have more than 200 individuals currently incarcerated, serving life sentences for committing a Class I felony--murder. Over 200. Now if the costs were the equivalent of the costs of death penalty appeals, believe me, we would see that reflected in someone's budget, either the Attorney General's budget or the Correction Department's budget, and you're not seeing those kinds of numbers in terms of the cost of the handling of appeals of life sentences. With regard to the comment on deterrence made by Mr. Kelly, I was reminded over the weekend--and if you didn't have an opportunity to view it, I'm sure you can Internet surf it. But as I was channel surfing over the weekend,

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I stumbled upon a one-man presentation of Thurgood Marshall by Laurence Fishburne--an outstanding presentation. And during the course of reliving Thurgood Marshall's life and his experience in the Supreme Court, he commented upon Thurgood Marshall's opinion with regard to the death penalty. For the lawyers on the committee, you know that Thurgood Marshall often represented the sole vote in favor of death penalty repeal, the sole vote on the Supreme Court in finding it unconstitutional. And on the question of deterrence, Thurgood Marshall is known to have said: if the death penalty...if execution was truly a deterrent, we would have never had another execution after the first one. I can't do it like Laurence Fishburne did, (laughter) but you get the point. I want to specifically thank Mr. Boyce for not only appearing at the hearing, but deciding to testify, because we've heard about the effect of the death penalty on the victims' families, on the state in terms of the citizenry and the safety of the citizenry, but we really haven't heard about the other rippling effects of having a death penalty. I mean, I think that Mr. Boyce's and Ms. Shanks's testimony both vividly illustrated, you know, how far-reaching our position and our policy on the death penalty is. Mr. Mesner, we always regret that your family had to experience a homicide, but Mr. Mesner's testimony is no different from the testimony that's been provided by families of murder victims in Connecticut, which is one of the reasons Connecticut is moving towards death penalty repeal. For any of you who are interested, I have a site that I will provide to you that sets out that the testimony of families of murder victims taking a strong public stand for repeal of the death penalty is what is believed to be the turning point in the Connecticut death penalty repeal debate. There was also a mention of DNA; there was a brief discussion by our Chairman. And, you know, clearly, DNA provides an avenue to reduce the possibility that innocent people are faced with death, but we all know that DNA is not available in every homicide case. And the one thing that is a fact is that execution is irreversible, and Cameron Todd Willingham is the most recent example in Texas... [LB276]

SENATOR ASHFORD: And my point, Senator Council, was in Illinois, and you brought up Illinois where it was the DNA effort... [LB276]

SENATOR COUNCIL: That led to the ten-year moratorium. [LB276]

SENATOR ASHFORD: ...that led to the moratorium. [LB276]

SENATOR COUNCIL: Absolutely. But I'm also saying that in the debate that's occurred on the death penalty on the floor in the past, DNA and the fact that, you know, we do have DNA as a means of more...identifying those who have committed the crimes in a more definitive fashion, and that DNA has been used to exonerate those innocent people who were wrongly convicted, I was just trying to make the point that DNA is not always available to exonerate, and execution is irreversible. And, you know, we cannot, I don't believe, as a civil society, continue to put innocent people at risk of execution and rely on the fact that scientific advancements should reduce that. Reduction, in my

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opinion, is not an option, because any innocent death has to be avoided at all costs. And finally, again I don't want this to boil down to an issue of cost. In my past presentations to this committee in advocating for repeal of the death penalty, I've discussed the moral issues; I've discussed the philosophical issues--and, you know, we can debate those for hours, and I have elected not to do that. As the Judiciary Committee, I think you need to consider those, and I do hope you strongly consider those, but we have to look more closely at the legality, and particularly, the constitutionality of maintaining a death penalty in Nebraska. The evolving standards of human decency, my colleagues, is moving down the path towards repeal. And the question that is being presented to us at this point in time is, do we want to be in the front of that train or behind that train? Because we've already been behind that train once, and we know what the outcome was, and here is an opportunity for us to be in front of that train. And I don't...I don't...I firmly believe that the three-drug protocol, under the circumstances in terms of manufacturing...and remember why we can't get those drugs. It's because the manufacturers are opposed to state-sanctioned homicide. They don't support execution...and when we're importing would limit it to the countries we can import from, because the overwhelming majority of countries where these drugs are produced will not export them if they're going to be used in executions. So we are going to find ourselves in the same position we were when we were utilizing the electrocution as a means of carrying out the death penalty. And with that, I would urge this committee's advancement of LB276. [LB276]

SENATOR ASHFORD: (See also Exhibit 9) Thanks, Senator Council. And I did have copies of the John Paul Stevens' New York Review of Books article, and I'll supply those to the committee, too, which I think is an extremely thoughtful discussion of Justice Stevens...how he progressed through his stages of judicial review on that issue. So, thank you, Senator Council. And that concludes the hearings for today. [LB276]