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Department of Correctional Services Special Investigative Committee
November 05, 2015

[LR34]

The Department of Correctional Services Special Investigative Committee met at 9:00 a.m. on Thursday, November 5, 2015, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR34. Senators present: Les Seiler, Chairperson; Kate Bolz; Ernie Chambers; Colby Coash; Laura Ebke; Bob Krist; Heath Mello; Adam Morfeld; Patty Pansing Brooks; Paul Schumacher; and Matt Williams. Senators absent: None.

SENATOR SEILER: Fellow Senators, the bewitching hour has arrived. We have a quorum. Okay. This will open the hearing on the LR34 and our first witness will be...but we've got to introduce these people sitting around this horseshoe. Laura, will you start out? [LR34]

SENATOR EBKE: Yes. Senator Laura Ebke, District 32. [LR34]

SENATOR PANSING BROOKS: Patty Pansing Brooks, District 28. [LR34]

SENATOR MELLO: Heath Mello, Legislative District 5. [LR34]

SENATOR BOLZ: Senator Kate Bolz, District 29. [LR34]

SENATOR SEILER: Oliver. [LR34]

OLIVER VANDERVOORT: Oliver VanDervoort, the committee clerk. [LR34]

SENATOR SEILER: Les Seiler, Chairman, District 33. [LR34]

DIANE AMDOR: Diane Amdor, committee counsel. [LR34]

SENATOR SCHUMACHER: Paul Schumacher, District 22. [LR34]

SENATOR WILLIAMS: Matt Williams, District 36. [LR34]

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SENATOR SEILER: Okay. We have invited the Ombudsman to appear today and he is sitting at the witness table and ready to go. So state your name and spell it and away we go. [LR34]

MARSHALL LUX: (Exhibits 1 and 2) Good morning, Senators. My name is Marshall Lux, M-a-r-s-h-a-l-l, last name L-u-x. And I am the Ombudsman for the state of Nebraska and I wanted to appear before the committee today to talk about the report that we released very recently on the subject of the riot at the Tecumseh facility in...on May 10, 2015. Before I go to the report itself, however, I'd like to do a couple of acknowledgments. First of all, I want to acknowledge the excellent cooperation that we got from the Department of Corrections in terms of providing us with information to make this possible. The information that they gave us included a lot of videos of the events at Tecumseh that day. So we got to see it firsthand rather than having to rely on faulty memories and incident reports. And that was very valuable and we got good cooperation in that regard from the department. I also want to say that I think that Director Frakes did the right thing when he brought in an outside crisis analyst to look at the situation as it unfolded and make recommendations to the department. I will be referring to that effort in my testimony. It was carried out by a gentleman by the name of Fithian who is from the state of Washington. He wrote a good report on his findings and many of those findings have been...which included recommendations that have been implemented, and that's a good thing. I also want to acknowledge people from the Ombudsman's Office who worked on this. James Davis of our staff, in the weeks following the riot at Tecumseh, spent many days down there talking to inmates, talking to staff. The inmates were, of course...in the immediate wake of the riot were locked up in their cells, some three men to a cell, for days on end. They had needs that needed to be addressed. There were people who needed medical attention. There were people who were having breathing problems because of the smoke that was lingering in their units. The inmates were having trouble getting their regular meals, things like that. And James spent many days down there talking to people. I felt that he would be a calming influence on the inmate population in that situation and that it was a good thing and a good way for him to spend his time to be down there for several days after that. So Mr. Davis should get credit for that. It was a valuable thing to do. I also would like to thank Jerall Moreland of our staff. Jerall was given the opportunity to follow Mr. Fithian around as he did his work trying to analyze the causes and the response to the riot. That was...that made it possible to...for us to gather information through that process and we were given a large volume of documents which helped us to write our report.

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And Jerall's work in that regard was very valuable to us and he gets...he should get a lot of credit for what we have produced. In regard to the report and its content, it covers a lot of issues but it...there are a lot...there is a lot else that went on and happened that's left out. I felt that our responsibility in this situation was to sort of fill in the blanks that were not covered in Mr. Fithian's report. And in saying that I don't mean to criticize his report in any way whatsoever. He had his mission. We had ours. And I felt that there were some other facts that needed to be brought out, and that's basically what determined what would go in or wouldn't go in our report. I saw no need to cover ground that he had already covered. At times we've heard the department refer to the situation out at Tecumseh on May 10 as an event or as an incident. Let me be clear about this, Senators. This was a riot by any reasonable definition of the term. It was a mess. It was terrifying for the people who were there. And the event on that day was unquestionably a riotous act. And we can at least be happy that this is the first time that an event like this has happened in our system in almost exactly 60 years. And I've mentioned in my report the last time this happened, which I can vaguely remember because I was a child at the time, when there was a riot at the penitentiary in 1955. And there are some remarkable similarities between the events. Neither of them was spontaneous. There was a reason for what happened and those reasons were alluded to in Mr. Fithian's report but not covered in the kind of detail that I felt that they needed to be covered. The report prepared by Mr. Fithian mentioned a petition of inmate grievances, but he said that "no such petition was found." There was a petition or a document that stated inmate grievances. It was on the yard at the Tecumseh facility that day. The inmates had it in their possession. And if you've seen the report, we have a photo of an inmate by the name of Lenaris Brown. And this is in the afternoon, well after the report has...well after the riot has been...has commenced. And what Mr. Brown is doing in that photograph is holding up the document which is the...their grievance...their list of grievances. He's trying to get the staff, who are watching him through a window, to see that document. We know that's what he was holding up because they zoomed in on it and we can see it, and you'll see a clearer picture of it in one of our attachments. For Mr. Brown and for many of the inmates who were involved at the beginning of the riot, at least, this was about a protest; this was about challenging some conditions and rules at the facility that the inmate population objected to. That is typical of these kinds of events. If you look back at the penitentiary riot in 1955, that, too, was a protest. The issues were different, but the intention was the same. In this case, I happen to believe that the intention was, of the people who started this event, was in fact nonviolent. I don't think they intended for staff to be assaulted

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or for structural damage to be done, at least not to the extent that it was. But the problem was that by creating a situation out in the yard on that afternoon where the intention of the inmates was not to obey staff directives, they created a situation where everything was destabilized in a bad way for a correctional facility. And other inmates who were out on the yard that afternoon who had nothing to do with this planned protest used that opportunity to assault staff. And those inmates, whose names are Zalme, Weikle, and Gooch, were in our opinion free agents. They were doing their own thing. Mr. Zalme and Mr. Weikle have long histories, and in one of their cases of assaulting staff. And so I believe that those actions by those three inmates who assaulted staff at the very beginning of this event, I think they were free agents; I think they were doing their own thing. Now, in order to understand this event, I think we have to look at how this all evolved and we have to give some consideration to some of the issues that the inmates were raising in their grievance document. And this all starts back almost exactly three years ago when the Department of Corrections decided to move from an open yards policy to a managed yards policy or model. Historically, Nebraska correctional facilities had an open yards policy, which essentially means that when the inmates were released from their cells in the morning and then throughout the daylight hours they were allowed to circulate between their housing units and the facility yards. And in the yards they could exercise, talk to friends, enjoy the sunlight and the fresh air until it became time to go back to their units because it was dark and they were going to be put in their cells for the night. That was the way it worked and it had worked that way in the department, in our correctional system, for decades. However, I do remember sitting in this room a number of years ago when Mr. Houston was the Director of the Department of Corrections and hearing him say to the Judiciary Committee at the time that the day might come when the department would have to change that policy and would have to move to a managed yard policy. So this is something that was going on in their thinking process for a while. And that event happened in the fall of 2012 when TSCI and the penitentiary both changed from an open yards policy to a managed yard model. Under the managed yard model, the inmates would spend a lot more time in their cells and would only be allowed to go into the yard at scheduled times of the day and only in the company of the other inmates who were in their own housing unit. That was the managed part. And the whole point of this was to create a situation where there was a limited number of inmates in the yard at any one time so that it would be easier to manage than a situation where you could have hundreds of inmates in the yard at any one time during the day. That's the idea. And the department justified this transition from open yards to managed yards

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based on security concerns. And of course it was a situation in the case of the penitentiary where overcrowding or overpopulation of that facility was probably a factor in their decision to do it. At Tecumseh there was not overpopulation but there was a problem with the staffing of the facility, which has always been an issue at that facility. In fact, if you look at the population at Tecumseh, as recently as August of 2013, they had fewer than 100 percent of design capacity in terms of the population there. There was a reason for that and that had to do with staffing at the facility. But it's interesting to note that, at a time when the other adult male facilities were getting more and more and more crowded by the day, at Tecumseh they had less than 100 percent of design capacity. And so I think that's a pretty good indication of the nature of the situation there and why it was decided to move to a managed yard model at Tecumseh as well. Many of the inmates were upset by this development, understandably, which substantially altered the nature of the institutional lifestyle which they had traditionally organized themselves around. It was an open yard-centered society in these facilities and that was suddenly stopped, perhaps for good reasons, but you can see what...why it would be a problem or a concern from the inmate's perspective: because it was a substantial change in the way they lived their lives in the facility. And as we looked at this incident, we note that they were still talking about the yards. They wanted open yards. That was the lead complaint as far as the inmates were concerned. And so it's still an open wound in terms of the inmate population at these facilities. It's something that they've lost that they valued and it's causing them a considerable amount of angst at Tecumseh and at the other facilities as well. So keep that in mind as a cause, a deep background cause of the actions of the inmates at Tecumseh on May 10. Then there was another thing that happened, and that has to do with the Wellness League, or that's what they called it. It was a wellness program and it worked like this: The Wellness League was what it implies. It was a chance to get outside and run or walk, exercise in the yard at certain times when the Wellness League did its thing. And it was treated as an incentive program, and it was a good incentive because here we are in a situation where open yards have been taken away from the inmates. Yard time now becomes more important to them, more valuable. If you're an inmate, you want to get out in the yard as much as you can and it's very limited as it now stands. And so the idea was, well, we'll give inmates more time in the yard and a Wellness League construct but it'll have to be an incentive program, so we're only going to allow inmates who have a clean record of no misconduct over a period of the last year to participate in the league. That was the incentive. It was to create an incentive for better behavior by the inmates and would then reward them with more time on the yard, which is

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a valuable commodity from the inmates' perspective. We knew that the wellness program was going on there. We felt that it was a positive thing, a good thing, and we still do. It has worked very well at the penitentiary. But because it was treated as an incentive program, it was...they didn't (inaudible) on any other regulations or requirements. And it's worked at the penitentiary. But it was handled in a different way at Tecumseh and that caused trouble. And we did not know in our office that these...that the wellness program at Tecumseh was morphing. We knew about the wellness program but we didn't know how it was being changed at Tecumseh. If we had, we would have been very concerned about it, but we didn't know about it. And that bothered me when I started to learn about all of the things that had happened and why, because part of the reason that we're here is to help address inmate concerns and complaints so that we can keep them using legitimate means of registering their grievances rather than illegitimate means. And so when I...you know, in the wake of the riot, I wondered whether...what was wrong with us that we didn't know that there was this angst out at the facility amongst the inmate population about the Wellness League. I feel a little better about that now because, as it turns out, the changes that were going on at Tecumseh happened relatively close to the event itself--in fact, within two weeks or perhaps less--and so this was something that was happening very near to the event itself. And one of the things that happened was what they did was they were changing...one of the things they were doing was changing the requirements for being in the Wellness League. I've already explained that it had to do with behavior. A year's good behavior, you could be a member of the Wellness League. Then somebody in the Tecumseh administration decided that it would be a good idea to add the requirement that an inmate be also not what they refer to as DOC, which is drug offender classification. So if an inmate had had a...or had been designated as a drug offender within the last year, then he would not be eligible to participate in the Wellness League. The drug offender classification was a bad idea in itself. It was a...it allowed the administrators at the facilities to say that a particular inmate was a, quote, drug offender, unquote, based on somebody's assumption that that was true. Now this was not a classification that was adjudicated in any way. There were no hearings held. There was no evidence presented to prove that a particular inmate was a drug offender. It was just a label that was put there arbitrarily, really, without any backup, without any adjudication, without any process involved, whereas, as I'm sure most of you know, there has long been a disciplinary process in our system where if you think somebody has violated the rules--for instance, the rules about using or possessing drugs--there is a charge made, there is a notice to the inmate, there is a hearing held,

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there is evidence produced, the inmate has a chance to challenge the evidence. There's a process. And then if the inmate is found guilty, he can be punished, and that's the way the disciplinary system works. None of that was going on with respect to the drug offender classification. It was just a label that was hung on the inmate and it was a bad way to do things and we told them that before. I did not put that in this report, but I can show you a document that we sent to the department questioning the drug offender classification idea. Well, that idea was now made a part of the criteria for a person to be allowed to be a participant in the Wellness League. That cut out a lot of people and there was a lot of people who were upset about that. And there was a sense in one of the units at the facility, Unit 2, Galleries A and B, that they were particularly being discriminated against in the management of the drug offender classification and the wellness program because of these new rules. Then some other things happened that involved the wellness program indirectly, and those are the things that happened that I think are really the triggering events that caused the inmates to do what they did in terms of mounting their peaceful protest. One of those things happened on April 28. And remember, the riot is on May 10. On April 28, deputy warden at Tecumseh announced that the criteria for choosing inmates to be given correctional industry jobs in the laundry would be the same standards used for the wellness program. This had not been the case in the past. Now here's the situation. You have inmate population at Tecumseh that's over 1,000 inmates. There are jobs for a few of those inmates in the laundry, in the corrections industry laundry at the facility, who obviously those jobs are a valuable thing for the inmate population. There are not very many of them and it is a way not only to make money...and the inmates need money to survive. Some of them have families. They would like to send money out of the facility to their families. Some of them have child support payments to make and it's hard to do when you're unemployed. So those are a valuable commodity to the inmates in the facility. And now they're being told that many of them will never be seriously considered for those jobs because of these new requirements that are being put on that have to do with maintaining a clear record for a year and not being classified as a drug offender. So now something else has happened. Something is being taken away here and that's an opportunity to be...to have a job in the laundry. So we've gone from a program, a wellness program which is designed to be an incentive to get something that you don't already have, and now we're starting to use somewhat the same concept as a way of taking things away from inmates who at least have the hope of qualifying to be employed in the laundry. The second step, and probably the one that, oddly enough, was the last straw, the triggering event, came on May 4.

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On May 4 it was announced that the Wellness League criteria would also be applied to those who were allowed to participate in the facility's traditional recreational leagues, including the upcoming softball competition. Now I understand that all we're talking about here is a softball league. That might not sound very important for those of us who are sitting in this room. It is important to that inmate population. That is a big social event. That is something that they look forward to. And when you're in a facility where there is...time is heavy and you don't have much to do, particularly if you can't get a job in the laundry, where there is not much programming going on, where the clubs have been substantially reduced, club activity, where the hobby activities have been stopped altogether--there used to be a very active hobby operation at our facilities--when you're in a situation like that, being able to participate in a recreational league, in a softball league, was very important to the inmates, big social event for them. And now, on May 4, they're being told that many of them will not be allowed to participate in those recreational leagues because now we're going to apply the same standards for participation in the Wellness League to the recreational leagues, so no softball league, no basketball, none of those things. And so what we're doing now at this point, or what the administration was doing, was taking away things that the inmates still had. We've taken away the open yards. Now we're going to take away from many people the opportunity to work in the laundry. Now we're taking away the opportunities for many of them to participate in the recreational leagues. For the inmates this was a big deal. And in fact, if you'll look at Mr. Fithian's report, he...there is a statement there and I'll read it to you. He says...he said, when developing new programs and activities, it is important that there be a balance between behavioral incentive activities--the Wellness League--and other activities that allow a majority of the inmates to participate in. It's a little...it's...that's not exactly how I would have done the sentence, but that's what Mr. Fithian said and you can get his idea. You have to have these other activities and you should not take them away under the guise of an incentive program. Essentially that's what he's saying. And he talks about a balance between those incentive programs and the things that all the general population inmates are allowed to do. And frankly, what was happening was that balance was being destroyed at Tecumseh in a way that matters to the inmates. So we get to the point where we've got a situation where the inmates are very upset, and particularly in Unit Number 2, with how this is all going. They have sat...several of them sat down and wrote out a grievance document, which is in the report, and that was what...that document is what went on in the yard that day was really all about. In fact, I think that the plan was that they were going to turn it into a petition and get inmates to sign it

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that day. Of course, that didn't happen because many other things happened and the whole situation spun out of control very quickly, in a matter of minutes. But that was the idea and that was what was going on in the minds of most of the inmates who were out on the yard. And we have...we had an opportunity to see what went on out in the yard because that's in the videos that we were given. We know precisely what happened. And there's an interesting scene at the beginning of the incident which it worked this way. They have a situation where the inmates will periodically be allowed to go to the medical department to purchase over-the-counter drugs-- Tylenol, things like that. And the way it had always worked was they let the inmates go out of their units, go to a window which was on the opposite side of the institution's yard, get their medications, and then they were supposed to go back to their units. And usually this was just a trickle of inmates. Well, on May 5 at, oh, I think it was at about 2:25, something like that, they called the medications, window which meant, okay, inmates, it's time for some of you, half of you, to go get your meds. There was...not all inmates were supposed to be eligible to do that. They had a...it depended on the alphabet and which...what letter your last name started with. I won't go into that. But the idea was, okay, we're going to open up the units to let inmates go buy their meds. It's almost always just a trickle of inmates, nothing...no big deal. Well, what happens is, of course, because they're planning a protest, instead of just a trickle of inmates coming out into the yard, a lot of inmates come out on the yard, certainly more than they expected. And at the very beginning of this event and of this video you will see a large group of inmates collected sort of in front of Unit Number 2, talking, "high-fiveing," shaking hands, that sort of thing, not normal activity for med lines, obviously. And nobody was walking over to the med window to get their meds, or not many. And it was at this point of course that the staff understood there was something else going on here. And that's how the situation started. And so what you get is a situation then where there are more inmates out on the yard than there are supposed to be; there are not enough staff really to take the situation under...in hand. And I can describe to you generally how this all gets started. But a big part of the problem was that there really wasn't enough staff to handle it at the facility. They weren't able to overwhelm the number of inmates with staff. It's...there is an interesting parallel, and I'll just spend a minute on this one. There was a point--I think it was shortly after this situation--at the D&E, the Diagnostic and Evaluation Center, which as you all know is a pretty crowded place, where in one of the units there was a fight between members of rival gangs in the unit. And I've seen the video of that. That was very interesting. This is at the D&E in one of the units and there are inmates fighting with other

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inmates and it looks like it could get pretty ugly. Then, all of a sudden, a large number of staff materialize in the unit. They seem to come from nowhere and in significant numbers and within a matter of a minute or perhaps a little more they have this whole situation under control. Now that's the way it's supposed to look. Okay. And it was...they were able to do that because they...well, first of all, because the D&E is a well-managed facility; and secondly, because next door to the D&E is the Lincoln Correctional Center. So staff from the Lincoln Correctional Center can come over to the D&E and help out if something bad happens. And that's how that got dealt with. It was over within a matter of a minute or two what could have been a very ugly situation. Well, that's not what happened here. What happened here was they called for help. A few people who were unit staff wandered out into the yard to help out and did help out, but there weren't enough of them. Then, as within a matter of five or a few more minutes after the inmates first appear on the yard, one of the staff people in the yard is directed to arrest one of the inmates involved, Mr. Washington. And as the staff person is talking to Mr. Washington and telling him that he was going to have to go to the control to be questioned, another inmate comes up behind the staff person and slugs him on the side of his face with his fist. And that of course becomes then a wrestling match on the ground between the inmate who is the assailant and the staff person. And then there are more assaults on another staff person and some fights going on. And what happens then is that there is a warning shot fired from the institution's tower. It has one tower. It's inside the facility, inside the boundaries of the facility. A warning shot is fired because of these fights that are going on, on the ground, and the assault of staff. When that shot is fired, all of the inmates who are in this collection of inmates right outside the unit sit down or lay down on the ground. That is their response to the shot. They get down on the ground immediately and they stay there, most of them, and that lasts...that situation lasts for about 12 minutes. And in that 12 minutes you don't see a lot going on in terms of the staff trying to take control of the situation. Maybe they would have...maybe they would not have been able to, but there's not much going on. And finally, after 12 minutes, the inmates who are lying on the ground decide they don't want to do that anymore and they stand up. Inmates do what they want to do sometimes. And that's how the situation starts. And Mr. Fithian saw this, too, and there's...so there was an opportunity, perhaps a window of opportunity there, to get the situation under control during that roughly 12 minutes when the inmates were compliant. That opportunity, if there was one, was missed. And so then everything else that happens, happens. The other two things of importance that happened out on the yard within this basic time frame

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are that, one, that the yard staff, the staff people who are in the yard as this is all evolving, finally decide that it's a good idea to take refuge in the tower. And so throughout this whole event there will be a collection of ten or more staff who are in the tower where they're safe from being assaulted by inmates or being taken hostage. And so basically the yard has been abandoned to the inmates at that point. The other thing that's going on is that the inmates are basically marching around the main yard. And they don't seem to be trying to do much other than march and show their presence, perhaps enjoy their few minutes of being under control of part of the yard. In any case, what happens is that they, as they're marching, they go past the door to the gym, the facility's gym which is on the south side of the facility. Inside the gym at that very time there are, I don't know, maybe 30, maybe more, inmates. They are in the gym because it's their scheduled time to be in the gym. And so you've got these inmates who are in the gym and then you have a lot of other inmates who are out in the yard. And a couple of inmates decide that it would be a good idea to pick up a heavy sign that's out there in the yard and try to use that sign to break the window in the gym, which is of course...it's not...is what I guess could be called safety glass. You can't break it. But they try to and that causes some alarm and I think some justified alarm that...because now we're starting to destroy property. And what also happens at about the same time is the inmates inside the gym are picking up a tier of aluminum bleachers, maybe three tiers, that's inside the gym and they're using that sort of as a battering ram, trying to get the door open from the inside. I think that the real idea here was probably to get those inmates who were in the gym out, but the concern of the staff was that they were trying to get into the gym because there was a staff person, a female recreation staff person, who was in the gym area in her office. She had locked herself in her office. And that was the concern on the outside among the staff. So that was going on. And as that was going on there were also...there was another warning shot that was fired from the tower. And when the second warning shot was fired it had no effect. The inmates didn't lay down on the ground; they didn't stop marching around. And so eventually, as all of this business is going on where the inmates are banging on the door from the outside, a decision is made to fire a lethal-force shot from the tower. And the timing of all of that is a little in doubt. The department's own chronology of the event says that the lethal-force shot was fired at 3:19 p.m. It hit Mr. Washington in I think his left thigh, wounded him, knocked him down, and that's how that all came to pass. Now in regard to the shooting, which is an important event, obviously, we need to understand what the timing of the shots was. The first warning shot when the fights were going on in the grass in the yard, the first

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warning shot from the tower was fired at 2:40 p.m. I've described to you what happened after that. A second warning shot was fired from the tower at 2:59 p.m. The lethal-force shot, as I have indicated, the best guess is that it was fired at 3:19. So you have quite a gap between shot one, shot two, shot three. They're supposed to be warning shots. They're supposed to basically say, better get down because we are serious about this. As Mr. Fithian indicated in his report, that was not the way it should have worked. Warning shots need to be contemporaneous with the lethal-force shot. You can't say, well, I fired two warning shots so I can shoot anytime I want to. But that was the way it was handled in this case and Mr. Fithian was clear that that wasn't a good way for that to have happened and that there should have been warning shots that were more contemporaneous with the event, with the lethal force shot. As long as I'm talking about firing shots from the tower, I might as well also mention that there was a second shot from the tower that we're aware of which happened at 5:40 p.m. This shot was fired by a caseworker. The tower officer for some reason was not the one in possession of the firearm at that point. But one of the caseworkers who had gone...who had retreated into the tower at the beginning of this event was the person who had the rifle and who fired the shot. What happened is that there was an inmate near to the miniyard by Unit 3 at the facility. Each of the units have a pair of miniyards. These are small areas enclosed by chain-link fences where there is a basketball hoop and they can go outside and spend a little time in the miniyards. The inmate is beside the miniyard at Unit 3. He gets up and decides to run towards the miniyard at Unit 2. This takes him through "no man's land," the designated place where no inmate is allowed to be. And so at this point the caseworker who has the rifle in his possession fires a shot at the running inmate. It's a little scary to watch because of course the miniyards at this point are full of people. Inmates have come out of the units and into the miniyards, and so there are a lot of people, a crowd of people in this miniyard, particularly at Unit 2. If you watch the video, the shot gets fired at about the time that the inmate is parallel with the Unit 2 miniyard. So a shot that missed could well have hit someone in the miniyard. I have a real problem with that shot. I think that was unnecessary and dangerous. But I wanted to make sure that you were aware of that. That is in the report. Now that describes what we've seen in our review of the tapes. It's a mess. It got out of control very quickly. It wasn't what Mr. Brown, the man on the cover of our report, and the others who helped him write his grievance document had in mind. But it happened and it was what it was. Now I think we need to move on at this point and talk a little bit about the staffing issues at Tecumseh. The staffing at Tecumseh has been a challenge, I guess would be a nice way to say it, since the facility opened

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in 2001. And the subject of staffing was touched upon in Mr. Fithian's report and I've tried to cover it fairly thoroughly in ours as well. According to the statistics we've been given, at the time of the riot TSCI had 431 authorized positions but 60 of those positions were considered to be true vacancies. On May 10 at TSCI, for the second shift the minimum staffing requirement was 61 staff but there were only 57 employees present. Now that meant that there was a shortfall in staff of several and so, well, the way they dealt with that shortfall was by closing two programming areas and two evening recreational opportunities. So basically they were fully staffed but they were only fully staffed because they had closed off the law library and some of the recreational opportunities, the scheduled recreational opportunities for the inmates. This is also mentioned, by the way, in their grievances that the fact is that sometimes inmates were losing things like time in the library or recreational activities because they were having problems staffing the facility. They didn't have enough people there, and so they had to close things, usually things that the inmates needed or wanted, in order to be fully staffed at the facility. Again, some numbers: Of the 210-plus security staff at Tecumseh, according to Mr. Fithian's report, over 35 percent of those have less than two years of experience. So the facility is understaffed. It's got turnover issues. There is a lot of overtime, and you've heard a lot about that, a lot of overtime that is being worked by staff. Some of it is mandatory overtime. Mandatory overtime in particular has a bad influence on morale of the staff, and so people leave, and that makes it more difficult to staff the facility. And that has been going on at TSCI for years. And I'm not sure what the solution is, but it is a situation that has gone on for a long time. There is a point in the report where I discuss a subject that you've heard about from Mr. Marvin a couple weeks ago, and that's compensation of the security staff. I'm talking now about the line staff--correctional officers, corporals, and sergeants--and about the fact that there could be a need to increase the salaries of those individuals. I listened to the testimony a couple of weeks ago. I thought that it was very informative. But I also thought that a little too much time was spent talking about Court of Industrial Relations issues. We have the Court of Industrial Relations to deal with a dispute where the employees think that they should be paid more and the employer thinks not. This is a little different situation. This is a situation where the real question is maybe the employer should be thinking that the salaries should be going up. And in a situation like that, it's more important not to get into that sort of Court of Industrial Relations analysis but to look at the practicalities of things. And I outline the practicalities on page 40 of my report when I show the differences between the pay scale for comparable positions at the Lancaster County Jail and

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the Douglas County Jail as opposed to in the correctional system. Those are...there's a pretty significant difference there. And some of those numbers may be dated by now. The numbers may have changed since we put this all together a number of months ago. But the relationship will not have changed. There will still be a situation where correctional officers, corporals, and sergeants in our system or in the state system are paid significantly less than the people who work at the Douglas County and the Lancaster County jails. And that has to be looked at because I believe that the department is actually struggling not only to have full staffing at Tecumseh but at some of the other facilities as well. And I think those are the real numbers that you need to look at because what happens--this is at least the story that we hear--what happens is that a person who would like to work at one of the county jails goes to work first for the state, gets some experience as a correctional officer working in the state system, and then, when there is an opening for a position at, say, the Lancaster County Jail, applies for that and takes that job. And so we've trained this person. We've given him or her some experience. And then they go work for somebody else where they can get a better salary and probably not have to worry about mandatory overtime. Okay. So that's the situation there. And again, I'm not here to tell you that I've got the solution for staffing at Tecumseh but...and how to deal with that. My feeling about it is that we make a little too much of...we give too much attention to the facility's location. I understand it's not in a population center. But what I'm concerned about is that we have allowed that fact--where it's at--to be used as basically an excuse for the administration, to let them use that as an excuse because they can't fully staff their facility. I think it has an effect. I'm not saying that it's not a challenge. But at some point we have to ask the administrators what they're going to do to get that under control. And it's...we're making it too easy on them, I guess is what I'm saying, by just letting them shrug and say, well, it's at Tecumseh, so what do you expect? The fact of the matter is they've hired a lot of people out there. If they didn't have high turnover rate there, it would be much better. There would be a much better situation in terms of its staffing. So if I were the director of the department, I would be asking myself what I can do to get people to stay at that facility because a high turnover rate is not a good thing here for a number of reasons. And you get sort of a vicious cycle where people are being asked to work overtime. They're being told to work overtime, mandatory overtime, so they miss a family event. Their morale goes down. They look for another job. They leave. Turnover means that there's another opening, so probably there's more mandatory overtime, and it just goes around and around and it gets worse and worse. And that situation is hard to control, and I'm not going to pretend to have the

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answers. But I think we need to have a good look at the pay scale for these people working at Tecumseh at the very least, and maybe for all of the line security staff in our corrections system. So that's a quick look at the staffing situation at Tecumseh, which I'm sure you all have heard is a challenge and it is. Finally I want to talk a little bit about the whole subject of repurposing Tecumseh which has come up a number of times. Given the situation with the staffing there and the fact that it's likely to always be a little bit of a challenge if not a big one, my sense is if we can't provide the staffing commensurate with the population, the nature of the population at the facility, then we have to do the opposite and change the nature of the population at the facility to make it commensurate with the overall numbers and quality of...and seasoning of the staff there and that means...for one thing it means trying to identify those inmates who are easier to manage inmates and moving them to Tecumseh and taking less easy to manage inmates who are at Tecumseh and moving them to the penitentiary or the Lincoln Correctional Center. Now that's a complex process and I don't pretend to know their population well enough to say how practical that is. But it's a way of doing things that might make the facility itself more manageable. Now one good thing has happened already, and that is that the department is moving protective custody inmates to Tecumseh. Protective custody inmates, I'm sure you're all aware, are those who are not able to be part of the general population of a facility because they're under threat or because of some kind of problem that they have with another inmate in the facility. So they are not in the general population. They're not free to move as much as a general population inmate is allowed to move. We're transferring PC--protective custody--inmates to Tecumseh. Actually, that was something that Mr. Frakes talked about back in March, as I recall, so that's preriot. That's a good thing. Those should be easier to manage inmates. That should help. However, we're also hearing of trying to double up some cells in their special management unit at Tecumseh and that means moving more inmates into TSCI than there are there already, probably slightly above 100 more inmates. So in spite of the fact that we have some of these weaknesses that we've discussed here, we're...the plan right now is to increase the population, the overall population at Tecumseh. This is one of those situations where I'm kind of torn. Some of you have been out to see the situation that exists out at the Diagnostic and Evaluation Center, the D&E. That has gotten better. But back when we visited it, it was at or above 300 percent of design capacity and there were men sleeping on pallets on the floor and carrying plastic chairs around because they didn't have any place to sit because they didn't have a cell. That's a dreadful situation, it's dangerous, and it needed to be addressed. And so what in effect is happening is we're addressing that problem by

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moving inmates around and they're ending up...they're going to end up in those newly doubled-up cells at Tecumseh. I like that as a short-term thing to do. I don't think it's a good long-term strategy for that facility, for its population to go up. And so there needs to be some questions I think asked of the department about whether they intend to have that be a permanent state of affairs at that facility. Now the other thing I would say is that when we talk about repurposing Tecumseh it's not limited to the characteristics of the population there and whether they're more manageable or not. There are other things that you can do to make Tecumseh a more civilized place that will make it easier to manage. And by the way, before I forget, the more manageable a facility is, the more civilized it is, the more...the less dangerous it is, the more likely you are going to be to keep staff there, because some of them are leaving because they don't feel safe. So the big goal should be to make it a safer place to work in and to live in for the inmates who are there. So to make it more livable there are a number of things that could be done and I'll just go down my list. One, you could bring more programming to the facility. It was not a programming-rich environment. There are some changes being made that probably will improve that somewhat. Probably more needs to be done to bring more programming into the facility. Something needs to be done to bring more jobs into the facility. Time on an inmate's hands is not a good thing. So the more of them that we can get employed out there doing something useful that even earns them some money, that's a good thing. We need to restore the inmate hobby program. There are a lot of skilled, talented, artistic inmates in this...in a facility of 1,000 inmates, and it used to be that many of them had hobbies. They could go to the hobby room and do their things and pass their time doing that. It kept them busy, gave them a sense of personal accomplishment, but that was killed. That's dead. The old hobby program is no more. That needs to be restored. There has also been a steep decline in club activity that is allowed at our facilities. The clubs are being deemphasized. I think that the clubs should be emphasized. We want those sorts of self-betterment clubs to go on at these facilities and that's been eroded over the years. You could do that. And you might even, following in the footsteps of what some other states have done, you might even add a vocational training program to the facility for those who are not serving a life term and who will then gain some training that will be useful to them when they're released. So those are the things that I would suggest that would make Tecumseh a better place for the inmates and, therefore, a better place for the people who work there and hopefully will make it possible to avoid this kind of event happening for another 60 years, because we don't want this. And it didn't have to happen. And it was a riot. The inmates who destroyed property

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and the inmates who are going to be charged with the two murders out there are going to...they're going to get their just desserts through the criminal justice system. But from the standpoint of those of us who just want to see the system work the way it should, this is not the way we want things to go. And the last thing I guess I would say, and I've saved it for last in my report as well, there needs to be better communication out there between administration and the inmates. If there is this kind of...this level of angst there or displeasure about an issue like recreational league softball, that should be known by the administration. That should be talked about between the administration and inmate spokespersons so that at least we understand what's going on and what's happening in the minds of the inmate population. Now the fact of the matter is that they are starting a new inmate council program, I think would be a good way to describe it, which will set up meetings and formalize this kind of process where staff will sit down with inmate spokespersons periodically to talk about things. Mr. Frakes had already started doing that and I believe the first meeting of that nature at Tecumseh was held within the last couple of days, probably on Tuesday. And that's a good thing but we'll have to see how it goes. It has to be handled in just the right way. You have to pick just the right inmates who are not...you can't have inmates there who don't get it and who are seen as being the snitches or the teacher's pet of the administration. So it's a ticklish thing but it's something that needs to be done. Better communication would help a lot. I guess that's about all that I've got to say in summarizing the report and our findings, and I certainly would be happy to answer any of your questions. [LR34]

SENATOR SEILER: I want to thank you for your testimony today. We'll start with questioning on the left. Laura. [LR34]

SENATOR EBKE: I wasn't expecting to be first. (Laugh) Let me ask you, what was your experience, both generally and specifically, with respect to cooperation amongst the staff and the administrators of Tecumseh? Were they... [LR34]

MARSHALL LUX: How are the staff and the administration getting along? [LR34]

SENATOR EBKE: Yeah, yeah. [LR34]

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MARSHALL LUX: Hopefully better. They have a good warden at Tecumseh. Our opinion is that the people in the next echelon in the administration are not the best administrators in the system. There is a history there of, as well, and I mentioned that in our report and I included a letter that we wrote a number of years ago, there were...you know, we've gotten petitions from inmates, we got petitions from staff back in I think it was 2004 complaining about the conditions there, staffing shortages and so forth. It's a good question. It's a very good question. They need for those administrators to be employee friendly, whatever that may consist of. And here's one of the ways that it has worked over the years and in our Corrections Department generally at the facilities. There has always been a tendency where any correctional officer, some low-ranking person, makes any kind of mistake whatsoever he gets written up or she gets written up. Okay. So the supervisors, instead of just having a quiet conversation with the staff person, they think that something has been done wrong, makes it into a federal case and writes them up. That's not a good way to manage people. It might be in a few cases but in a general way that's not a good way to manage people and to keep them happy and motivated. And I think actually that Mr. Frakes has figured that out and he's trying to change that culture. It needs to be changed. And it would be particularly helpful if we don't see that sort of thing going on at Tecumseh because there are enough other difficulties in keeping staff there. So it's a good question and I'm sure it's not an ideal situation out there right now. It could be improved. [LR34]

SENATOR EBKE: Thank you. [LR34]

SENATOR SEILER: Anything further? [LR34]

SENATOR EBKE: No, that's it. [LR34]

SENATOR SEILER: Senator Pansing Brooks. [LR34]

SENATOR PANSING BROOKS: Okay, I didn't know we were going around like this either, but I might have another question later after people talk. But first off, my goodness, this is so beautifully written. I want to thank you for your work on this. The efforts that you have all made and the fact that you can write this so it's interesting and clearly... [LR34]

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MARSHALL LUX: Thank you. [LR34]

SENATOR PANSING BROOKS: ...understandable and I just...you've spent a ton of time on this clearly. And not only gathering the information but writing this missive was really incredible. So thank you. [LR34]

MARSHALL LUX: You're welcome. [LR34]

SENATOR PANSING BROOKS: Obviously I do like that you ended on communication because every single piece of any kind of problem that we have in our world is generally based on an inability of people to communicate. And you know, clearly, if the Department of Corrections thinks it doesn't need to communicate with its inmates or with its employees, then that is not a healthy culture. And I think you spoke to it a couple times with the issues of overtime and recruitment and salaries and retention. I feel that you talked about the rookie mistakes that can be made and the lack of teamwork that seems to be going on and that even when employees talk about some of their issues, you talked about the fact that they feel like they're sort of being dismissed, that their complaints are not really listened to. And so if that's the culture from the administration to their own employees, it is no wonder that that group does the exact same thing to the inmates whom they oversee. So really it's a complete culture change of communication, of validating at least the humanity in each person, from the administrators to the employees to the inmates. And I really...you know, those are nebulous things in a way to mandate or...all you can do is hope that disturbances and situations like this do not arise again because they have a better communication and they have a better way of talking to one another. You know, I do like the idea of those...the councils, the inmate councils. But again, I agree that there are issues where people are seen as snitches and the person chosen is...you know, I don't know how that whole thing works and the whole politics of the inmate system and among the guards. But also the ideas of programming and more jobs and the hobby program and all of that, the clubs, I think it's so important that we look into that. And of course some of those things cost money and managing those things costs money and managing those things causes us to have to pay to have people oversee those specific things. So I really appreciate you bringing these all up to our attention. The vicious cycle that you talk about is clear: that you mandate overtime and then morale gets low and nobody wants to work there and then you have to mandate more

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overtime. And it is totally a completely vicious circle. That, I agree with you, if I were the boss of that situation, I would be trying to determine how I'm going to do it. And whether it's moving those people from Tecumseh, that's one possibility. The not having the rookies managing, you know, it's the hens managing the fox...or what is that thing? Anyway, it's something like that. These aren't questions, but I want to just again stress how important it was for you to go in and find the document that is...this sort of sent chills up my spine, seeing this, and then seeing the blown-up version of what the demands were. And then I still can't understand the part where they didn't find this. But then I look at the report and I agree it's really wonderful to bring somebody in from outside. But how did they miss that key piece of evidence? [LR34]

MARSHALL LUX: That's a good question, Senator. I just think there was...they were overwhelmed and they were...I don't know. I'm not sure what the answer is, but they did miss it. I'm convinced of that. It's interesting the...when Mr. Moreland was working with Mr. Fithian and following him around, watching what he was doing, we were given a large volume of documents relating to the riot, just as were the other people who were helping Mr. Fithian. And they were in binders that we were given. And I started leafing through them and, you know, I saw the usual stuff, all the incident reports that, you know, the staff had written and, you know, all of the sorts of things that I'd expect to see. And then I came across this document and it just sort of jumped out at me. And I didn't have any trouble finding it, but I don't think they were trying to hide anything or anything of that nature. I just don't think they found it. It was there. And then of course later on then, when we watched the videos of the event and saw Mr. Brown, the man who is on the cover of our report, and when thankfully the person who was taking the video from the window zoomed in on the document, so that's how we see that in fact that is exactly the same document that we had picked out of all that pile of papers that were sent to us, that's how we discovered how important it was. It was what...for these people at least it was what the event was all about for the inmates that were...that started it. But basically I agree with all of your points. You're right. There is...it needs...communication is a big deal in these situations. It needs to be improved. There is a culture change that needs to be made. I think that even the previous administration, when Bob Houston was the director, there was an understanding that there needed to be more in the way of professionalism among the staff and that was stressed even in that administration. And I'm sure it's going to be stressed going forward. But it's really a pretty simple concept. These are complicated places, potentially dangerous places. We don't need staff

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who treat inmates badly and cause more problems than we already got. And that's really a pretty simple concept. And that means that there has to be some civility, not just by the staff, by the inmates as well, but certainly by the staff so that we don't cause problems that are unnecessary. I think that's kind of what you're looking for. [LR34]

SENATOR PANSING BROOKS: It is. And I want to thank you, too, for drawing the comparisons to the 1955 riot, which I...it was actually before I was born, something that actually happened before I was born. But anyway, I think it's interesting to see those comparisons. There are some similarities, although it's different too. [LR34]

MARSHALL LUX: Right. [LR34]

SENATOR PANSING BROOKS: But I just thank you for giving us that full perspective on this. [LR34]

MARSHALL LUX: You're welcome, Senator. [LR34]

SENATOR SEILER: Senator Mello. [LR34]

SENATOR MELLO: Thank you, Chairman Seiler, and thank you, Marshall, for your testimony today. Thank you and your staff for a very informative report walking through really the details of what happened on Mother's Day. I've got a couple questions that center around page 42 of the report which primarily focuses about programming. As you're well aware, you started to provide for the Legislature, the former Chair of the Judiciary Committee, Brad Ashford, and myself memos back in the summer of 2013 about the lack of programming at a number of correctional facilities. That continued through what we saw through the Nikko Jenkins case, the LR424 Committee last year. Page 42 kind of reiterates the concern I've had, and I think the concern I know Senator Bolz had also had as a member of the Appropriations Committee, that both the prior administration and the current administration has yet to request any funding for any additional programming at any facility in the Department of Corrections. [LR34]

MARSHALL LUX: That's right. [LR34]

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SENATOR MELLO: I just draw the attention of the committee to the bottom paragraph of page 42 where you say it simply that you're not convinced that Director Frakes' plan for programming options at Tecumseh State Correctional Institution are ambitious as they need to be, especially in an overcrowded prison. I took this more than anything else in regards to writing other notes in regards to the hobbies, activities, the inmate clubs, other opportunities for more jobs through the Cornhusker State Industries. Can you shed some perspective in regards to anything that...anything else that maybe wasn't in the report that we need to know about in respects to future conversations with Director Frakes and the administration, also noting that in their budget request that was submitted October 23 there was also no request for any additional support or funding for any additional programs at any of the facilities? The question I've got is the Ombudsman's Office has been the entity that's brought this issue to light in behalf of this Legislature and arguably the state of Nebraska, yet we've seen no real movement at all from anyone in the Department of Corrections when it comes to actually...what Senator Pansing Brooks just said, when the rubber meets the road it's going to cost funding to actually do programming. Can you shed any other perspective in regards to what you identified through your guys' investigation at Tecumseh? [LR34]

MARSHALL LUX: Not really, the situation is changing. They're moving programming around, but I don't get the sense that there's a move to increase programming. I could be wrong. Maybe Mr. Frakes is a better person to ask that question of. But here's what worries me. We see the hobby program go away. We see the clubs being deemphasized. We see stresses in terms of programming. And it's all coming at a time when the population is growing significantly, which means, of course, you should need more resources. And those resources have not increased. And there could be good reasons for that. But that is the situation as I see it. And I'm not on your side of the table. If I were, that is a question that I would certainly bring up when you get a chance to talk to the director. [LR34]

SENATOR MELLO: Thank you, Marshall. [LR34]

SENATOR SEILER: Senator Bolz. [LR34]

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SENATOR BOLZ: Thanks, Marshall. I just have one question for you. My biggest concern after we heard about what happened in Tecumseh and after we toured the facility was whether or not something similar could happen in another facility. And I think given what we all know about the current context in Corrections and our overcrowding circumstances, that's a legitimate concern. [LR34]

MARSHALL LUX: Yes. [LR34]

SENATOR BOLZ: And so it would be helpful to me if you would speak to if you share that concern, if you think that your recommendations in Tecumseh can be applied to other facilities, and if you have any specific indication of soft spots or specific issues in other facilities that we might need to pay special attention to. [LR34]

MARSHALL LUX: (Exhibit 3) Good question. The one that frightens me the most is the situation at D&E. When you don't have enough cells to put people in, it's hard to keep control of the facility. And we've been fortunate in that that was a well-managed facility when it was at 300-plus design capacity. There have been some retirements at D&E. I'm concerned about that. But fortunately the population there is being reduced which needed to happen. That was the one that concerned me the most. Now...and then here's another way I would answer that. I learned about the riot at Tecumseh when my clock radio went off on the morning of the 11th. And looking back on that, if somebody had asked me on the 9th of May if I thought that there was going to be a riot at a Nebraska correctional facility, I would have said no. On the other hand, if they would have told me there was a riot at a correctional facility in Nebraska, guess which one it was, I would have said Tecumseh. Okay. So that is not a huge surprise that that's where it's happened. I don't...it's hard to know, of course, what's going to happen in the future. I think that we...our facilities are overpopulated--Tecumseh less than the others. But LCC and the penitentiary, the D&E still today, are overpopulated and we need to recognize that. We need to reduce the population of our correctional system. We need to reduce the incarceration rate in this state. And when I look at the most recent strategic plan that the department distributed very recently, I get the impression that what they're planning on is a status quo in terms of the population rate of the department. That is...well, I don't make the policy; I just work here, okay? But if I were you, I wouldn't like that idea very much. I think that the population of our

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corrections system needs to go down. The population of corrections systems in other states are going down. In Texas, they are closing prisons. That's because their population and their incarceration rate has declined. That's a good thing. And that is what, I think, we should be planning for. And I understand we have a small system, correctional system. We are not going to be able to close prisons. But we could units and that would save money, too, okay? So that's the direction, I think, that our criminal justice system and our corrections system should be moving in. And I'm not sure that that's what's being depicted in that strategic plan that we saw. And I've got...I was going to give you something. This is an article from The New York Times because we've talked before about the whole issue of overpopulation and the incarceration rate and we know...and those of you who worked on LB605 know that there's movement, not just in Nebraska but in many other states, to try and reduce the rate of incarceration. And I'm distributing this to you because it's evidence that actually that movement nationally is gaining momentum. It's not declining. It's gaining momentum. Now law enforcement leaders are supporting this idea. So it's...again, I'm not a policymaker but if I were, what I would be insisting on is more to be done to reduce the incarceration rate in our system and reduce the population of our system because it is overcrowded. The other...I have one other concern about the document that I got to read late yesterday, the strategic plan. It emphasizes the idea of operational capacity, which is defined as the capacity that we can still operate effectively under, I think. That is not the standard that is used, as I understand it, by the federal courts. And it is certainly not the standard that is in our statute, which talks about design capacity. What's the difference? The design capacity of a system is a given, certain number. We know exactly what that number is down to the last number. And it is a bright line. It is a clear standard that the courts can use so that they're not guessing about when they make decisions about what is too many people in one system. That's what design capacity is. Operational capacity is a moving target. It is what some bureaucrat says it is. And I don't think we want to get hung up on what is a moving target when our statutes state that the standard is design capacity. And that's what I think it should be. So when we evaluate the full question of overpopulation of the system, we need to keep using that design capacity standard. And when I do it, what I do is I look at the six, I think it is, adult male facilities in the state, that's where the crowd is. And I compare that with the design capacity for those facilities. And I think that should be the standard. [LR34]

SENATOR SEILER: A follow-up question? [LR34]

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SENATOR BOLZ: Just a quick comment or two, just quickly, I think that your comments about making facilities more civilized and, therefore, a safer place to work and your comments about appropriate staffing apply to more than Tecumseh. And I just want to say that out loud because I think that's a consideration this committee really needs to keep at the forefront. And my other brief comment is I appreciate your reference to decreasing the population as a whole and I just see it as an opportunity to reiterate that I think we have challenges in our behavioral health system and can improve our front-end strategies to limit the number of people that have a mental illness and end up in our correctional facility rather than in treatment. So I just wanted to thank you for sharing both of those perspectives. [LR34]

MARSHALL LUX: Yes. I agree with those points, Senator. [LR34]

SENATOR SEILER: Senator Williams. [LR34]

SENATOR WILLIAMS: Thank you, Chairman Seiler, and thank you, Marshall, for being here. Just a few comments, I was alive in 1955, although I wasn't when the Titanic sunk. Appreciate your comments and your analogy that you used there. When you're talking about status quo in what you read into Director Frakes's report, shouldn't we recognize that he is part of the executive branch that doesn't determine what the legislative branch determines as far as LB605 and what are deemed proper incarceration rates. And he's faced with a situation of overcrowding. And even though LB605 is past the period of time that it will take to see that have an effect on that is going to be lengthy. [LR34]

MARSHALL LUX: Yes. [LR34]

SENATOR WILLIAMS: And so would you care to comment on how Director Frakes is currently addressing the fact that we are...we have not lowered that incarceration rate. [LR34]

MARSHALL LUX: That's a difficult one to get a handle on. One of the ideas...here's one of...here's a problem. It's pretty clear if you look at our system, we have beds that we probably...we don't have enough beds and we know they're not distributed in the best possible way. And what the system most needs, I believe, are community custody beds which are work

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release beds and we need them in Omaha certainly, we probably need some here in Lincoln, and we could put some in other parts of the state as well. And so if I were the person who was thinking about what the strategy should be, my strategy would involve trying to find ways to increase the number of community custody beds in the system because there are...there's a backup, a backlog of inmates in our system who probably would be good candidates for a community custody bed and aren't in a community custody bed. We've talked over the last couple years about the idea of the Air Park facility--it belonged to Lancaster County--and of cleaning it up and using it as at least a temporary way to increase our number of community custody beds. The department doesn't like that idea. But it would be a short-term thing. It would be inexpensive in relative terms. It needs to be cleaned up but it's still, I think, useful, has a useful life in it. I saw it myself just a week or so ago. And so that's what I would be thinking of. And then the other point about that facility, we wouldn't be buying it; we'd be leasing it. And so once LB605 helps, if it does which I hope it does, then as a we...as the population morphs and changes, it would be possible not to use that facility anymore, although that's not clear. But that's...I think that's what the system needs. [LR34]

SENATOR WILLIAMS: The next two questions are questions that will certainly be directed to Director Frakes when he is testifying, but I would like your opinion on them. The first one, you did a masterful job of talking about the iceberg events that led up to the prison riot of May 8 and how that was an accumulation potentially of events over a lengthy period of time dating clear back to when they changed from open yards to managed yards. These decisions were made under the previous director of prisons with maybe the possible exception of the last couple. How do you feel the current director feels about the implementation of those items and how do you think he is addressing those issues and future changes in those areas? And I know that's an unfair question to ask you, but you're first on the stand... [LR34]

MARSHALL LUX: I see. [LR34]

SENATOR WILLIAMS: ...and your impression and the analysis of the Ombudsman's Office, the independence of that is important to us. [LR34]

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MARSHALL LUX: Okay. Well, we have a pretty good working relationship with Mr. Frakes. He has ideas. That's the first thing I look for when I meet a new director or when I start dealing with a new director. I at least want it to be somebody who has an imagination, has ideas. He does. You're right. Much of the trouble is something that he has inherited. What you heard yesterday, as jaw-dropping as some of that stuff was, was all stuff that happened not on his watch. The problem is he's the director now and so you're probably going to ask him what he's going to do to fix it. He's been cooperative with our office. He was cooperative with our office on the issue of looking into the riot. He offered to put one of our staff on the committee that actually did the critical incident analysis and we decided not to do that because we knew we were going to write our own independent report and we didn't want to be put in a position of saying one thing one time and another thing another time. But he was cooperative in that regard. He did not hesitate to give us the videos of the event. Those are all good things and good signs because the first thing that's important to us is that we get cooperation from the agencies. I think that he understands that there needs to be transparency on the big issues at least. And I think he understands the importance of legislative oversight, which is what this is. So those are all good things. What direction things will move in is, on a substantive level, is altogether another question. [LR34]

SENATOR WILLIAMS: And that hits my final question and that is the cultural change. Cultural changes in any situation are difficult but here, with over 2,000 employees, multiple locations, multiple geographies, in your judgment does he understand the need for a significant cultural change? [LR34]

MARSHALL LUX: He says he does. And of course, the proof will be when we see what he's doing. He obviously has replaced a lot of the upper-level management in the system, the people who were there and whose names we heard when we had the LR424 Committee hearings last year. Those people are gone. And that's a good thing. That in itself is a change, but it's not enough. And there needs to be a new culture really all the way down to the corrections officer level. That's what we've been talking about already. And it will be a challenge for him to do it. And this event, which...has not helped. It's made it more difficult. And you might ask him how that has worked as well. But it's hard to argue that that hasn't been a distraction at the very least and it's probably made it more difficult to fix things out at Tecumseh even as they existed on the 9th of May, before the riot. [LR34]

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SENATOR WILLIAMS: Thank you. [LR34]

SENATOR PANSING BROOKS: Senator, I'm sorry, but can I just ask a follow-up question because it relates to that? Otherwise, do we have to go in specific order? [LR34]

SENATOR SEILER: Okay. [LR34]

SENATOR PANSING BROOKS: All right. Thank you. This is just following up. Senator Williams said that almost of this had to do with our previous administration and with the previous director. But it's my understanding that the entire Wellness League happened under Frakes's regime. [LR34]

MARSHALL LUX: That's true. And I can't fill in the blank there because I have not asked him if he knew about those changes that were made in terms of the incidents that led to the inmates being unhappy. I don't know if he knew about that. It's a big agency and it's wrong to assume, as I sometimes do, that the director knows everything that's going on. They very often don't. And it is encouraging and a good thing that it looks like when he learned about the drug offender classifications thing... [LR34]

SENATOR PANSING BROOKS: Yes, he did. [LR34]

MARSHALL LUX: ...which is a mess, he killed it. Now he suspended it and maybe he'll breathe life back into it, but that would be...I wouldn't like that very much because I thought that was a good move. So that's something that he did that was positive in that connection. [LR34]

SENATOR PANSING BROOKS: Yes, because it's good not to violate people due process rights. [LR34]

MARSHALL LUX: It's not the way that those sorts of things should be treated. There needs to be a process, yes. [LR34]

SENATOR SEILER: Senator Schumacher. [LR34]

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SENATOR SCHUMACHER: Thank you, Mr. Chairman, and thank you for your report and your focus on these efforts. It certainly is helpful in trying to perform the judgments that we have to form. In going through your outline today, it seems that a lot of the (inaudible) turns back to this open yard versus managed yard thing. When was that change implemented? [LR34]

MARSHALL LUX: It happened at the Lincoln Correctional Center first. And then about a year or more later, they did the same thing at the penitentiary and at Tecumseh simultaneously. That was in the fall of 2012, I think. [LR34]

SENATOR WILLIAMS: Fall of when, Marshall? I'm sorry, fall of when? [LR34]

MARSHALL LUX: 2012. [LR34]

SENATOR WILLIAMS: Thank you. [LR34]

MARSHALL LUX: It was almost three years ago exactly. And the way they did it was one day the sun came up and the inmates, expecting to be let out of their cells, weren't. So there was what they call a modified lock down of these two facilities while they implemented this new policy. And you can see why. They were concerned that there would be some kind of demonstration by the inmates once they learned that this change was made. And they wanted them to learn while they were all locked in their cells. So that lasted for a while. When they changed that policy it was certainly not a surprise. Mr. Houston was the director then. He called me up and told me that they were doing it, mentioned already that he predicted that was going to happen to the Judiciary Committee several years before that. But it was in the fall of 2012 that they did it at Tecumseh and the penitentiary. At the LCC is where it started. They had a series of gang-related fights in the yards. And that...so they closed...they abandoned the open yards policy there first because of that. [LR34]

SENATOR SCHUMACHER: But when the context of institutional management across the prison world, have open yard policies be the thing that generally prevails or these managed yard policies? I mean something had...was there a trigger other than this? [LR34]

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MARSHALL LUX: My impression, and I could stand to be corrected, but my impression is that the open yards is not the way it's done. But here in Nebraska it was still being done that way. But I think we looked at other systems, depending on the custody level of the inmates that are...you know, if you're minimum custody inmates, it might be different. But in a facility like this which is maximum, sort of medium, I assume that most states do not have open yards. [LR34]

SENATOR SCHUMACHER: Then a lot of this, as it always does, it traces back to money and the availability to pay for things that would be good ideas and would be implemented but for the money. [LR34]

MARSHALL LUX: Right. [LR34]

SENATOR SCHUMACHER: But one issue that came up in our presentation from the folks with the state employees union and then we were told that some of the folks here at Corrections aren't getting merit raises or longevity raises and are maybe undercompensated compared to jails and things like that. As an overlay, don't we have some type of a state employee contract that covers all the state employees? [LR34]

MARSHALL LUX: I think...yes is the general answer. The Patrol has its own contract, I think. And I don't know if there's a separate one for the Corrections staff or not. I'm not sure. [LR34]

SENATOR SCHUMACHER: So to what extent do we have or does the administration have flexibility to give one department extra, above, what might be called comparability or extra bonus just because there's needs there and not have a ripple effect in the other departments. [LR34]

MARSHALL LUX: I'm not sure what the answer to that question is. I think that's possible. But...and of course, it would have to be negotiated. And the problem is if you try to raise salaries a little bit here then there are going to be, even in the same bargaining unit, there are going to be other people who think, well, I should get more, too, right? But I think it could be done. [LR34]

SENATOR SCHUMACHER: So I mean we do have that practical... [LR34]

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MARSHALL LUX: Yes. [LR34]

SENATOR SCHUMACHER: ...limitation. And while we might say, hey, let's target some extra money toward this problem area, we do have to deal with the ripple effect that other people may say that, hey, why are we being left off this bus? [LR34]

MARSHALL LUX: That's true. And you also inevitably will have the problem where the person who was hired two years ago will end up being paid less than the new guy who's hired on a higher salary...you know, higher scale. That causes trouble, too, sometimes. [LR34]

SENATOR SCHUMACHER: Apparently a lot of this is the inmates don't have enough to keep them occupied, too much time on their hands. [LR34]

MARSHALL LUX: That's part of it, yes. [LR34]

SENATOR SCHUMACHER: And one of the things you pointed out was the hobby program and the clubs were killed. What was the reason for getting rid of the hobby program? [LR34]

MARSHALL LUX: I'm not sure what the answer to that is. I suspect that it had to do, in part, with staffing. [LR34]

SENATOR SCHUMACHER: Was that a recent thing? [LR34]

MARSHALL LUX: No, that happened several years ago. [LR34]

SENATOR SCHUMACHER: Okay. And then so we've taken away things to keep folks occupied other than staring at four walls or chitter chatter between each other. And we haven't implemented programming or educational programs or job training programs because all those cost money and staff. [LR34]

MARSHALL LUX: Yes. [LR34]

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SENATOR SCHUMACHER: And facilities. [LR34]

MARSHALL LUX: Yes, probably. [LR34]

SENATOR SCHUMACHER: And so, you know, we've heard on a couple of occasions, well, we'll delay any requests for any more money. We really don't need more money. But yet it seems like we do need more money and that we need to act probably sooner rather than later. [LR34]

MARSHALL LUX: I agree with that. [LR34]

SENATOR SCHUMACHER: Okay. Thank you very much. [LR34]

SENATOR SEILER: Senator Krist, do you have any questions? [LR34]

SENATOR KRIST: I do. I apologize for being late today. A choice between my daughter and you, I chose my daughter. So, sorry. Thank you, Chair, for an opportunity. Just two questions, Marshall. Were you consulted at all or did you get a preview at all at the strategic plan that was laid out yesterday at 3:00? [LR34]

MARSHALL LUX: No. [LR34]

SENATOR KRIST: No? The answer is no? [LR34]

MARSHALL LUX: No. [LR34]

SENATOR KRIST: Okay. Are you aware that there is a special committee or group that was formed to help, before Mr. Frakes was even hired, from the community to help that transition and to educate him when he comes in on Corrections and the way that we do business in Nebraska. [LR34]

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MARSHALL LUX: I'm not sure that I'm familiar with anything quite like that. But there was a...there was supposed to be a committee that's been formed to deal with the administrative segregation question. [LR34]

SENATOR KRIST: Okay. So this group would have been made up by people who could consult in terms of the state of Corrections and helping the director move in. It was made up of judges. It was made up of past senators. But you were not asked to be a part of that. [LR34]

MARSHALL LUX: No. [LR34]

SENATOR KRIST: And for the record, to my knowledge, no one in...actively in the legislative branch was. And we'll find out later if that's true. But the Ombudsman's Office has done an excellent job of amicably embedding itself where it needs to be embedded, maintaining an objectivity, and not being there for things that would compromise that objectivity. And 90 percent of that, obviously, is leadership and it's the kind of leadership that you have shown and I appreciate everything that you have done and you have some wonderful people in place that are carrying out that mission. So thank you very much. [LR34]

MARSHALL LUX: Thank you, Senator. [LR34]

SENATOR SEILER: Senator Chambers. [LR34]

SENATOR CHAMBERS: Thank you, Mr. Chairman. Mr. Lux, I won't take a long time praising the report, your leadership, the work of the staff people in the Ombudsman's Office. But you know that I've worked with them. They've worked with me. I've worked with you. You've worked with me. So all of that is taken care of by what you actually know without me going into great detail now. But there are three or four things that I would like to touch on or have you touch on. Mr. Frakes was quoted somewhere as saying that one element that may help prevent another occurrence like that May 9 would be better intelligence. Had you been aware of him making such a statement? [LR34]

MARSHALL LUX: I read that somewhere, yes. [LR34]

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SENATOR CHAMBERS: What did he mean by intelligence and what would be the source of it?
[LR34]

MARSHALL LUX: I think he was using the term in the sense of gathering information about what's going on and what's being whispered about amongst the inmates so that we know that they're planning to do this sort of thing. I think that's the concept. [LR34]

SENATOR CHAMBERS: Yours corresponds to what I thought he meant. What would be the source of that information? Inmates? [LR34]

MARSHALL LUX: Inmates, yes. It would be snitches and...what they call snitches and other inmates who are... [LR34]

SENATOR CHAMBERS: So they could be called cooperating individuals? [LR34]

MARSHALL LUX: That's what they call them. [LR34]

SENATOR CHAMBERS: Or good citizens? Or snitches? [LR34]

MARSHALL LUX: Right. [LR34]

SENATOR CHAMBERS: Now, if an inmate is functioning as a snitch in the classical sense of that term, it appears that Mr. Frakes is willing to lend credence to what is said by an inmate in that capacity. [LR34]

MARSHALL LUX: Um-hum. [LR34]

SENATOR CHAMBERS: Yet if an inmate is called as a witness on behalf of a fellow inmate who is being charged with an offense, there is not the same degree of credibility accorded what the inmate offers as a witness, would you agree with that? [LR34]

MARSHALL LUX: I would agree with that, yes. [LR34]

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SENATOR CHAMBERS: Okay. Now, a concern that I have revolves around the use of deadly force, whether it's by the police or these Corrections people. Just briefly, there should be very clear guidelines as to when, under what circumstances it should be used and who specifically is going to be authorized to use it. There should be adequate training, and I don't mean two or three hours shooting at a target, but substantive training that would deal with all of the ramifications of the infliction of deadly force. There should be accountability, a system in place, and there should be consequences if there are violations of the rules, regulations, or any other thing pertaining to when and how such force should be used. When a rifle...well, let me not say it. Let me ask. What type of firearm was used to shoot Mr. Washington with? [LR34]

MARSHALL LUX: Senator, you've got me there. I'm not a firearm person, and I'm not sure. I think it's referenced in the report somewhere. I don't know one rifle from another. [LR34]

SENATOR CHAMBERS: But it would be a firearm capable of dealing out or inflicting deadly force. [LR34]

MARSHALL LUX: Absolutely. [LR34]

SENATOR CHAMBERS: How much training did the person have, if you know? [LR34]

MARSHALL LUX: I don't know. [LR34]

SENATOR CHAMBERS: Okay. Is there documentary evidence in the form of a video which would disclose how that shooting occurred? [LR34]

MARSHALL LUX: Yes, there is. And we've seen that. [LR34]

SENATOR CHAMBERS: Were there reports written and statements given by the shooter and by other Corrections people? [LR34]

MARSHALL LUX: Yes. [LR34]

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SENATOR CHAMBERS: Did the statements and the reports correspond with what was shown by the video? [LR34]

MARSHALL LUX: Basically they did. But the problem with the reports that are applicable to this is that it's...there's one by the shooter. And then there is one by an administrator who had suggested that the deadly force shot be used. And then there is one by the middleman who was involved in communicating between the administrator and the shooter. [LR34]

SENATOR CHAMBERS: Does the video show that the person who was shot indeed had a metal bar or some kind of implement which could be used to break a window, and that person, in fact, was doing such a thing when he was shot? Does the video show that? [LR34]

MARSHALL LUX: No, it doesn't. What it, in fact, shows is that, the individual, Mr. Washington, who was shot, was not one of those who was assaulting the door to the gym at that point in time. There were two other inmates who did. He was not one. [LR34]

SENATOR CHAMBERS: Did the account of the shooter which said that she aimed at the center of mass of the individual who was in the process of breaking the window correspond to what was shown by the video in terms of who actually was carrying out this activity? [LR34]

MARSHALL LUX: As I recall, her report was accurate basically to the extent that there were details in it. One of the problems, as we watched it... [LR34]

SENATOR CHAMBERS: Wait, you said that what the shooter said was accurate? [LR34]

MARSHALL LUX: I think so, yes. [LR34]

SENATOR CHAMBERS: I thought you said that the one who was shot was not, in fact, trying to break the window. [LR34]

MARSHALL LUX: That's correct. [LR34]

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SENATOR CHAMBERS: Well, if the shooter said the one shot was trying to break the window and the video didn't show that to be the case, how can both of those things be correct? [LR34]

MARSHALL LUX: They can't be. You're right. The other...there's another problem with this. There was a second inmate who did try to break the window, who was standing near to Mr. Washington who did not. And I'm not entirely convinced that the shooter hit the target that was being aimed at. He may have hit the wrong one. [LR34]

SENATOR CHAMBERS: To your knowledge, is the administration, and by that I meant Mr. Frakes, allowing charges to be brought against the one who was shot on the basis of what the shooter said when there is testimony and video evidence to indicate that Mr. Washington was not the one doing this damaging activity? [LR34]

MARSHALL LUX: Yes, there were...disciplinary action was taken against Mr. Washington as I... [LR34]

SENATOR CHAMBERS: As though he, in fact, were... [LR34]

MARSHALL LUX: Yes. [LR34]

SENATOR CHAMBERS: ...the perpetrator. [LR34]

MARSHALL LUX: Um-hum, yes. [LR34]

SENATOR CHAMBERS: But the documentary evidence and testimony from others would indicate that he was not in that capacity. [LR34]

MARSHALL LUX: He was not. From what I saw in the video, he did not do the damage to the door. [LR34]

SENATOR CHAMBERS: And I would go by the documentary evidence rather than what Mr. Frakes is saying. And by him taking that position, he reminds me of what these police

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investigators do. Once one of their officers does something wrong, they close ranks and all tell the same lie. Then the one whose job it is to sort through that and make sure the right thing is done will join the lying. So instead of Mr. Frakes being like the sheriff, he has joined Jesse James and Frank James and the Dalton Brothers who are justifying what Billy the Kid did. So that, to my mind, makes Mr. Frakes worse than all of them. But I'll have a chance to deal with him when he comes this afternoon. I took a note or two so that I could restrict my questions to a couple of major issues to get your take on them. This wellness program which allow those who qualify, however they do it, makes available activities, benefits that are not available to others who are not a part of it. [LR34]

MARSHALL LUX: Yes. [LR34]

SENATOR CHAMBERS: Is there enough roster space for every inmate at Tecumseh to be a part of this wellness program? [LR34]

MARSHALL LUX: I assume that they could if they're a general population inmate and not locked up in a segregation cell, something like that. [LR34]

SENATOR CHAMBERS: Would there be enough benefits for every inmate to participate? [LR34]

MARSHALL LUX: I would think so. [LR34]

SENATOR CHAMBERS: So there would be enough jobs to go around, enough of these favored jobs. [LR34]

MARSHALL LUX: Well, not jobs, no. Not if what we're talking about is jobs. I'm talking about belonging to the Wellness League. [LR34]

SENATOR CHAMBERS: They used to have what was called meritorious good time. And some of the senators were conned into thinking that would be a good idea. It was rejected because rather than being something that served as an incentive, it was a tool for arbitrariness,

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discrimination, to punish some by withholding from them what they were entitled to in terms of an opportunity to gain meritorious good time. And it was used to reward the snitches and the provocateurs who carried out activities that the administration wanted carried out so that events would occur that would allow them to crack down on the inmates. When you have this kind of thing, it is the same corrupt notion under a different name. Now, what is the standard? There should be some standard that would determine who is engaging in the conduct that would qualify him to be in this program. Are there written rules and regulations that spell those things out? [LR34]

MARSHALL LUX: There are written standards that spell it out. They're obviously not promulgated because the department doesn't do that. So they're not, strictly speaking, regulations. But there are standards, yes. [LR34]

SENATOR CHAMBERS: Written standards. Who makes the determination as to whether the standards are met? [LR34]

MARSHALL LUX: I suspect that is a responsibility of the person who's the recreation manager at the facility. [LR34]

SENATOR CHAMBERS: And whenever an individual has the right to exercise total and sole discretion, there's the opportunity for discrimination, arbitrariness, and other inappropriate factors to enter into that decision. [LR34]

MARSHALL LUX: There are...that was part of the problem. When the standards for participating in the league were focused on whether a person had been convicted of an act of misconduct within the last year, that is a matter of record and that is a status that is litigated or handled via a hearing with evidence and that sort of thing. What happened in this case is they decided that they would also add this idea of a drug offender classification as a...as disabling a person from participating. That is not adjudicated at all. That is an arbitrary label that is hung over an inmate by the administration. And that was a problem. And if there's going to be any discrimination in this--and there could well have been; that's what the inmates thought--then it would be...that would be the source of it. [LR34]

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SENATOR CHAMBERS: And if the Legislature becomes aware of a program that has an inherent weakness such as a built-in methodology for discrimination, the Legislature should step in and say that's not going to be the way it is anymore. [LR34]

MARSHALL LUX: You could do that. Yes, sir. [LR34]

SENATOR CHAMBERS: And touching on this notion of adjudication, the report would suggest that...let me ask a question. Was every inmate who was accused of a violation during that riot allowed to review the evidence that would be used against such person? [LR34]

MARSHALL LUX: I'm not positive what the answer to that is, but I would assume that they were if it was a documentary evidence. [LR34]

SENATOR CHAMBERS: Was Mr. Washington allowed to view the video? [LR34]

MARSHALL LUX: Absolutely not. [LR34]

SENATOR CHAMBERS: But that was used to help convict him of what he was accused of, isn't that right? [LR34]

MARSHALL LUX: That's my understanding. Yes, sir. [LR34]

SENATOR CHAMBERS: So how can there be a fair hearing when the one charged cannot view the evidence? [LR34]

MARSHALL LUX: In my opinion, there can't be. [LR34]

SENATOR CHAMBERS: Now, along that same line, if there is no opportunity to view this evidence when the disciplinary hearing is going forth and the hearing officer can find that person guilty then...I'm trying to look at some language here so I cannot misstate it. There are inmates allegedly involved in the riot who did not have a hearing presented at the interdisciplinary

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committee, yet the case was presented at an inmate classification hearing where the burden of proof is lower, is that correct? [LR34]

MARSHALL LUX: Yes. [LR34]

SENATOR CHAMBERS: How fair is that? [LR34]

MARSHALL LUX: Not fair. I don't like that at all. [LR34]

SENATOR CHAMBERS: But it's being done. [LR34]

MARSHALL LUX: I think that's right. [LR34]

SENATOR CHAMBERS: And Mr. Frakes is in charge. [LR34]

MARSHALL LUX: Yes. [LR34]

SENATOR CHAMBERS: If the captain of the ship knows that there are certain individuals misbehaving and the captain doesn't put in place a system for doing the right thing, the captain can do whatever he or she wants to when that ship is out there on the sea. Mr. Frakes is the captain of this ship. And I see great defects in what he's doing because he apparently hasn't given the word that equity is to be a guiding principle, that due process is to be in place, and we will not deny a person that to which he is entitled based on a finding in a hearing where he could not view the evidence that was used against him. And in fact, he may not even be given a hearing over here. But that which is going to be used against him can be used in the classification process. That might seem convoluted, but you know what I'm talking about. [LR34]

MARSHALL LUX: I do, yes. [LR34]

SENATOR CHAMBERS: I think the transcript will be clear. And I know Mr. Frakes will be aware of what I'm talking about. When you were doing the work and your staff members were doing the work which resulted in this report, which I think is excellent as are all the reports that

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I've seen that have come out of your office, was there cooperation at all levels by everybody who was approached? Willing cooperation? [LR34]

MARSHALL LUX: As far as I know, yes. [LR34]

SENATOR CHAMBERS: Are you aware of any resistance or foot-dragging by anybody along the way and there had to be an intervention by the captain of the ship, as far as you know? [LR34]

MARSHALL LUX: As far as I know, there wasn't. [LR34]

SENATOR CHAMBERS: Okay. I'm going to tell a joke if you don't mind. [LR34]

MARSHALL LUX: I don't mind. [LR34]

SENATOR CHAMBERS: There was ship, a cruise ship. And they had a magician doing the tricks and he always did the tricks. But he had new audiences so each audience was baffled. But there was a parrot and the parrot watched all of these tricks again and again and again and knew how they were done. So when the magician was going through his misdirection, the parrot said: It's in the other hand, it's in the other hand. And the magician would frown. So then the parrot would say: It's in his pocket, it's in his pocket. So there was not a good relationship between the magician and the parrot. A storm came up and the ship sank. But there was a large piece of wood or something that would float. And the parrot was on one side and the magician was on the other side. And they were glaring at each other. And neither one said anything to the other for days. Then finally, the parrot said: Okay, I give. Where's the ship? (Laughter) My final question. If...have you had a chance to review what Mr. Frakes handed out while this committee was in session yesterday? [LR34]

MARSHALL LUX: Very quickly, very briefly, Senator. [LR34]

SENATOR CHAMBERS: Okay. I haven't either. I was just going to ask if all of the things he mentioned were feasible. That doesn't mean that they will necessarily be done. But are they

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feasible? Do they address the issues? Are the projections about cost within the ballpark? Those were the type of things I would like to have asked. But you are in the same position as the rest of us where you didn't have a chance to see it. [LR34]

MARSHALL LUX: That's correct. [LR34]

SENATOR CHAMBERS: That's all that I will have. Thank you. [LR34]

SENATOR SEILER: I just have a couple things. I'd like to take you through a bird's-eye view of the system. And it appears that about two or three directors ago, it seems like the prisoners were chasing beds rather than classification. And I think it's more than just Tecumseh. If you look at what's been done out at McCook, that prison has changed completely in character, is that correct? [LR34]

MARSHALL LUX: That's correct, yes. [LR34]

SENATOR SEILER: I'm asking this so that I can either get off of this subject and forget about it or it's something we need to look at. Is that true of all of the prisons, the other nine or ten, where the prisoners were actually chasing...being put in beds, not...didn't care what the right classification was? [LR34]

MARSHALL LUX: To a certain extent it is, yes, Senator. [LR34]

SENATOR SEILER: Okay. [LR34]

MARSHALL LUX: In the male facilities, which is basically what we're talking about, and not necessarily in the community corrections facilities because there is a shortage there. [LR34]

SENATOR SEILER: Okay. Then there was another subject you brought up about Texas closing prisons. They've adopted and have had for about five years, a (LB)605 program. [LR34]

MARSHALL LUX: Yes. [LR34]

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SENATOR SEILER: And also South Carolina has had it two years, and Georgia has had it 3.5, 4 years. [LR34]

MARSHALL LUX: Um-hum. [LR34]

SENATOR SEILER: Their prison population has just extremely lowered. [LR34]

MARSHALL LUX: Yes. [LR34]

SENATOR SEILER: If we are lucky enough for our LB605 to have the same result, there is a caveat though. And I want to ask you if you think the prisons that are now in place can handle it. The prisoners we're going to end up with if LB605 is successful will be a lot more violent. [LR34]

MARSHALL LUX: They'll be a lot...that's true because the whole idea is to keep nonviolent offenders out and fill those beds with the people who are convicted of violent crimes. That is right. That's exactly...if it works, it will boil down to that essence of the more difficult, dangerous. [LR34]

SENATOR SEILER: I have two questions then. Do we have the physical structures in place to handle those? [LR34]

MARSHALL LUX: We do depending on how many of them there are, yes. [LR34]

SENATOR SEILER: The second question is do we have the staff currently in place to handle those? [LR34]

MARSHALL LUX: I'm not sure of the answer to that question. Probably so, but again, there's the Tecumseh quandary about staffing that facility and whether we can put...and I think I even mentioned that in the report at some point. When you boil it down to the essence and get only more violent offenders in your system, then you're going to have those kinds of issues. And it's

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going to be more important that Tecumseh, for instance, have a better, more seasoned staff than it does now. [LR34]

SENATOR SEILER: I know McCook is about twice as big as Tecumseh. But have we looked at whether or not they have problems with their staffing out there? [LR34]

MARSHALL LUX: No. I have no idea about what's going there. But you are correct. It's basically...there are people being sent there because there are beds there. [LR34]

SENATOR SEILER: I'd like to thank you for your testimony and for your excellent work with you and your staff. Thank you. [LR34]

MARSHALL LUX: Thank you, Senator. [LR34]

SENATOR CHAMBERS: Excuse me. [LR34]

SENATOR SEILER: Any others have any questions? [LR34]

SENATOR CHAMBERS: I didn't put it...I put it in my note...I mean, I didn't put it in my note but I had marked it, a question about the prisoners in the county jails. May I ask a question? [LR34]

SENATOR SEILER: Yes, you can. [LR34]

SENATOR CHAMBERS: Mr. Lux, are there unique problems being encountered by inmates in the county jail because the standards by which they are treated in the institution are not obtaining at the county jail level? [LR34]

MARSHALL LUX: Yes, there could be. If you're at the county jail, you don't get programming obviously. And there is a culture shock, if you want to call it that, for inmates who are accustomed to a correctional facility being moved to a jail where things may be handled differently. So there are some issues there, yes. If I could, I want to mention something which

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surprised me a little bit when I discovered it yesterday. Our count of inmates in county jails has gone down by a fairly significant number since August. And if I were asking Mr. Frakes questions later, you might want to ask him what's up with that because that was a surprise to me. It's gone down. [LR34]

SENATOR CHAMBERS: In your opinion, and this is what I wanted to get to, is that a good arrangement of taking people from the prison and putting them in these county jails where there's no standard that applies to all of the jails where they are, there are services not available in the county jails, their attitudes toward nonwhite inmates at the county jail which wouldn't...they might exist in the prison, but they're not acted on in the same way. And the Ombudsman's Office can't handle all of these issues. Would it be a wise thing to continue that practice or to discontinue it, of putting these prisoners into the county jails? [LR34]

MARSHALL LUX: I don't like the county jail program. I didn't like it when it started. But it's...I also don't like having way too many people at the D&E. So that's the sort of trade-off that...but you're right about the problems, absolutely right about them. And it is certainly not an ideal arrangement. It would be better, in my view, if we want to relieve that population issue, we would probably be better off opening up the Air Park facility and putting some community custody beds out there rather than spending the money on the... [LR34]

SENATOR CHAMBERS: My final question so that you won't have to go beyond what I'm asking, under an equal rights theory, equal treatment, equal treatment under the law, even prisoners are entitled to that. And in their capacity or role as prisoners, they're entitled to the same treatment under the law. If the state has put some inmates in a set of circumstances where they are treated less fairly, the state knows they're treated less fairly, and will allow that to continue, a lawsuit could be brought--whether or not it would succeed and I think it would. And the state might be out of more money in that case than continuing to take the easy way out and give these counties some extra money to which they're not entitled. [LR34]

MARSHALL LUX: That's conceivable, certainly. [LR34]

SENATOR CHAMBERS: And that is all that I have. Thank you, Mr. Chairman. [LR34]

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SENATOR SEILER: Okay. Senator, Pansing Brooks. [LR34]

SENATOR PANSING BROOKS: Thank you, Chairman Seiler. I wanted to just go back one more minute to the issue about Air Park because fortunately I did get to go there and I know that it was set up when most people could not attend. And that was highly discouraging to me at that point because when we went through that facility...and I want to talk about it a minute with you because I want them to hear what we...I felt it was really appropriate for community corrections and for a way to let people go out. I was blown over that we have this entire building sitting there empty that was used for the Lancaster County prison before the new prison was built. So it's totally built for a prison situation. It needs to be repainted and some carpet. But even looking...even I could tell looking at stuff like the electrical facilities and the plumbing facilities and things like that, there might need to be some shower improvements. But as far as the entire infrastructure, it was shockingly in really good shape. It also has a place, would you agree to that? [LR34]

MARSHALL LUX: Yes, I'd agree with that. It's a little dirty and would have to be cleaned up, but the department has free labor and so they could get that done. [LR34]

SENATOR PANSING BROOKS: Okay. And so the other things that were beneficial out there is it has a whole garage area where...and there's a lot of trucks and trucking companies out in that area. So trucks could be brought in and there could be vocational rehabilitation and jobs that could be worked where the inmates can learn skills from the community as they're moving back in. And this rehab...this place is a place where inmates...can you explain to us how you would use that place. How are inmates...they're able to go out in the community and then come back at night, is that correct? Could you explain that? [LR34]

MARSHALL LUX: That's the way it works. It's a work release program. The inmates have a job in the community, mostly during the day. They are transported from the community corrections facility to their job. They work. They get back on the minivan or whatever it is that we're using for transportation and we bring them back and they sleep at the facility. They pay rent from the money that they earn. And these beds are cheap beds compared to a bed in a prison. So it has a lot going for it. And of course, the whole point of this is to try and transition people out of where

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they're in custody in a prison back into the community where they work for a living and learn how to get along outside of a prison again. [LR34]

SENATOR PANSING BROOKS: And it's my understanding there was enough land to even do some farming, to teach farming skills, is that correct? [LR34]

MARSHALL LUX: Well, I'm not sure about that. But there could have been a garden out there. [LR34]

SENATOR PANSING BROOKS: Gardens, yeah, garden skills. And then do you have knowledge of about how many beds could be placed there? [LR34]

MARSHALL LUX: My recollection is that there were 200 maybe when the county was using it. When Bob Houston was talking about it a number of years ago when it first came up, the number I recall him using is 250. [LR34]

SENATOR PANSING BROOKS: Okay. So would this be used instead of putting people into the county jails that's being done now? [LR34]

MARSHALL LUX: Yes, you could do it that way. [LR34]

SENATOR PANSING BROOKS: And so how many do we have that are being placed in the county jails right now? [LR34]

MARSHALL LUX: As I recall, it was over 200 at one point. But it's gone down so I'm not sure what the exact number is. But we have that. Mr. Koebernick got that for us yesterday. I was surprised to see that the number in the jails has gone down. [LR34]

SENATOR PANSING BROOKS: Well, I have heard from I don't know which report or maybe it was something that was released yesterday that the emphasis is now on building a women's prison, yet we continue to hear that the men's prisons are the ones that are having the greatest overcrowding issues. And then meanwhile we also have community corrections where it's my

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understanding that one of the prisons in the counties, they're placed in that prison, they never see the light of day until the day they're finally released basically. [LR34]

MARSHALL LUX: That could happen, yes. [LR34]

SENATOR PANSING BROOKS: So I guess as...I presume there's going to be some big reason why this county jail is not appropriate. And at least it seems that until something is built or something better is done to help these inmates become safer and come back into our communities, we have to have something that will work at least temporarily. If they want to build a new place to help move these inmates out and move them out so that they can start assimilating and coming into our communities, I cannot imagine a better place. And I know that they're going to say well, it's going to cost money to fix it up, or this is a leased space, as you told us. But we did the \$250 million bond issue that looked at the schools across Lincoln. And we contemplated whether or not to tear down Lincoln Southeast High School because it was a mess or whether to go ahead and rehab it and put the money in and keep the good parts and move on. And I just...I don't understand what the...can you see where the major problems are in this building? [LR34]

MARSHALL LUX: No, but of course that's not my expertise. But I'm like you, I suspect we're going to hear there are termites or some other... [LR34]

SENATOR PANSING BROOKS: Termites in a bomb shelter built with concrete. But, yes, okay. [LR34]

MARSHALL LUX: Right, yeah. [LR34]

SENATOR PANSING BROOKS: All right. I just wanted to at least get your take on this so that if I bring this up later today I'm not the only person. Thank you for your time. [LR34]

SENATOR SEILER: Senator Krist. [LR34]

SENATOR KRIST: I don't want to belabor my earlier point, but I'm going to belabor my earlier point. There was a study done on the Lincoln Air Park. And I was going to bring this up anyway,

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but I was informed that the date on that study was the 29th of September. Have you seen that study? [LR34]

SENATOR PANSING BROOKS: No. [LR34]

SENATOR KRIST: Have you seen that study? [LR34]

SENATOR MELLO: No. [LR34]

SENATOR KRIST: I make my point. Have you seen that study? [LR34]

MARSHALL LUX: No, sir. [LR34]

SENATOR KRIST: There you go. And that's why the collaboration before you come up with a strategic plan and you plan the way you're going to spend money and put programs in place should be a consultation, if you will, a collaboration, if you will, between the branches of government because they're going to have to come to us for money. And my comment yesterday in the paper, it holds today and it will hold this afternoon: Don't spend our money without giving us an opportunity to weigh in on the things that we have spent the last...I'm offended. I've spent the last two years of my life and most of my summers as have many of us studying these issues. And now we get an eight-page, this is what we're going to do and discounting the things that we have talked about for the last few years. Shame on them. Thank you, Mr. Chairman. [LR34]

SENATOR SEILER: Senator Williams. [LR34]

SENATOR WILLIAMS: One really quick point, just so I'm understanding something, Chairman Seiler, I think your question to Marshall on the implementation of LB605 led to someone saying that under LB605, we will incarcerate more violent criminals. Won't we actually just incarcerate a higher percentage, in the system, of violent criminals? I just want to make sure that I'm understanding it. [LR34]

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MARSHALL LUX: Here's what I see. The point of LB605 is to incarcerate fewer people who do not commit violent crimes. That means that as you...as that begins to work, you're going to boil your population's characteristics down to the point where a very high percentage of them are going to be people who have committed violent crimes. And so that is...it could conceivably be more of a management issue for the people who run the facilities. [LR34]

SENATOR WILLIAMS: I certainly recognize that. But it's not that the number, the pure number of violent people incarcerated goes up. It's the percentage of those. [LR34]

MARSHALL LUX: Yes, that's what I'm saying. [LR34]

SENATOR WILLIAMS: Yes, thank you. [LR34]

SENATOR SEILER: It's 65/35 right now. And at the end of our LB605 it should be 100 percent. Okay, yes. [LR34]

SENATOR CHAMBERS: Because of some the things the Governor and others of his ilk have been saying, not everybody who is convicted of having committed a violent is a violent person. And there is a difference. [LR34]

MARSHALL LUX: There is a difference, yes. [LR34]

SENATOR CHAMBERS: And they don't make that difference. And I don't think they care about the nuances and that's why we get these kind of reports, because everything is going to be impressed from the top down and we're going to take it. And I'm going to say it here like I've said it before. The Governor was a spoiled brat, a spoiled brat of a rich family. And now he's a spoiled adult and he thinks he can do the same thing here that he did when he was working for his father. But he was such a drawback in the company that they got him out of there, and the facts establish it. And I've got information somebody in the Cubs operation read a rhyme that I wrote about him and the Cubs. And that person said they don't like him. He sits on the board. If you think that I'm not telling the truth, let some inquiring reporter find out how the Cubs organization feels about Pete Ricketts who sits on the board of directors of the Cubs

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organization. But the point I want to get to is this. When we allow the Governor to frame the issues, we allow him to disrespect the Legislature. He'll call press conferences to lambaste the Legislature and say you're out of touch with everybody. But he won't call a press conference on his own to explain what he's doing on those drugs. Now, how is he going to spend \$54,000--and you all who are smart know this--without having services that were performed, goods that were never received, the checks were cashed, and he can get away with that? That's called sending good money after bad. But I'm going to question Mr. Frakes very closely this afternoon. And so that my colleagues will not be nervous, I'm going to do it in a way that is very nonconfrontational, depending on how he comports himself. And it will take a lot of time or not much time depending on how he chooses to answer the questions. If it's a yes-or-no question, obviously not a gotcha kind of question and he chooses to elaborate, I won't cut him off. But those are the kind of things that will extend my questioning. I have some very specific items that I want to raise with him. And that's all really that I have to say at this point. Thank you. [LR34]

SENATOR SEILER: Senator, can I set up a pool on that? (Laughter) We'll be adjourned until 1:30. [LR34]

MARSHALL LUX: Thank you, Senators. [LR34]

SENATOR SEILER: Thank you very much. [LR34]

BREAK

SENATOR SEILER: It is the bewitching hour and we are ready to reopen on LR34 committee. Laura, will you start off with your...we've got to redo it for the record. [LR34]

SENATOR EBKE: Yeah. Senator Laura Ebke, District 32. [LR34]

SENATOR PANSING BROOKS: Hi. Patty Pansing Brooks, District 28. [LR34]

SENATOR MELLO: Heath Mello, District 5. [LR34]

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SENATOR BOLZ: Senator Kate Bolz, District 29. [LR34]

OLIVER VANDERVOORT: Oliver VanDervoort, committee clerk. [LR34]

SENATOR SEILER: Les Seiler, Chairman, District 33. [LR34]

DIANE AMDOR: Diane Amdor, committee counsel. [LR34]

SENATOR CHAMBERS: Ernie Chambers, District 11 in Omaha. [LR34]

SENATOR MORFELD: Adam Morfeld, District 46 here in Lincoln. [LR34]

SENATOR WILLIAMS: Matt Williams, District 36. [LR34]

SENATOR SEILER: I see we have a quorum. Heath, you have a motion. [LR34]

SENATOR MELLO: Chairman Seiler, I would move that the committee restrict its questioning today to Director Frakes on anything that relates to the strategic plan that was released yesterday afternoon, anything involving prison overcrowding, behavioral health, mental health services, their budget requests for the upcoming fiscal year, as well as any additional programming concerns or issues and try to restrict our questions as a committee this afternoon to the incident at Tecumseh back in May, as well as issues surrounding the department's attempts to try to acquire drugs related to carrying out capital punishment. [LR34]

SENATOR CHAMBERS: Second. [LR34]

SENATOR SEILER: I have a second. All those in favor raise your right hand. Carries. Director, would you like to come before us and testify. Please state your full name and spell it for the record. [LR34]

SCOTT FRAKES: My name is Scott Frakes, S-c-o-t F-r-a-k-e-s. [LR34]

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SENATOR SEILER: Go ahead. [LR34]

SCOTT FRAKES: Senator Seiler, members of the committee, given the change in direction for today's testimony, my opening comments will be brief. I appreciate the opportunity to appear before you today and to respond to the questions you have. Most of my focus today was, in fact, at least from my opening testimony, was specific to the strategic plan for the department. So we will save that for another opportunity. You know, based on the topics to be discussed, I don't know that I can add a lot more at this moment. I would be ready answer questions and engage. [LR34]

SENATOR SEILER: Okay. Senator Laura, do you have any questions? [LR34]

SENATOR EBKE: I'll defer for a little while. [LR34]

SENATOR SEILER: Okay. [LR34]

SENATOR PANSING BROOKS: I'm deferring for a little bit too. I want to...I expected to hear something. [LR34]

SENATOR SEILER: Mello. [LR34]

SENATOR MELLO: Thank you, Chairman Seiler, and thank you, Director Frakes. And to some extent I guess, since I was the one who made the motion, I can give you a little and the public a little bit more background in regards to why we wanted to try to direct I guess some of our questions today, and focus. It became very apparent obviously that releasing the strategic plan that you did yesterday in the middle of this committee's hearing gave this committee less than 24 hours to actually review the plan, digest it, have a conversation amongst ourselves prior to your testimony today. And to some extent it would probably be very fruitless for us to simply listen to your testimony on the development, what went into the plan, so to speak, and then not be able to fully digest it on our own to be able to ask you the appropriate questions that you would probably expect us to ask you in respects to that strategic plan, particularly as it relates to your budget request that was submitted on October 23, issues that we said surround the behavioral

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health, mental health treatment programming as well as how we're going to address the chronic overcrowding in the department. So you understand that was kind of the rationale for the committee in conversations that we had, the motion that I made, Senator Chambers seconded, was to not discuss that today in the sense that we'll, the Chairman will likely, on behalf of our committee, will likely figure out a time to bring you back to talk about those items so we have more time, in the legislative perspective to prepare to be able to ask you the appropriate questions that are needed in regards to ferreting out that seven page strategic plan. So with that being said, the question I have a little bit is maybe giving an open-ended question to you to give us, from your perspective, an update in respects to what has been happening at the Tecumseh State Correctional Institution as particularly in light of obviously the incident report that we had received that you had released, that the public has received, as well as in regards to any feedback and comments you may have on a general perspective on the Ombudsman's report that was recently released regarding the riot that happened in May. [LR34]

SCOTT FRAKES: Okay. And actually I don't need to turn to this. And just quickly in response to your comments about the strategic plan, I do understand. At the same time, it's a plan that needs to be walked through. And so that was my intent today. It was important that...it's a plan that was written for my staff. That's the primary intent of that plan. So the first people that needed to see it and engage with it were my staff and same issue for them. They have it, but now we need to actually sit down and walk through and explain it to people because it is just a broad overview. But I do appreciate your comments. Tecumseh, it has certainly been a difficult late spring, summer, and even today in terms of the impact that the events of May 10 at Tecumseh have had on the department. The good news was that despite the scale of the disturbance, despite the damage that was done to the facility, the deaths of two inmates, the attacks on the staff, and just the general destruction of that facility for a moment in time, despite all of that, we were able to regain and restore control. We were able to maintain all of the inmates within the perimeter. We were able to begin moving very quickly to restore operations. And so that is...actually that's part of why I continue to refer to is as a disturbance as opposed to a riot, but I expect, you know, we could get into the semantics issue. More important is where do we go from here. While it is certainly important to fully understand the factors that led up to the events of May 10, night of May 11...morning of May 11, which the Ombudsman's report as well as the critical incident report and other reviews that we've done have helped us get a better sense of that, but it's as, if

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not more, important figuring out how we restore operations at Tecumseh and then move forward because, as I've been telling people, the more immediate goal is, are we back to where we were on May 8? When we can say that operations are kind of or very similar to where we were May 8, then that's the starting point of where we go forward with Tecumseh because it wasn't a facility that was operating as it should have been. We have been able to, with the insurance company, clean up the fire damage, repaint, they're currently replacing flooring that was damaged from the flooding. All the fire systems work. They've replaced the ceiling tiles that were damaged. Pretty much the construction work is completed except for the two demising walls that were built after the construction of the facility and were built internally, and unfortunately were built using materials that weren't appropriate for a medium/maximum security prison. And by having wood inside of those walls, that contributed to the ability for the inmates to light them on fire and contributed significantly to the smoke damage and just general damage within the two living units. We have been able to get the information needed, an engineering report. Those walls have gone out for bid and now we're waiting to see what we come back with as far as bid prices and our ability to move forward and replace those walls. So that's probably one of the bigger issues that's still standing in terms of repair and construction. It is the big issue. Staffing was a problem May 8. Staffing is still a problem today. We have been aggressively redesigning how we hire, train, and deploy staff. We hired a full-time recruiter. I was able to bring Denise on and get her trained and actually out and working several months ago. She's beginning to help us see some good results. The numbers at Tecumseh are not moving as quickly as I had hoped. And as we know from history, it's been a challenge to staff that facility. So we're just going to continue to push to find qualified staff, train them, get them deployed. And just as important if not more important, continue to figure out how we reduce turnover because that's our long-term strategy is to find good staff and keep good staff. Good news across the agency is we have seen a slight downtick in turnover. So I'm encouraged by that. We've had much more success in hiring at all the other facilities. We still have too many vacancies at NSP, but we've made better progress and that's showing up in the reduction of mandatory overtime and just general improvement in staff morale. But back to Tecumseh, we are at the point as of...it's either I'm not sure if it's this Monday or this coming Monday. I think it's right now though that the out-of-cell time on average is four hours a day. That's way too little, but that is right now what we're able to manage given the construction issues that we still have, the contractors that are inside the perimeter, the staffing challenges that we still have. So as we continue to hire and deploy more staff, we're almost on a

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weekly basis adding additional activities and continuing to increase that towards that restoring operations to the point of where they were prior to May 10. Then as I said, then the next challenging, difficult, but important conversation is where do we go from there? What are the additional programming needs? What are the additional work needs? How can we provide more inmate activities? How can we increase clubs and volunteer programs and all the things that we need to make Tecumseh the prison that it can be and it will be? We have an excellent project that's under construction, and fortunately the disturbance didn't stop that project. That's the expansion of the Cornhusker State Industries building. I think we're about maybe 25 percent. So I'm going to say we're probably 18 months out from deploying and actually putting that to use. And we'll be talking in the months ahead about what's the right program to bring into that space. So that will be an important addition for jobs at Tecumseh, but a lot more work needs to be done. Staff are tired and rightfully so. We remain on 12-hour shifts because we still are in a...we're in restrictive movement. Emergency operation is still an applicable term just because of the fact that it's nowhere close to what normal prison operation should be. Still committed to going back to the standard eight-hour shifts and allowing people to go back to the bid posts that they own just as soon as possible. And we're looking for that intersecting line between restoration of normal operations and adequate staffing. There will be a point, just don't know when that comes, where we can look at each other and say it's time. We'll do that with enough notice, of course, so that staff have the opportunity to make the adjustments they need to make. But right now, because of the 12-hour shifts, our officers and case workers, corporals and some other staff as well are working at least 48 hours a week. There is additional overtime that's available if they choose to work it. So some do work one or two or probably some work three of their days off because they want to, choose to. Of course, they can't work back-to-back shifts because, not enough hours in that day. But there are certainly people that are working additional days. The good news is there's been very little mandatory overtime out at Tecumseh. As I said, staff are tired. I was out there on a Saturday three weeks ago I think it was. Spent a few hours walking around. People are still in reasonably good spirits. Some are ready for it to be back to how it was; others are still not sure, you know, that they're at the place. There's certainly still safety concerns. You can't go through an incident of that magnitude and not be impacted by it. It's just...that is part of the process that we have to work through. We continue to provide staff resources, the Employee Assistance Program. We're actually looking at some other resources that we might bring in to come out and just give staff every option they have. We know there's some staff that are hurting. And there's

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sometimes a sense that you can't talk about it. There's sometimes a sense that you can't show your weakness. We want to make sure that we have safe, confidential opportunities for people to turn to and get the help that they need. It's another critical component. The management staff is tired as well. They have also been putting in incredibly long hours, many of them working sometimes 14 or more days straight, maybe taking a day off. So I am still optimistic about our ability to bring the facility back to where it needs to be. In fact, I'll say that a little stronger. We're going to bring the facility back to where it needs to be and then we're going to move it forward and turn it into the prison that it can be. The piece that I can't sit here and tell you today is that it's going to be December 15. Or is it going to be January 15? We have a good plan that takes us out through the end of the year and continues to add additional activities, visiting, and recreation and other pieces. We've had some little setbacks. We've had some staff assaults. We've had a serious attack, inmate on inmate. None of that helps the process. But the reality is that those are events that happen in prisons whether they're healthy and operating exactly as they should or in the state that Tecumseh is in. [LR34]

SENATOR MELLO: Can I ask a couple follow-up questions, Mr. Chairman? [LR34]

SENATOR SEILER: Go ahead. [LR34]

SENATOR MELLO: Director, we won't get into a semantical debate about disturbance versus riot. I think that can be left to the eye of the beholder. But we've met at the end of the legislative session, this committee, with you and members of the department in regards to looking and evaluate what we know is an ongoing challenge. It's not something that's new to anyone, which is the staffing challenges at Tecumseh, in what was going to be done in regards to the end of the legislative session towards when we were going to meet this fall to discuss an update on Tecumseh, you mentioned mandatory overtime. It sounds like you're saying that mandatory overtime has decreased at Tecumseh and that there still is a number of people utilizing overtime. Can you walk through a little bit more in regards to the vacant positions. I mean, you said, I'm just to clarify what you said on the record that turnover has decreased at Tecumseh since the May 9 and 10 incident. Have we seen, is it...I should...is the issue in the sense that we're seeing more people stay or, are you simply hiring...you're hiring more people and thus that turnover rate is kind of staying where it's at. [LR34]

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SCOTT FRAKES: No, I actually do measure the true turnover rate, the people that leave the organization. So we had a visible uptick right after the incident and then things stabilized. They have come down slightly, not just at Tecumseh but across the agency as well. And again, is that economy, is that...I don't have a good answer right at this moment about...I'm just happy that it's happening. [LR34]

SENATOR MELLO: Okay. Has there...have you or anyone in your leadership team engaged the state employee's union NAPE/AFSCME in regards to evaluating what I believe we discussed at the end of the legislative session looking at possible changes in their contract, looking at ways to recruit more interested individuals to come down to Tecumseh to work at the facility. Has there been any ongoing conversations between the department and the union representing state employees to consider other options to address the staffing challenges? [LR34]

SCOTT FRAKES: No, we have not specifically sat down and had those conversations. [LR34]

SENATOR MELLO: You mentioned in regards to the out-of-cell time and I just had a question. Is Tecumseh still on lockdown? [LR34]

SCOTT FRAKES: No, no, not to me, not to people that work in this business. Some on the outside would say four hours of out-of-cell time...out-of-cell time is not nearly enough and it's a form of lockdown. It's very restricted movement and that's not how you run a prison for a long time. [LR34]

SENATOR MELLO: What's the traditional normal amount of out-of-cell time that...what were inmates getting on May 8 in regards to out-of-cell time? [LR34]

SCOTT FRAKES: Of course, it always...it varies but at least 10 to 12 hours depending on the days of the week, the work opportunities, some were less if they didn't have a job or were in whatever transition. And then there's the true restrictive housing where 23 hours in, one hour out. [LR34]

SENATOR MELLO: Okay. Thank you. [LR34]

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SENATOR SEILER: Senator Bolz. [LR34]

SENATOR BOLZ: Good afternoon. [LR34]

SCOTT FRAKES: Good afternoon. [LR34]

SENATOR BOLZ: I have a few questions about the audit report that we reviewed yesterday. Before I ask some specific questions, do you want to broadly address what we heard from the Auditor yesterday? [LR34]

SCOTT FRAKES: (Exhibits 5 and 6) I can. I can also share copies. I did bring...I thought we were focusing a different direction but I have the facts. Just go ahead and get your copy even though we're not going to specifically discuss. The strategic plan in Air Park. Here is the Air Park study and here are the audit action plan, our action plan to respond to the audit so that we can address all the discrepancies noted. Been through a lot of audits. This was a lengthy one. It was very labor intensive both for the Auditor and his team, for my department. I know there was times when the auditors...pardon me, the team felt that the department wasn't being as responsive as they could have been. I have no doubt there probably was some times when other work or other needs or whatever it was, got in the...didn't allow us or we were not as responsive as we could have been. At the same time, the work of the department never stops and it's pretty consuming. My staff are...have full days. Have full work loads, so I appreciate that it would be frustrating if I were waiting for documentation to answer a question, I wasn't getting it. That is why I inserted myself in the process early on to say, if there's a delay, if there's an issue, if there's a concern, I'm available, and did engage on more than one occasion. A lot of findings, big department. They looked at a huge amount of things and we're not just a department that manages the budget. We're a department that manages bank accounts; we're a department that makes huge amounts of purchases for all kinds of things related to the work we do. We're a department that disburses funds in a lot of different directions...collects and disburses funds in a lot of different directions. So, a fair amount of complexity to our finance side of our house and that is certainly another factor that would contribute to a seeming significant number of findings balanced against the size and the scope of the department and the work we do, the amount of things that needed to be looked at. Were there things in here that I was unhappy about? Yes,

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certainly, and we can get into those specifics if you'd like to and we may. We can go into as much detail as you'd like to. Were there other areas where we acknowledge people made mistakes, work wasn't done as well as it should of, the check-and-balance process wasn't what it needed to be. There's quite a bit of that in this and those are repairable. Short-term fixes often for us are going to be manual because we do have challenges in our electronic capabilities. Longer term fixes through a budget process, of course, will be to figure out what electronic systems that we need to either enhance or add to our existing systems. So... [LR34]

SENATOR BOLZ: I have some specific questions that I may...the first is, the first item on the Auditor's report was of the greatest concern to me and that is the work with Blue Cross Blue Shield and the intersection of some inappropriate payments, lack of connecting to the Medicaid program, leveraging that program when appropriate. There seemed to be some procedural issues about folks lacking those emergency referrals before moving forward and I guess, what I thought was lacking in your response to the Auditor's report, and I understand that you have a more detailed report for us that I haven't seen yet, but what I saw lacking in the report and the response that we reviewed yesterday was a plan to change your procedures and a plan to not only change things moving forward, but to do a look back and see where we could pull down any other reimbursements or any other funds when and where appropriate. Would you like to address that? [LR34]

SCOTT FRAKES: I would. So my training and practice again after many, many years of being engaged in receiving audits is the initial response for an audit of this type is to acknowledge, to...if we have no disagreement with the finding, to acknowledge that we agree with the finding. If we have disagreement with the finding, to express our concerns and that's the initial response. Then the next piece is we come together and we build an action plan, looks at each one of the discrepancies and actually identifies the work that needs to be done, ultimately assigning that to someone so that they have the lead responsibility, setting some target dates if it's an extensive complicated issue or just a completion date if it's something that's relatively easy to fix, and then moving forward. The Blue Cross Blue Shield example is a great one because we still have faith, complete faith in the Blue Cross Blue Shield approach, although we are going...the contract does come up for bid again next year and we are going to take a hard look at whether or not it's the best approach. Of course, it will be a competitive process so we'll see if there are other people

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that are interested. What was missing for us and something I identified, I can't say that I beat the auditors but as soon as the question came up, I said, so who does our review? Where is our internal checks and balances? Well, we sort of had somebody but not really, they wore more than one hat. We made the commitment, we identified a position. It takes a while to establish, as I'm learning, to get a position actually established to write the PDQ, to get the approvals. The position has been filled. The person will be starting in the academy December 1, I believe it is, which means she will be on the job in January and she will actually be committed to doing that bill review and providing that check and balance. The other piece of it, though, is, of course, we couldn't just wait so we've used some internal resources and we're taking a look at invoices over \$10,000 in reviewing to see if there's any billing issues. Right now, that's all the resources I've got. We're pretty thin. The good news on that one, first of all, my thanks to the auditors for finding it and there was really no contention or disagreement once we've identified the correct...identified the issues, identified the supporting evidence, the provider immediately adjusted their bill and we were given the \$370,000 credit. So we did recover the money. Of course, it raises that question, what else is out there? Seventeen million dollars worth of expenditures, so. [LR34]

SENATOR BOLZ: Well, I will review what you've provided today, but as I referenced yesterday, we found some significant challenges in the 50 cases that were reviewed by the Auditor. I think there's a lot more work to be done given the scope of medical services provided with Department of Correctional Services. My other audit-related question is somewhat related. I'm very concerned about what we learned about what's happening in the pharmacy and with the medication protocols. And one place I'd like to start is, I am...I assume that the Department of Correctional Services is subject to the Controlled Substances Act and subject to licensure and inspection just like other facilities in the state. Can you explain to me how that works with Department of Correctional Services? When was the last time you had an inspection? Are you in compliance with the Controlled Substances Act? I'm just...I'm concerned about the way that your pharmacy is working. [LR34]

SCOTT FRAKES: Okay. Here's what I can give you today because I can't answer some of the specific things you raised as far as the last time or insight. I'm not aware of any challenges or

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citations or concerns expressed by the outside agencies that provide governance over our pharmacies. [LR34]

SENATOR BOLZ: Just quickly, do you happen to know when your last inspection was? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR BOLZ: And that inspection is provided by the Department of Health and Human Services, correct? [LR34]

SCOTT FRAKES: I don't know. Now then, specific to what was found, the fact that there was medication found sitting on the floor and the door unsecured, completely unacceptable. The fact that medication was being returned from facilities and was stacked in buckets and just left around, unacceptable. The prescription of the Oxycontin, there actually is more to that story. First piece would be that all of it was prescribed legally by a prescriber. Our policy requires that the Director of Health Services, Dr. Kohl, review any nonformulary prescriptions. In fact, they were formulary. It was on the formulary. There was confusion or...but more importantly whether or not they were on formulary, it should have been reviewed. We're going to ensure that it is reviewed as required by our policy, but there was no question that medication was not legally prescribed, and there was no question as far as the amount. Even though it sounds like a large amount, we take care of a large amount of inmates. So specific to that drug, they are limited to a 30-day supply. And then they, prescribers look for other options because of the known addiction and abuse issues. And it's also a tightly controlled medication that wouldn't be given to the inmate. It would be issued to the inmate to take. No excuses about any of it, though. Our chief pharmacist retired and we've brought in a new chief pharmacist in July. He's actively working with the...John Wilson, the CLO, Dr. Kohl, to tighten and improve practice. We've again, because we...not all of our electronic systems do everything they should do, we've got some additional manual systems, checks and balances. We've created secured cages to make sure that medication is locked up. We've created systems to ensure that the same person can't receive the medication and log the medication when it comes into the pharmacy because that can be...it's a well-known diversion issue if we don't have those kind of checks and balances. The issuing of medication to the inmates was another area of concern. That was an area of concern for me almost

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immediately. Our practice here, was developed many, many years ago, was our correctional officers, corporals, and usually the caseworkers, actually issue medication. The system I came out of quit doing that in about 1987. So it will be something that we will be looking at for our next biennial request, but it's a staffing issue whether we look for medication aide staff or LPNs, but the fact that I have line officer custody staff that are put in the position to control the issuing of medication, it's not a good practice. And that's not a reflection on them, but it's not their expertise. It's one of many things that they need to focus on at a given time. And what we see happening, one of the things that Dr. Gage saw happening was, they're trying to control the issuing of medication, trying to make sure that they log it correctly, trying to get the inmates signature at the same time that three other inmates are behind him saying, "I need my," "I need this," which is kind of typical of how things are if you're sitting in a day room in a prison. Not a good way. We need medication lines. We need those to be in controlled spaces and we need appropriately trained staff to issue medication. Short term we're just going to continue to put more focus energy, do more spot checking of the MARS, the Medication Administration Records, and do everything we can to make it work until we can do it right. [LR34]

SENATOR BOLZ: It's my opinion that there's a lot of work to be done in terms of everything from the IDs of people who can engage in the tracking system to making sure that licensed folks are the ones who are ordering, to making sure that the unused medications follow the protocols in the Controlled Substances Act. It just seems to me that there's some depth of concern there that I encourage your department to address. I want to be able to pass the mike to my colleagues but I just have two additional brief comments more related to the Tecumseh riot and the first is just to reiterate something I said this morning which is, as we continue to discuss the issues that happened at Tecumseh I continue to be concerned about the implications in other facilities as well, and I hope that we can find solutions that apply system-wide not only to Tecumseh. And the last comment I'll make is just a comment for you and your legal staff to consider and be thoughtful about and that is when I reviewed the information about the use of the drug offender classification regulation and how that was used with your wellness program, to me it reminded me of all the depth of challenges that we heard about the Administrative Procedures Act last summer. And I guess I just want to reiterate that we have history there and I think it's deeply important that the system as a whole is very respectful of that process, and to hear one more time

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that there was a miscue between practice and what was in regulation was of concern to me. So I'll just note that for you. [LR34]

SCOTT FRAKES: I appreciate that and you know, I share your concern because I stopped it once I became aware of what it had morphed into. I said that's not allowable, that's not how we're going to do business. [LR34]

SENATOR BOLZ: Okay. Thank you. [LR34]

SENATOR SEILER: Senator Williams. [LR34]

SENATOR WILLIAMS: Thank you, Director Frakes, for being here today. This morning we heard significant testimony on the events that may have contributed to the riot at Tecumseh and some of those took place over...starting three, four years ago, you know, going from an open yard to a managed yard and the wellness program that Senator Bolz was just talking about. I'd like to get your reaction to that in two contexts. One is, how you would view being proactive to grievances that are known to the department, and second of all, a comment from you on what you discovered the culture to be in the system when you arrived and how you would propose adapting and changing that culture for the future. [LR34]

SCOTT FRAKES: You give me a lot of opportunities. [LR34]

SENATOR WILLIAMS: I opened the door. [LR34]

SCOTT FRAKES: Yes, you have. First of all, as I wrote to Marshall Lux, a very thoughtful, very thorough and very valuable report, so I do appreciate the time and energy that they put into it and we will make use of it as part of our ongoing improvements to this department. One of the things I appreciated about the report was while it identified the issues that go back easily four or five, five, six, seven, some of them go back to 2004, as far as the concerns about staffing, it identified that there were a collection of issues. It identified that there were factors coming up to May 10 that created tension within the facility, no question about it. The only place I'd vary, I think, with Mr. Lux today would be while he stated that he did not...if you had asked him on May 8 or May

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9 there was going to be a riot at Tecumseh, would have said no, didn't think so. But if you had called him on the night of May 10 and said, where you do you think there's a riot? That would have been his first guess. If you had asked me on May 8 or 9, is there going...first of all, is there going to be a riot at Tecumseh? I would have said no based on interactions that I've had just less than two weeks before with inmates there. And then if you had asked me where did I think it was going to be, I would have immediately said NSP because that's where I thought the greatest amount of tension and problem was at that time. So that's about the only place where we're probably some distance apart, certainly some other things as well. So we know that Tecumseh had everything going for it in terms of it wasn't crowded, it's new, it's clean, the staff are well-trained. Many of them are young, still learning, but I was young and still learning once too. That's part of how you develop in this business. There were programs, there were jobs, clearly not enough. There was an incentive-based program that I believe had the best of intentions. It just ended up evolving in a direction that created problems. And unfortunately what we lack in this department--starting to make progress--but we lack in this department a culture of staff talking to inmates like I'm talking to you, which the world I come from, that's exactly how I manage my prisons. I talk to staff, but I also talk to the inmates and more than anything else I encourage staff to talk to the inmates. We've had a command and control, would be a good way to describe the culture of my department. There's a time when that was probably an effective way to run a prison system. There's also limits. The disturbances in the '50s weren't just NSP, there were disturbances across America. That was the same time, though, that there was still beating of people, there were cells with no toilets. They got slop buckets. There were all of those horrible conditions that existed led to significant change. We go 20 years, civil disobedience becomes very active in the community. Seems to be a popular trend. Conditions in the prisons do not keep pace with what's happening in society. You can look across the country at the amount of disturbances and horrible things that happen in prisons. Then we moved into a very much a command and control system and a warehousing approach to inmates across America, that whole "nothing works" philosophy which was far from true, but it was a philosophy that was adopted by a lot of systems. I think that's reflected in a lot of the construction within my department. I have living units with no day room space, no programming space, small recreation space, no education space, and they were built late '70s, early '80s. And that adds to our challenges. So bit by bit, we're going to work to change those cultures. We're working to get staff engaged with inmates and at the same time getting inmates to believe that staff really would

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engage with them. It's going to be a two-way process. So we've started inmate councils, we now have them at six of the prisons. They just started at Tecumseh, which is kind of a...given the timing and everything, that's actually pretty significant. We started small, started in the living units because that's the way to get people used to the process and start to learn and understand how you can do this and get value from it. I believe by no later than spring, we'll move to the next step where we actually have facility-level councils where I will expect the executive team members, as well as other supervisors and managers, and some line staff, because you need to have a multidisciplinary approach so that you've got somebody from health services and somebody from food services and a representative group of inmates from the facility to sit down and have conversations. When we build that culture and turn that into an effective process, when we do improvements to our grievance system, which at this point what I get back from the men...I haven't actually asked the women about it, but the men they don't believe in it. They don't think that it's effective. They don't believe that they're...actually anything good comes from them so we're going to...we started working on how we can improve that system as well with an effective grievance system that people really believe in with an effective communication system where people are talking face to face, sharing ideas, identifying ways to make things better. Actually acting on it when it makes sense. Then we can move to a system where we don't have built-up tension. People coming together to create petitions which may or may not get processed and be a visible, and even if they are, often cover so many items and don't...and because we don't have any system to interact with all the folks, it ends up being a written response from me because they always come to my desk. That's a really ineffective way to address issues, to break down barriers, and to take advantage of the brains of the 5,200 people that live with us, as well as the thousand that we have on parole. A little more challenging there because they're busy trying to build a life but we do interact with our parole staff, interact with the people on parole. Let's figure out. Let's hear from them. What do you need? What could be different? Are we going to do everything that is asked? No, of course not. Are we going to be able to meet all the different individual needs and thoughts? No, but do they understand their world at least we well as we do, in some respects, if not better? They live there 24/7. Yeah, absolutely. So we're going to tap into that resource. I have no doubt that I have staff right now that are watching me say this and they're going, "what"? What is he talking about? And that's where this strategic plan comes in. That's my first great opportunity to sit down with groups of staff. First, managers and supervisors starting on the 13th of November, and walk through the plan. We've got leaders identified to be

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team leaders. They will be the ones that start to bring that plan to life. This year we'll reach down a ways into the organization. We'll get everybody some explanation so they understand what the vision is and where we're headed. Next year, as we go for the next phase of our strategic plan, because we will update it for the next biennial budget, we'll reach down at least to the supervisory level and engage staff in the building of that plan. The long-term goal for me would be just like I experienced a long, long time ago, was staff will have some opportunity at every level of the organization to engage in the building of that plan. And then a learning experience from this, of course, is there's probably some opportunity to get some other stakeholders involved in that as well. So we'll be looking in that and seeing, is there some things we could do a little differently next time. So I need to change the culture, I need to change the staff culture, I also need to change the inmate culture. I think that the tools they have to work with aren't very effective but they're the only tools they have to work with. The last piece--and I'm going to stop--would be as I talk about the plan, well, actually, it's not so much there are things in the plan that would lead the conversation I'll have as I walk people through it, we need to complete our risk needs assessment process to determine what are the needs to be addressed that will reduce people's risk to reoffend. That's how we decide what our programming needs should be and the dollars that we ask for. We get our classification tool completed, the revision work is almost done. We're going to have it validated by UNO in the spring and then we can train staff, we can train them in the new risk-needs-responsivity tool as well and then we can assess our population. We can figure out what the real classification makeup is of that population because I do not believe that how we have people classified today is an accurate reflection of how...where they belong. Part of that is because our classification system heavily relies on criminal history. And that's certainly a factor you should use, but the most important part in my mind for classifying inmates in the prison system is, what's their behavior? Based on their behavior should help determine what's the safest, least restrictive level that we should house them at. Right now, a third of our population roughly is classified as maximum custody. I in no way believe that that's an accurate reflection. About 20 percent, roughly, are in some kind of an override, mostly an override to a more restrictive custody because it's driven by bed space. That's another challenge we've got to fix. Bed space cannot drive classification. And then going back to the risk needs piece, get a good assessment of what the needs are, build our programming around those needs. We get the resources needed. In some cases, it's redeploying existing resources. In some cases it's coming back to say we need funding so that we can bring these programs in. And, ultimately,

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reduce the risk to reoffend and achieve the goal of sending people out and having them be successful and not come back. [LR34]

SENATOR WILLIAMS: Just one additional question. You mentioned in your discussion with Senator Mello the staffing and how some of those issues have been addressed and fixed. You certainly, when you came on to the job, understood that there had been staffing issues. Did you discover any major surprises in that or were the reasons for our staffing issues what you assumed that they were? [LR34]

SCOTT FRAKES: Where I come from....I try not to say this all the time, but I end up saying it a lot, 4.5 percent unemployment is considered the bottom line. Supposedly, no one...everybody below that is unable to work, doesn't want to work, doesn't need to work. So to come here and suddenly realize that the employment rate is 2.7, that was a shock. It's a great shock, but that does contribute because we do compete for a very tight, tight labor market. So that was probably the biggest shock. The other piece was I did underestimate our ability to attract and fill positions at the speed that I thought we could, so. You know, what we've done is we went to running double academies in, I think we started that in June, if I remember right, June...yes, in June, and we work hard to have no less than 30 staff in each of those. We've had a couple of academies that were over 50 staff. We are more...our goal around hiring of protective services, the custody staff is, we're going to fill all the vacancies that we have in our department and we're going to use the data that we've collected over a number of years to determine hiring needs in advance of vacancies. And we're going to continue to hire, train, and actually have people ready to deploy as the vacancies occur. And there's some science to that and there's some art to that. We don't have to worry too much about it today because we're still moving towards the filling the vacancies piece, but so a low unemployment rate that was...that's still shocking as I tell people you can't go anywhere...I tell my friends in that other place, you can't go anywhere in the state without a window in the business, you know, and a sign of...a sign in the window of business "help wanted," "help needed." The smaller the business, the smaller the sign. That's why we have billboards because we have a need. You know we've gone to print media, we've gone out to the radios, we're using YouTube, we're using the social medias, the recruiter piece. We're going to just continue to aggressively pursue it until we find not just the immediate solution but the long-term solution. Part of it is the strategy I just described in hiring in advance of knowing you're

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going to have the need, because what happened in the past was, an officer retires, an officer promotes to...goes to another agency. At that point the hiring process would begin. Well, it typically takes four to six weeks to hire and six more weeks to train, so that position would sit vacant for at least twelve, if not more, weeks. And if there's not someone there, our positions are pretty much all mandatory fill. It's what it takes to run the prison. All that then was overtime. Not a good way to do business. We're going to get more scientific about it, continue to be aggressive, and not stop at the point we fill the vacancies. We're going to continue and build this...build an infrastructure around how you recruit, bring in good people, and the most important piece of all in our staff culture study which is moving along very well and should give us a lot of good information about what do staff want to be happy on the job. That's how we can address the turnover piece and keep people. [LR34]

SENATOR WILLIAMS: Staffing culture will clearly improve if the current staff and those you're attempting to hire see the top guy as an advocate for them in the employment sphere. Thank you. [LR34]

SENATOR SEILER: Senator Morfeld. [LR34]

SENATOR MORFELD: Thank you for coming today, Director Frakes. Just a few questions and Senator Mello and Senator Bolz already asked a few of mine, but in regard to staffing at Tecumseh, and maybe I missed it because I was reading through some of the information you passed out, where are we at right now as to where we were with staffing compared to where we were in May? I know that there's a lot of time for training and we want to make sure we have qualified people, but... [LR34]

SCOTT FRAKES: Well, shame on me for not actually bringing an updated report, so today I can't tell you the exact number of vacancies in the protective services piece. I believe it's about 45, but... [LR34]

SENATOR MORFELD: Is that...that seems about around where we were when you last talked... [LR34]

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SCOTT FRAKES: We were...we probably got to 60 at one point. [LR34]

SENATOR MORFELD: Okay. So it's looking a little bit better. [LR34]

SCOTT FRAKES: Yeah. So, we're training, we're making progress, but instead of the 9 to 12 that we seem to find and get into an academy for NSP for Lincoln, it's typically 4 or 5 for Tecumseh, so. [LR34]

SENATOR MORFELD: Okay. And then my second question is, and you just noted that the chief pharmacist had retired in July, that would have been in place during the time of the audit. What is their name? [LR34]

SCOTT FRAKES: Mark Cave. [LR34]

SENATOR MORFELD: You already answered the questions about the Oxycontin pills so I appreciate the follow up on that. I'm certainly concerned about the handling of Schedule II drugs, but then also just the handling of the drugs in general, but we've already discussed that a little bit. One of my other big concerns that came out of the audit was just the lack of financial controls, particularly with the inmate trust accounts, I believe, of around \$5 million. In reviewing those documents before and then after, I realize that my nonprofit agency that I'm the chief executive of, which has a budget under \$1 million has two-times more financial controls over much less money. So what is your immediate plan to provide more financial controls and what do you need additional to be able to provide those types of controls across your department? And I looked in here and I'm sorry, I couldn't see... [LR34]

SCOTT FRAKES: Yes, I know, and I'm...I could spend way too much time trying to find it. So, immediately, it is bringing one of the issues for our department as we were not centralized in most of our functions, so we are in the process of centralizing our business and purchasing functions. That will significantly contribute to our ability to have controls in place. We're probably just getting into that and I'd say we're six months from getting that completed and those moves made. We're doing more checks and balances. The comptroller is meeting with the business managers going over issues. What I can't recall off the top of my head is whether or not

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there is an electronic answer to this that needs to be addressed. I just can't remember on that one.
[LR34]

SENATOR MORFELD: Okay. Thank you and I guess my next question is, and you address this a little bit about inserting yourself in the audit process when you heard the auditors were not getting the documents sent in a timely manner. We heard yesterday that there was one document that they sent nine to ten requests for that document over the course of six or seven months and they weren't able at the time give me what that document entailed. Do you remember what that is or what the disconnect was there? [LR34]

SCOTT FRAKES: I do not. I do have some memory of details along that line, but no, I don't recall. [LR34]

SENATOR MORFELD: Yeah. Well, I appreciate you inserting yourself in that process because, as you can imagine, it's wholly unacceptable to have our auditors...not our, but the State Auditor anyway, request documents and not be able to get them for six or seven months. But I probably don't need to tell you that, but that's concerning and I'd like to know what that document is.
[LR34]

SCOTT FRAKES: Okay. [LR34]

SENATOR MORFELD: Thank you. [LR34]

SENATOR SEILER: Before we go on, are there any questions on staffing? I think you had had one. [LR34]

SENATOR PANSING BROOKS: I had a question on staffing. Just going back to that a little bit. So thank you, Chairman Seiler. I was just trying to figure out on staffing, I mean, do you feel that Tecumseh is adequately staffed and that we're...that you're just...it sounds like the...you're going to try to work with the culture, which is good and those are things that sound like need to be done, and trying to make sure that the employees feel safe and that they also feel like they're being listened to by the administration, that's partly what we're hearing. But again, when we talk

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about staffing we've had again and again the question of whether or not Tecumseh is the right place to put the most dangerous people. And you talked about the fact that, well, all young people need to learn, we all were young at one point. But, of course, the youngest don't fly our most expensive jets, our youngest don't...there are all sorts of instances where we help our youngest get to the point where they can take care of the most dangerous or the most difficult or the most technological situations. And I think that you have not attempted to state that, of course, the veterans were as equally effective as the rookies by any means. So what is the plan with that? Do you think it's a good idea to have the...a great proportion of the youngest and most experienced people taking care of our most troubled and dangerous inmates? [LR34]

SCOTT FRAKES: Done correctly, yes. Now, here's the longer answer. [LR34]

SENATOR PANSING BROOKS: Okay. [LR34]

SCOTT FRAKES: We had a practice that we're working hard to move away from of lumping most of our population together in one big pile. That we would refer to it as max-medium, but if you looked at the breakout there was often a lot of minimum inmates in there and a few that were technically ready for community custody. Just didn't have a bed to go to. So, it's not the best approach. We have begun the process of identifying and creating space that we can designate specifically as maximum custody or level 4 custody. It's a space that we can designate specifically as medium custody and house offenders appropriately by classification. That's an important piece of changing Tecumseh as well as ultimately making changes across our department. The importance of that is, you house people in a housing unit and/or a facility in facility parameter that is consistent with their security rating. My best, most secure beds in my entire system, except for some segregation beds, are Tecumseh. So, I don't have a better place to put my most challenging general population inmates. So I've got to find some other solutions around ensuring the staff are trained...our staff are trained, are ready to be there to manage those people. Part of that is that even though there is...I'll say it's 35 percent. I think that is a number that we looked at that are pretty new, real new in some cases because we've hired quite a few this summer. There's also a good core of staff at Tecumseh that are seasoned, have, I think, an average tenure of four and a half years, which in the business of corrections, you're pretty tenured. So we need to make sure that our FTO program is as effective as it can be. It's a pretty

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good program but we probably have opportunities to improve it as well. We also need to move forward with a program plan that's, I think, may have got off the ground somewhere but I haven't confirmed that, and that is just a mentoring program to make sure that both tenured staff and our supervisors, our sergeants, corporal sergeants, lieutenants, unit managers, people that have time in and understand, are reaching out and actually, in essence, putting an arm around those new staff to help make sure that they get the guidance they need, they have their questions answered, and they're able to do the work safely. In the newly established maximum custody unit at Tecumseh, we actually have the physical plant construction that's consistent with what level 4 security inmate should be housed in. It's stronger, it's more secure. It was built to be a restrictive housing unit. We're going to turn it into a general population maximum custody unit and then we're going to figure out all the challenges of how we do that in a way that is honest and that they actually have the out-of-cell time that they should have, they have access to programming, jobs, and all those things. And we will be able to do that, but we'll have a physical plant where we control the doors. And that's one of the problems across my system. Most of our cells, most of our doors, most of the doors that lead into the units that lead into the different living unit pods, are what we call pop-doors. So, you push a button on a control panel and the doors open. Now the inmate controls the door and that did contribute to the challenges we had at Tecumseh. In a well-designed, level 4 security facility, the doors are sliders. The world I come from, even at medium custody, the doors into the units, the doors into the living pods, are sliders so that we control opening and closing of the doors. Typically the cell doors are not, but at max or level 4 security, all the doors slide. That gives complete control because that is that small part of the population that you need the maximum amount of control around. So that's the justification. That's why it's still important to house some of our most challenging inmates at Tecumseh. At the same time, we want to make sure staff have the tools they need and that they're safe. Like any prison system in America that has some kind of a bid system, I'd say the majority of them do. In our case, staff are able to bid post by seniority. They rotate every six months so it provides some freshness and new eyes, but the fact is, the senior staff are going to gravitate towards typically the day shift, weekend off, jobs. That's part of what they move towards as they get their seniority, which means the less-tenured staff end up working the afternoon shift where it's really busy, and they work the weekends where there's no other supporting management or very little supporting management. So, there's another area where we need to figure out what should we do differently. I'm going to say this and I'll probably hear about it from my staff, but one of the solutions is, you

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make sure that the supervisory staff overlap across the weekends. Some of the supervisory staff overlap into the evening hours so that there's a greater presence and greater guidance available. The last piece...I know it's a long answer, but it's a pretty critical one. Do we have enough staff? That is a question that I'm working on diligently to get an answer to and it's not Tecumseh, it's ten facilities. Sent a group...actually the National Institute of Corrections came in, in August, they trained twenty of our staff in how to do staffing analysis. That team is out working. They've done their first review two weeks ago of the Omaha Correction Center. We met on Monday, late afternoon, went through their work. Really happy with what they saw and what they learned, because it is a learning process. Gave them some more guidance about how I want them to shape things. We will ultimately by the end of the year have...should have the framework for a custody staffing model for this department that would say, a medium custody living unit needs two officers on the floor and one in the booth. That's hypothetical. That's not what...but that's just an example. You know, an education building should have an officer on the floor when there's programming and those kind of things. With that information, and then an analysis of each of the ten facilities because there's always some variations, custody levels, program needs, whatever. Physical plan, unfortunately, can drive staffing a lot. So, we'll do an individual analysis of the facilities based on the model and then we need to see, here's our staffing, here's our needs, where's the variance, are there opportunities to do some moving of FTEs to different facilities. I'm not overly optimistic about that but that's something you do look at. More importantly is, there are gap and then, how big is that gap? If the gap is large, how do we figure out how to fund that? Probably not over a single biennium. But I don't have a good sense at all yet today. I want to let them finish their work. As I've said about other things, I try really hard to just...give people the guidance they need, give them the tools they need, do a little course correction through the process, but try not to...not to tell them what the outcome is that I want them to bring back to me. Want them to go out and figure out what the right outcome is and then we'll work together, figure out how we resolve the issues. Ultimately, we're going to end up with facilities that are staffed correctly to accomplish not just the basic security mission, that's always important. Without that, you can't do all the other good work. If a prison isn't safe, then we can't do anything, Tecumseh, being the perfect example. We're doing very little right now for that population because safety was compromised. Safe prison, more programming, more activities, more opportunities for change, more transition to less restrictive custody levels where people have more ability to make decisions for themselves like all of us do in the real world, ultimately

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return in a transitional process to the community so that there's somebody kind of on their shoulder or in the background and giving them guidance when needed and a hug when needed and we can help people become successful. [LR34]

SENATOR PANSING BROOKS: Can I continue? It's just...I'm trying to figure out, so basically you're taking off the table repurposing Tecumseh, is that correct? [LR34]

SCOTT FRAKES: No. The document that I shared back in the spring in March that identified how we were going to reuse, repurpose 100 of the 200 restrictive housing beds at Tecumseh, very much came to life. Just ended up with a different population. Originally, we were talking about using that for the protective custody housing. With the kind of same outcome, it was going to be as much like a general population living unit as possible, but provide that level of safety for that population. Well, we had an opportunity to step back and rethink and say, you know, there's a more dangerous and violent population...pardon me, that can be safely housed and managed within that space and now, let's look at our unit one which was built with some really good vision actually as a programming unit. Has programming space on the unit, let's turn that into protective management for the department. So we're two-thirds of the way down that road. It removed the protective custody...using protective custody as the status, protective management is a way to house and manage that group. We pulled those people out of NSP, turned that space where they were living back into general population. Didn't change the bed count, just changed who lives there. [LR34]

SENATOR PANSING BROOKS: Does it change the staffing count? [LR34]

SCOTT FRAKES: No, because we didn't change the bed count anywhere. Now, okay, in the living unit where the max custody is, fortunately because it was restrictive housing, it had the highest staffing ratio of any unit in the facility. I did not reduce that staffing. At some point as we complete the staffing model and staffing analysis, we'll look to see whether or not that's appropriate but the restrictive housing segregation units are staffed two to sometimes three times the level of a general population living unit because all services are brought to inmates and all inmates are brought out in restraints and it's very labor intensive. So, that's the other advantage right now of that living unit. It's very well staffed. The protective management units going well.

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The last piece that's, you know, raised a couple eyebrows, but really it's a great opportunity, there's a substance abuse program that's inpatient in that unit. We're finishing the last cohort of general population, men. We will now bring in a couple of...actually will probably end up being about six cohorts every three weeks or six weeks, whatever the time frame is, that are protective management, that needs substance abuse treatment that could not get the treatment because there was no place to deliver it. Once we've completed that and caught up that population, then we're going to make a decision on what's next for that living unit. And things are just going to continue to evolve. There's nothing static about the process. [LR34]

SENATOR PANSING BROOKS: Thank you. I don't have any more on staffing, but I'll ask questions on other things later. [LR34]

SENATOR SEILER: Senator Mello. [LR34]

SENATOR MELLO: Thank you, Chairman Seiler; and thank you, Director Frakes. You answered some of my questions in regards to your dialogue with Senator Pansing Brooks. But you mentioned earlier and I think maybe Senator Williams or Morfeld did in regards to the Governor's Office is doing a culture study on the department and the one thing we've heard pretty consistently since last legislative session, is that the issue regarding step raises, step plans, bonuses, merit raises, the actual payment of higher wages to employees is the one thing we've heard consistently as a way to retain them. Do you know, has that been of discussion at all with the culture study that the Governor's Office is leading is looking at? I asked you earlier. You guys obviously haven't talked with the union representative of the state employees since we last met at the end of May. Has that been a conversation at all in regards to the people the Governor's Office is interviewing regarding the culture study is focusing on, the wages, the step payments or plans, the bonuses, anything that can be used in regards to retaining our current employee base? [LR34]

SCOTT FRAKES: Just to make sure that we're clear, the question was asked before in regards to communicating with the union, whatever the specific question was, I had not specifically talked to them whether it was compensation, but we certainly have engaged in some conversations on a variety of issues, so it isn't that we don't talk. We have had a couple of conversations that I've been involved with around compensation needs. Of course, this is...there is the issue of, it is not

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just about this department, there are other departments that also have needs, large amount of state workers. There's the issue of...most of the workers we're talking about are represented. It is a collective bargaining process so it isn't just a matter of me deciding. In fact, there's nothing about the process that says, I can just say, I'm giving people more money. And actually... [LR34]

SENATOR MELLO: Actually there is, actually in their contract you can give merit bonuses under the current contract. We heard that a couple of weeks ago from that representative that you as the director have that legal authority to be able to do. You have to be able to defend that process in regards to why you can give someone a merit bonus, but that is currently in the existing collective bargaining contract that you have that authority to do. [LR34]

SCOTT FRAKES: It's in the contract, but my sources tell me it is not within my authority, so that...so there is... [LR34]

SENATOR MELLO: We can probably figure out that contract a little better is what you're saying then. [LR34]

SCOTT FRAKES: So there's a disconnect there that does need to be addressed. My understanding...but the sources that come back to me say the intent of that language was if, in fact, merit raises were restored as part of the process for compensation, then it would be within my authority to do it. Okay. There was another question behind that though. It was.... [LR34]

SENATOR MELLO: The culture study. The culture study in regards to this. [LR34]

SCOTT FRAKES: I have purposely stayed, you know, a distance from that culture study other than to be very supportive. It is my administrative assistant who does...has done all the scheduling of all the staff and I stay out of that as well because I want people to believe that it unbiased, that it is not influenced by the agency and that they can say what they need to say. I know there are questions that would open the door and if there's a specific question about how much money do you need to make me happy, there are questions though, I believe, that would open the door for people to say, these are the things that I need to be satisfied in my job. So, I expect to get information back from that culture study that will tell me about things like, desire

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for compensation and working hours and other conditions as well, but...so we're going to continue to talk about and plan for, but short of coming to the table sooner around the contract, the next time that would start I think the date is next summer, next fall is the next time we open up for the... [LR34]

SENATOR MELLO: And correct me if I'm wrong, but I believe that the meeting we had...the hearing we had with you back in May you discussed that the department was going to do their own staffing study and to some extent, salary, wages, that would be a component, quote, unquote, of that staffing study. Is that something we will see from you, this committee and the Legislature, public at large, before the legislative session? Is that something that's going to take an extended amount of time in regards to the staffing study and then kind of the salary-wage study that would be a part of it? I mean, I know you'll have to do something. You just said in light of the contract negotiation, collective bargaining that would come next year when in regards to the state has to do it for everyone. But is that something we'll be able to see sometime in the near future? [LR34]

SCOTT FRAKES: The staffing analysis work, I'm going to say will be ready to be shared and discussed in the spring of 2016. The goal is to make sure that it's done and it's been worked through thoroughly in preparation for the next biennium. If I spoke to salary...not if, obviously I spoke to salaries at that time. I didn't fully understand how that process works and so I've learned a lot more about, you know, how we get there. [LR34]

SENATOR MELLO: We can just, for our purposes, we can generally expect there won't be any proposal, new ideas, new plan in regards to staffing for this upcoming legislative session. [LR34]

SCOTT FRAKES: Correct. [LR34]

SENATOR MELLO: Thank you. [LR34]

SENATOR SEILER: Do you have a question? [LR34]

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SENATOR BOLZ: I want to be respectful of this committee's decision to defer a conversation about the strategic plan and the purpose of facilities and programming, but I...and I don't necessarily need you to respond. I just wanted to say out loud that it seems to me that some of the research and the data collection that you have referenced this morning that I wasn't aware of, such as the custody staffing model and the classification model. I would just request that you think about whether or not there are pieces that you could share with us that would help us make decisions and help our discernment in understanding the strategic plan as it relates to the information that you're gathering. And specifically I wonder...and again, don't comment because I want to be respectful of what we've decided, but I want to make a note that it seems to me that particularly the work you're doing on classification and understanding that census could really inform a strategic plan. So, you know, I think you referenced having that completed in the spring and I would just give that to you for consideration. Okay. [LR34]

SENATOR SEILER: Paul, I'm sorry, I cut you off. You're up. [LR34]

SENATOR SCHUMACHER: Oh, thank you, Mr. Chairman. Now is this questioning supposed to be limited strictly to the staffing or is it other topics except the... [LR34]

SENATOR SEILER: You can go into other topics. [LR34]

SENATOR SCHUMACHER: Okay. Thank you for your presence here today and you have my sympathies. (Laugh) Being put in a position like yours and trying to clean up a lot of areas has just got to be an enormous challenge. And so, I want to go back a little bit to where we were a year or so ago when we first started to really delve into these things. And systemically it appeared there were two issues and I'm a little curious as to if anything has changed, what has changed, and whether or not for the better. Looking down from the office in which you sit, what we saw was various levels that did very little to communicate, or at least it was claimed they did very little, to communicate between the various levels. And the lower level people were making decisions which it appeared should be made at a higher level and the higher-ups were claiming, well, gosh, we didn't understand exactly what was going on and we were busy at meetings, and etcetera. And there a real information-flow from what was really going on in reality in the inmates' life and in the management decisions on how bookkeeping was done and things like that

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up to the folks who were in your position and the immediate position under you. The other part of this systematic issue was from the other direction and it appeared that there was a general understanding among department heads that, look at, there's some budgetary constraints. So don't bother proposing spending much money because you see we promised tax cuts. There are other priorities, so unless you can damn well make the case, you'd better not show up here at the budgetary level with anything other than a zero-cost option. And that is the world you're going to live in, Directors, and as a result, needs were unmet because, you know, you just...pretty decent-paying job and you really didn't want to blow it over asking for something you weren't going to get anyway. And things just weren't getting done, weren't addressed. As one person said, points we didn't have the luxury of statutory compliance. We made do with what we had to do. And a pretty sorry, sorry situation. On both of those areas, my first question is, in the past, I'm not talking about the strategic plan for the future...in the past, what issues tagged your decisionmaking, have you done to clear information channels from the bottom up to your office and secondly, what constraints is your management living with from...as result of budgetary or philosophical constraints? [LR34]

SCOTT FRAKES: I don't know which one I want to start with. [LR34]

SENATOR SCHUMACHER: The easy one. [LR34]

SCOTT FRAKES: The easy one. Okay, the easy one would be, what's changed about the culture? Well, we made some leadership changes and it's amazing what can happen when there's just a change in a few key positions, especially if there's a position where a person of pretty significant power mandates that all communication come through them, that most decisions are made by them, and that maintaining of the status quo is the best approach. I'm talking about somebody within the agency. So, I have two new deputy directors. You'll get to meet one of them tomorrow, and Mike Rothwell, and Diane Sabatka-Rine who was the warden of the penitentiary came in acting to begin with and then made permanent. These are two people that have a style. They each have their own style, but they have a style that's certainly complementary to mine. They like to talk to people. They want people to talk to them. And I mean that in terms of staff at all levels. As far as my style, one of the first things I did was...thank you very much...one of the first things I did was let people know, you can talk to me and it's okay. And, in fact, if you want

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to have a conversation that you want to stay just between me and you, we can do that as well as long as it's not in their little narrow band of things that I have to bring forward. And I open the door both in terms of going out and walking around and seeing people, but also I'm pretty active on e-mail and bit by bit, staff have come to realize that they can send me a note and they'll get a response sometimes quicker than they would ever imagine, because I'm on it way too often. But I've used that to break down some of those barriers. I've tried to issue a fair amount of communication to staff as well just in terms of updates and providing information. And that's again, the strategic plan was a great example of something I needed to get in staff's hands before they read about it in the newspaper. But it's also then what's happening down below. Can't just solve that problem at central office. You've got to make sure that the executive layers below, clear down to the line...down to the first level supervisors and even farther down sometimes, depending. So, model the behavior, create opportunities, continue to convince people that it's safe to actually express dissent, to have a different opinion, to challenge something, and I've allowed plenty of opportunities for that and people, as I've kind of pushed back to them, still got a job. Did you get...is there any repercussions, is there anything? Will I still talk to you? Of course, I will. And so now people are actually writing me back saying, well, since you said it's safe, I'm going to tell you this. Well, that's just a culture change and it's going to take time but I'm happy with where we've moved on that piece and it's going to help then in the next piece of changing the inmate culture as well. Talking to the wardens, getting them to understand that I have a different philosophy, that I really want a management by walking around approach to running this department. That's the most effective way, taking that to the next step and saying, you know, and it's not just interacting with staff, that's critical. You've got to talk to your population, you've got to engage in your population. For some, it was already it was how they did business; for others, not maybe to the degree that I want, so I'm going to continue to reinforce and encourage, and actually check back and ask for feedback. And then they know that I'm going to go out and walk around and talk to people, so I'm going to get it straight from the sources. So that's as much today as I can say about how we're changing that culture, getting the feedback and the data from the staff. Culture survey is going to help a lot as well, because I can make a lot of assumptions about what I think people need or what needs to change, but I'd rather just get some good solid data. And the second piece again was...second question was? [LR34]

SENATOR SCHUMACHER: The other side of the equation, what constraints you're... [LR34]

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SCOTT FRAKES: Well, from what I can see, you're absolutely correct. I see a lot of deferred maintenance. I see...and that's a euphemism for, we didn't fix stuff we should have and we didn't do preventative maintenance to prevent it from breaking because there was no money. We did few improvements to our facilities, most of which are showing their age, some of which are at the end of or past the end of their lifespans. We cut staffing. Most shockingly we, to me, we cut some custody...protective custody staffing, protective services staffing at different times during some of the periods of budget crisis. So, that's part of what's...no doubt, that's part of what contributes to the challenges that I have today. So it's different, but the Governor told me when I came, and what the Governor spoke to me when we were walking through and talking about the deficit request and this proposal that I'll get into when I talk about the strategic plan was, there's problems that need to be fixed. We're not going to fix those just by getting out some paint and, you know, and some polish. It will take funding to resolve issues. What we need to bring forward is the evidence, the data that supports the decisions we're going to be pushing forward. We need to be able to clearly define the outcomes that we're looking to achieve, so whether it's creating more community custody beds or providing living space that's better suited for female offenders, or whatever it might be, that it isn't just...and I think that sounds good. I think I'd like to do it. Bring the evidence forward, bring the data forward and support it. Have a thoughtful, defensible plan and we'll make the right decisions. And then acknowledge that we're...I'll say several years. I look at it and I'm thinking it could be nine years of digging the hole that we're in and at least I'll speak just for my department. It's a deep hole. Not going to fix it in one biennium. We've got to figure out all the needs, prioritize, and that's where...not only do I need, you know, a six- to eight-year capital strategic plan, but as we continue to get better at and build our own strategic plan, I want that to be a six-year document so that we're looking out across three bienniums and really addressing the needs and having a very strategic approach to where we need to get to. So I think it is different. I feel that it is different in the fact that I've said this enough times, part of the reason I couldn't answer a question to a reporter yesterday was, because the system I come out of, you don't come in mid-biennium and talk about building new prison space. It's just not part of the culture. So, the fact that we are coming forward with proposals in mid-biennium, to me that says quite a lot. [LR34]

SENATOR SCHUMACHER: You know when you talk in terms of three bienniums, that's six years. Fairly high percentage of population that's in there today most likely won't be in there in

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six years, probably a pretty fair guesstimate. So, as far as programming, as far as education, as far as training, that's just collateral damage? I mean, we just...we can't move faster? [LR34]

SCOTT FRAKES: We'll move as quickly as we can. We have a capacity problem. We have capacity in terms of too many inmates packed into spaces that don't provide the course support and the other opportunities to give a reasonable quality of life. We don't have good programming space. We don't have the infrastructure to deliver the programming. Don't have the staff to deliver the programming. And I've got a department, you know it and I know it, that has been beaten for over two years just in terms of capacity to respond to change, to capacity to take one more, look what you did wrong. We're pretty thin. People need an opportunity to recover, to regroup, to believe that the work they do is important, because it is. It is critical work. They need to know that you support them and I support them and the people of Nebraska support them. That yeah, they're going to make mistakes and it's...you don't want people to make mistakes, but people make mistakes. I certainly make mistakes. We need to use those opportunities whenever possible to let people learn from them, become more skilled from them, not repeat them. In those cases where people willfully do things wrong, that's a different issue and we'll deal with that through the appropriate tools we have. So, we've got to build capacity just about every way you could use that word within the department. [LR34]

SENATOR SCHUMACHER: Would it be fair to say then over those three bienniums or in the at least foreseeable future here, that there's going to be requests for substantial increases in funding for Corrections? [LR34]

SCOTT FRAKES: There's going to be increases for request in funding. But I won't qualify it any more than that until I have... [LR34]

SENATOR SCHUMACHER: Right, but I mean, there's been a lot of stuff that's been neglected and, you know, there's no free lunch and it's going to have to be made up someplace. [LR34]

SCOTT FRAKES: Agreed. [LR34]

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SENATOR SCHUMACHER: And to that extent, the necessity of articulating that high probability of significant increases should be on our minds, particularly at the same...another thing on our minds is massive tax decreases. Some specific questions here a little bit. I looked at this audit thing and I don't have a good feel for how purchasing is done by the department. So if you know, and maybe you don't get down to the weeds this much, but if you know, let's say you needed 250 mattresses. Okay. And how does the process go for the acquisition of those mattresses? Do you bid it? How do you pay for them? Do you use a credit card? How does that all work? [LR34]

SCOTT FRAKES: Yeah, you're not going to be able to get me too far down in the weeds. So I could say in that example, and I probably should know this, but I don't know for sure, first of all, does Cornhusker State Industries make mattresses? I think they do, but if they don't, that would be the first place that we would turn. [LR34]

SENATOR SCHUMACHER: Let's pretend they don't. [LR34]

SCOTT FRAKES: Okay. So then, we would have...we should have, we do have specific purchasing contracts for different vendors that provide a wide variety of things. Something like mattresses, we're buying them. We'll always buy them. They have a relatively short shelf life in a prison. So there's...I would say that we have a vendor that has been awarded the contract to provide, you know, mattresses and whatever other collection of inmate need items, we would turn to that vendor. There would be a process over...under...(laugh) there would be some process for those contracts to go out for bids every X number of years. I don't know exactly what the schedule is. I'm going to say probably two years though. Then for those things that are out of the ordinary, we need to buy...a great example would be, we've got to do significant upgrades to the Tecumseh electronic system. Doesn't have anything to do with the disturbance, it has to do with the shelf life of those control systems. Modern prisons bring a cost that old prisons didn't bring in terms of technology, only lasts so long. So that is a project that will go out for bid, would be a bid process. Whether that falls...I'm not sure if that falls in capital or equipment, let's say though it was just equipment, it was just new monitors and new cameras and new whatever it was, then it would be put out for public bid. It would be a process that's managed. We have internal staff

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that understand and have a role in creating the contracts but DAS also serves then as a controlling point of the management of those contracts. [LR34]

SENATOR SCHUMACHER: So then the mattresses would be delivered, the truckload of mattresses come in, and then the normal procedure is for them to send you a bill? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR SCHUMACHER: And is that paid on some department check blank or does that go to the State Treasurer, or how that works? [LR34]

SCOTT FRAKES: I know we work with the State Treasurer. I believe that most of our payments of those natures are done by electronic transfer. We do have the ability to cut warrants when necessary for a vendor that doesn't, you know, use electronic transfer or for some reason to move quicker. We also do have the ability on small purchases. You need a tool to repair something in a prison and there are Visa cards that are available and controlled as well. [LR34]

SENATOR SCHUMACHER: So is there somebody in the prison system that then has the checkbook, so to speak, or the code to enter into the electronic transfer machine? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR SCHUMACHER: And they say, okay, here's a bill for \$30,000 for mattresses. I guess that would be pretty expensive mattresses, but, you know. [LR34]

SCOTT FRAKES: That's not unusual. Nah, for us that would be a little high. [LR34]

SENATOR SCHUMACHER: And they then enter a code and a wire transfer is made. [LR34]

SCOTT FRAKES: But they would also have...they would have verification that a purchase order was issued that authorized the purchase. They would have a receiving document that showed that

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the 206 mattresses arrived and they were counted and signed off by someone at the warehouse. And that's probably the two primary documents they would need then. [LR34]

SENATOR SCHUMACHER: And who would sign those documents? [LR34]

SCOTT FRAKES: At the warehouse it would be, you know, warehouse staff. I'm not sure which title we use, warehouse worker. The...as far as the entry in payment piece, I can't give you a good answer on those. [LR34]

SENATOR SCHUMACHER: Somebody has to say, okay, this is legit, pay it. [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR SCHUMACHER: And that would not be you or somebody...it would be some bookkeeper or somebody below? [LR34]

SCOTT FRAKES: Depending on the size, it could move up to the...near the top of the business office, but state comptroller position, I believe that's the right title. [LR34]

SENATOR SCHUMACHER: Now I notice throughout the report there's references where on some of these audit criticisms, particularly ones with the pay scale, I think is one of them, what they call shift differential, that there's disagreement or doesn't appear to be agreement between the Auditor's folks and the Department of Administrative Services and maybe even your internal lawyers, and maybe even the Attorney General. Who is kind of in control of making a decision of whether or not you're doing something within the state labor contract or this rule or that rule? Who do you go to for advice? [LR34]

SCOTT FRAKES: First thing I do is gather together the people within my department that I believe have enough expertise and skills and understanding, so typically would be my deputy director of administrative services. I'd bring in my HR administrator as well if it's a contract issue. For some of the other financial issues where we're being told that statute says we must do this, I'm going to bring in my counsel. They're going to look at it. They'll give me their opinion

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as well. In the case of a couple of these items in particular, one would be the staff overtime being paid when staff take leave in the same week. If after thorough review, we still feel that we are within statute, then the next phase will be, we'll turn to the AGs. [LR34]

SENATOR SCHUMACHER: And the "we" is that coming from some nonlawyers in your group or some lawyers that...? [LR34]

SCOTT FRAKES: In that one, it will start with the...I will use my counsel to provide the first level of review, because if they do the review and they say, no, clearly we don't believe that we're within statute, do not have the authority to manage as we have. Specific to that issue of paying overtime when people take leave in a work week, if it turns out to be that, I will be coming back for a conversation because it would be very difficult to staff my prisons. If they come back and tell me, you know, we think it is within statute, we think that within the Fair Labor Standards Act, whatever applicable rules that is within your authority, then I'm going to go to the Attorney General's Office as well and get an additional review, not because I don't trust my staff, but based on the history, I'm going to make very sure that we've sought the level of legal advice necessary. In the example I've just given, I would expect there would be a fair amount of contention because it's a million dollar issue and I understand that. [LR34]

SENATOR SCHUMACHER: As I take it, you've got a basically different legal staff than you were looking at when you took office. [LR34]

SCOTT FRAKES: I was able to fill the chief counsel position, Julie Smith, who came from Johnson County as their prosecutor, and has been amazing. She's amazing. Not that...my other two attorneys are excellent as well, so now I've got a great team and I have a lot of confidence in their decisions and their reviews they do. But anything that if I'm going to be in contention with another state agency or in contention with some other branch of government, then I'm going to do what I should do, my due diligence. [LR34]

SENATOR SCHUMACHER: I'm going to go through quickly. I don't want to consume too much time. Some of these are a little bit picky. If you don't know or don't remember, we can always get to those... [LR34]

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SCOTT FRAKES: And if you'll give me reference numbers, I did bring my notes. [LR34]

SENATOR SCHUMACHER: Okay. This is with regard to, I guess, we're not calling it an incident or a riot, the behavioral anomaly that occurred at Tecumseh. (Laugh) Apparently there was an officer that shot an unidentified inmate running from unit 3 to 2 that appears in the review team final report. But that's not mentioned elsewhere. Are you familiar at all with that? [LR34]

SCOTT FRAKES: I am. [LR34]

SENATOR SCHUMACHER: And what's the story on that, quickly? [LR34]

SCOTT FRAKES: Make sure I am. Pretty sure I have that one correctly though. The staff believe that the inmate was...so we had the one where the staff believed that the inmate may be trying to breach the fence. [LR34]

SENATOR SCHUMACHER: If you're not sure, let's not speculate. [LR34]

SCOTT FRAKES: Yeah, I'm not going to speculate. [LR34]

SENATOR SCHUMACHER: If you just maybe address that later. Were there any indications that inmates were trying to get at staff...a staff member in the gym? [LR34]

SCOTT FRAKES: I believe so. [LR34]

SENATOR SCHUMACHER: Is that reflected in the report? [LR34]

SCOTT FRAKES: In which report? [LR34]

SENATOR SCHUMACHER: The critical incident review team report. [LR34]

SCOTT FRAKES: Well, I believe it is, but I'd had to go back to the report to... [LR34]

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SENATOR SCHUMACHER: This further clarification, inside the gym, approximation of the number of inmates actually participating in the disturbance. [LR34]

SCOTT FRAKES: Yeah, I don't recall that number at this point. [LR34]

SENATOR SCHUMACHER: Okay. When the...I think they call them SORT team members went into the gym with guns, why weren't they wearing protective equipment? [LR34]

SCOTT FRAKES: That was the rescue of the staff members that was... [LR34]

SENATOR SCHUMACHER: I think so. [LR34]

SCOTT FRAKES: Yeah. Being...I'll have to say, held hostage. There's again semantics. But let's say, held hostage. They made the decision with the support of the incident commander that that staff member's life was in danger...imminent danger. They felt that despite not having all the protective gear that they needed, they had the tools they needed to go in, free that staff member. [LR34]

SENATOR SCHUMACHER: Is there adequate stashes of protective gear now? Has something been done? [LR34]

SCOTT FRAKES: I don't know that we've completed all of those improvements that we need to. That is part of the action plan to be addressed. There's a fair amount of equipment on order. A lot of this stuff doesn't...like the additional nonlethal munitions, there's quite a bit of lead time before it's delivered. [LR34]

SENATOR SCHUMACHER: Okay. There was some videos that were mentioned that I think the...have been reviewed. Can this committee have access to those videos? [LR34]

SCOTT FRAKES: Yes. [LR34]

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SENATOR SCHUMACHER: There was a tactical plan erased? Do you know anything about that? [LR34]

SCOTT FRAKES: Erased? [LR34]

SENATOR SCHUMACHER: Yeah, apparently a tactical plan was developed. But it must have been erased on, I would assume that's a computer. [LR34]

SCOTT FRAKES: No, I'm not aware of that one. [LR34]

SENATOR SCHUMACHER: Okay. Did the...why were the initial incident commander and the warden set up in separate rooms? Wouldn't it be better if they're...kind of high command was in one location? [LR34]

SCOTT FRAKES: No, actually in incident command systems you want the incident commander to have the people in the room that they need to help them manage the incident. And if he chose to not make use of the warden as a resource at that point or gave the warden other assignments, that is within his authority as the incident commander. I would have liked to have seen a sooner change of command. [LR34]

SENATOR SCHUMACHER: Is the warden normally above the incident commander or is it the other way around? [LR34]

SCOTT FRAKES: Nope. Whoever is designated as incident commander has the authority to manage the incident until there is a change of command. [LR34]

SENATOR SCHUMACHER: And the change of command occurs when? [LR34]

SCOTT FRAKES: Under our policy language that is being rewritten, or may already be done, there was some confusion about whether that occurred when the incident was resolved or contained, or at the point that someone else...whether it was someone of higher authority or

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another person qualified to be the incident commander, had all the information they needed, and was in a position to take over command, so. [LR34]

SENATOR SCHUMACHER: The warden didn't show up till six hours later. Was there any reason for that? [LR34]

SCOTT FRAKES: No. The warden was on site much, much earlier than that. [LR34]

SENATOR SCHUMACHER: I think I've probably used up enough of your time for right now. Thank you very much. [LR34]

SENATOR PANSING BROOKS: I have a question on...what...something that he said. [LR34]

SENATOR SEILER: Is this...okay. [LR34]

SENATOR PANSING BROOKS: Okay. So I had heard, when I went to tour Tecumseh, from some of the people that they were not after the woman that was in the room. In fact, the ones that were inside were trying to get out. They weren't even dealing with the windows where the woman was, and that the guys that were coming in, we don't know for sure if they were coming to get her or if they were just trying to help their fellow inmates get out of that room. Is that correct? Do you have something that shows that they were going to go get her, because I had not heard that. [LR34]

SCOTT FRAKES: What I have is that a warning shot was fired--two, in fact--that inmates recognized that they should get on the ground. They did do that initially. They then decided they no longer were going to comply with direction from staff. They began to engage... [LR34]

SENATOR PANSING BROOKS: After like 12 minutes, right, on the ground? [LR34]

SCOTT FRAKES: Yeah. They began to engage in uncontrolled behavior, which included tearing the sign out of the ground and attempting to break into the gym. The staff member inside the gym...my understanding is that--now, you know, it's been a number of months, I'd have to go

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back and read reports to get the details--my understand was though she communicated that she felt that she was in danger. Staff believed that she was in danger. The actions of the inmate outside of that gym...why would...there was no reasonable assumption that the staff in the tower or in other positions would think that they needed to break the window out to let out the inmates that were inside the gym. It's not a conclusion I would have come to had I been on site either. So based on all those factors, at then in the review of the use of force by the State Patrol, I am comfortable that the correct actions were taken. But there's pieces of it that we know that we need to do better, so we're reviewing our use-of-force policies to make sure they're clear; reviewing our training policies to make sure they're clear; reviewing out training policies to make sure that we cover all those bases. Certainly, the incident command, change of command, the fact that another manager who was duty officer provided direction to staff outside of the incident command, those are all things we need to do differently and improve upon. [LR34]

SENATOR PANSING BROOKS: And you referenced the fact that you have to be worried about the employees. We are highly worried about the employees. We're concerned about staffing. We're concerned about mandatory overtime. That's part of why we're here is because we care so much about the employees for the state of Nebraska in the Corrections Department. So just to make clear that this isn't...we are also concerned about the rights of the inmates and we're concerned about your administrators as well. So this is not just because we don't care about those people. They have been bruised and wounded, I presume, but we have to deal with these issues because we help fund what's going on there. So it's important for us to be involved as well. [LR34]

SCOTT FRAKES: And I will quickly apologize if that's how my comments were perceived, because I know that's true. That was not what I meant. It was more of the broader. We need everybody's support to get through this. [LR34]

SENATOR SEILER: Senator Chambers: [LR34]

SENATOR CHAMBERS: Thank you, Mr. Chairman. Welcome, Mr. Frakes. [LR34]

SCOTT FRAKES: Senator Chambers. [LR34]

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SENATOR CHAMBERS: (Exhibits 4, 7, and 8) Will you step into my parlor, said the spider to the fly. This is not a courtroom, this is not a trial, so I'm not going to ask you to read these documents aloud, but I would ask that the page let you look at them. The letter you can retain. The other two I would like you to return. And I will tell you what I would like once you receive them. Would you first examine the letter to see if you recognize it as a document you have read before. If you had read it, do you think you'd remember? [LR34]

SCOTT FRAKES: That's why I was trying to just search my brain, but I believe I have read this. [LR34]

SENATOR CHAMBERS: Okay. Now would you look at the other two items which are invoices. One is for the pancuronium; the other is for the sodium thiopental. On the right-hand side, do you see a circled item on both of them? It says, method of payment or payment terms, and then the two words, or three, due upon receipt. What is due upon the receipt of what? [LR34]

SCOTT FRAKES: I'd have to have one of my fiscal staff respond to that question. [LR34]

SENATOR CHAMBERS: Okay, well, that's not anything I'm going to spend time on, so if the page would return them to me. Thank you. I would like to ask you a couple of preliminary questions first and let you know how I intend to proceed. This that I'm going to talk to you about relates to those, what I refer to as, death drugs that you, the Attorney General, the Governor have been collaborating on to try to procure from an individual in India. I'm not going to offer a lot of opinions or argument, but I have in my possession about 52 articles related to the procuring of those drugs. And all of them are within the period of time the Legislature was considering the abolition of the death penalty. I've reduced the number from which I will read considerably and there will only be small snippets or excerpts that I will read for the purpose of context. And I will give you the opportunity to respond to any of them if you feel necessary to do so. And there may be one or two that I will ask for your response. And if I'm otherwise occupied when you want to make a response, such as examining a document, do you see a plastic water bottle to your left on your table? [LR34]

SCOTT FRAKES: Yes. [LR34]

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SENATOR CHAMBERS: If I'm not paying attention, just throw that water bottle at Senator Williams and he will tell me that you would like to comment. Now have you seen...did you sign a contract for these drugs? [LR34]

SCOTT FRAKES: Yes. Yes. [LR34]

SENATOR CHAMBERS: Was it a standard type of contract which you, as head of the Department of Corrections, would sign for the purchase of other items? [LR34]

SCOTT FRAKES: No, it was not standard. It was a specialized purchase. [LR34]

SENATOR CHAMBERS: Could you speak a little louder, please? [LR34]

SCOTT FRAKES: No, I would not describe it as a standard contract process. It was a specialized purchase. [LR34]

SENATOR CHAMBERS: Who drafted the contract, if you know? [LR34]

SCOTT FRAKES: I think...my memory is there's not a contract, there is...the contract was the purchase order. [LR34]

SENATOR CHAMBERS: So there is no contract in existence for this...these transactions, is there? [LR34]

SCOTT FRAKES: Not a multipage document, just the purchase order. [LR34]

SENATOR CHAMBERS: Now at the time you were going to obtain these drugs, you knew the name of the two drugs that were being sought, didn't you? [LR34]

SCOTT FRAKES: Yes. [LR34]

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SENATOR CHAMBERS: One was the pancuronium and the other was the sodium thiopental. You knew those were the two drugs that were being sought, is that correct? [LR34]

SCOTT FRAKES: Initially it was the sodium thiopental and then not too long after it was the pancuronium. [LR34]

SENATOR CHAMBERS: Then how long after that was a determination made to get the other one? [LR34]

SCOTT FRAKES: The document, what I just gave back to you, would show the (inaudible). Yeah. [LR34]

SENATOR CHAMBERS: Well, you don't have to...I mean, was it a matter of days, weeks, or months, if you recall that? [LR34]

SCOTT FRAKES: Weeks. [LR34]

SENATOR CHAMBERS: Okay. When I mentioned the Attorney General, the context in which I intended that to be taken is that you did on occasion, or did you, consult with him about this activity of trying to procure these drugs? Did you have direct discussions with him at any point along the way? [LR34]

SCOTT FRAKES: Those conversations would be attorney/client privileged. [LR34]

SENATOR CHAMBERS: I'm not going to ask you what it is. If you will listen to the question, then it will be simple to answer it. Did you have conversations with the Attorney General along the way with reference to procuring these drugs? Well, I have articles which quote you saying that you talked to the Attorney General and he said what you were doing is all right. So was that a misstatement in the newspaper or did you, in fact, have such conversations with the Attorney General? [LR34]

SCOTT FRAKES: Yes. [LR34]

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SENATOR CHAMBERS: Yes, what? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: That it's a mistake or you had the conversations? [LR34]

SCOTT FRAKES: Yes, we had conversations. [LR34]

SENATOR CHAMBERS: Okay. I'm going to read into the record that letter that I mentioned for the sake of a complete record. And since I let you have a copy of it, I'm going to just have you look at it as I go to be sure that I'm not misstating what this document says. When I come to the name of a company, the name of the person who signed this, I'm going to spell them both for the sake of the transcriber. In the upper right-hand...first of all, this letter is addressed to Chief Justice Michael Heavican, Nebraska Supreme Court, 1213 State Capitol, P.O. Box 98910, Lincoln, Nebraska, 68509-8910. In the upper right-hand corner is a date stamp and it is labeled "Office of the Chief Justice," then the word "received" and the date is November 22, 2011. The letter itself is dated "18th November 2011." It begins with the abbreviation of the word "referring to" or "reference," three capital letters followed by a colon, "REF: Use of," and I'm going to pronounce it Naari, N-a-a-r-i, "Use of Naari sodium thiopental for the purposes of executions in Nebraska. Dear Chief Justice Michael Heavican, I'm writing to you on an extremely grave and urgent issue. It has recently been brought to my attention that Nebraska Department of Correctional Services has purchased 485 grams of sodium thiopental manufactured for Naari which it intends to use in capital punishment procedures in Nebraska. I am shocked and appalled by this news. Naari did not supply these medicines directly to the Nebraska Department of Correctional Services and is deeply opposed to the use of the medicines in executions. The medicines in question were supplied by Naari to a man called Mr. Chris Harris." Chris spelled C-h-r-i-s. "The agreement with Mr. Harris was that he would use these vials," v-i-a-l-s, "for registration in Zambia. Our intention was to get the product registered in Zambia and then begin selling it there, since sodium thiopental is used very widely as an anesthetic in the developing world. Mr. Harris was authorized specifically to take the product to Zambia and get it registered there. He was not authorized to sell the product to the Nebraska Department of Correctional Services or to anyone else in the USA. Mr. Harris misappropriated our medicines and diverted

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them from their intended purpose and use. I am writing to request that the thiopental which was wrongfully diverted by Mr. Harris to the Nebraska Department of Correctional Services be returned immediately to its rightful owners, that is, that it be returned to us at Naari. Thank you in advance for your urgent assistance on this important matter. Sincerely," I'm going to pronounce it Pre-thee (phonetically), but I'm going to spell it, first name P-r-i-t-h-i, last name K-o-c-h-h-a-r, "CEO, Naari," with a copy to Jon Bruning, Nebraska Attorney General. Now are you aware of the incident described in this letter since you seem to have a recollection of having read the letter? This happened before you came, by the way. But you're familiar with this circumstance, correct? [LR34]

SCOTT FRAKES: I'm familiar with this letter. [LR34]

SENATOR CHAMBERS: Do you understand the circumstances that are being described in the letter when you read the letter? [LR34]

SCOTT FRAKES: I understand what the letter says. [LR34]

SENATOR CHAMBERS: Okay. And to your understanding, did the letter say that Chris Harris, with whom you contracted with, from whom you were trying to receive or obtain two drugs, one of which is banned for import into the United States by the FDA, the same Chris Harris you are aware that a letter described him having obtained drugs, one of which was sodium thiopental, under false pretenses, misrepresenting what he was going to do with them, dealt with them contrary to the way the agreement or according to the agreement which led to him procuring those drugs and he diverted them to the Nebraska Department of Correctional Services...knowing that, you nevertheless chose to deal with him for the same drug. Is that true or false? You can respond however you feel you need to. [LR34]

SCOTT FRAKES: I became aware of the letter after the purchase. Equally important is this is what this individual alleges. That's the information I have. I'm not aware of any criminal charges or other actions that were taken against Mr. Harris in respect to this. [LR34]

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SENATOR CHAMBERS: How did you find out about this Harris fellow and that he was in the drug dealing business? [LR34]

SCOTT FRAKES: Mr. Harris contacted me. [LR34]

SENATOR CHAMBERS: He contacted you? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: And when he contacted you, was it by telephone, e-mail, or how? [LR34]

SCOTT FRAKES: E-mail. [LR34]

SENATOR CHAMBERS: Did you know who this Mr. Harris was when you received the e-mail? By that I mean did you have any awareness of him prior to the receipt of that e-mail? [LR34]

SCOTT FRAKES: I believe I had a little bit of awareness. I'm trying to play back the memories. [LR34]

SENATOR CHAMBERS: And what would that awareness be based on, if you recall? [LR34]

SCOTT FRAKES: That he was the seller of or producer...I'm going to say seller of drugs that were imported and bought by the department previously, the last drugs that were actually brought in and available for use. [LR34]

SENATOR CHAMBERS: Had you had conversations with anybody, once you were contacted by this Harris person, with reference to this prior drug deal that had been transacted between the department and Harris? Did your discussion touch on prior dealings with this Harris person? [LR34]

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SCOTT FRAKES: I believe I...my memory is that after interacting with Mr. Harris, stating that I was interested, I did go back and find the documents that were available that are on...available within the department specific to all of the death penalty issues and looked at what was available in there. I was able to ascertain that, in fact, the department had purchased drugs from him. They were successfully brought here and retained by the department. [LR34]

SENATOR CHAMBERS: Did you undertake any "investigation"--and we can put that word in quotation marks--any investigation or research relative to him and his company or somebody out of the...well, let me let you answer that. Did you go on what I call the gadget, which other people call the computer, to do any research to see whether something might be available about who this person was who contacted you and made the representation that he was able to provide drugs to be used in executions? Or did you just take at face value what the e-mail said and began to bargain with him on that basis? [LR34]

SCOTT FRAKES: What I know I did for sure is review available documents and determine that we had--we, the department--had purchased drugs from Harris Pharma, had brought them into the country, and had retained those drugs. [LR34]

SENATOR CHAMBERS: Did you become aware of any attempt to use those drugs? And by the term "use those drugs," I mean that they were in the possession of the state to use. The fact that these drugs were in the possession of the state, are you aware that the Attorney General's Office used that fact to procure a death warrant from the Nebraska Supreme Court? Are you aware that that had happened? [LR34]

SCOTT FRAKES: I can't recall. [LR34]

SENATOR CHAMBERS: If you're not, just say no. [LR34]

SCOTT FRAKES: Yeah, I can't recall. [LR34]

SENATOR CHAMBERS: Okay. I'm going to read something. A death warrant was issued by the Nebraska Supreme Court setting an execution date for Carey Dean Moore. And that death

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warrant was procured...I think it was maybe April 11 or April 21 of the year in question. But on April 11 the Attorney General's Office had knowledge before they procured that death warrant that the drugs were not going to be available. FDA had ordered them to be confiscated. But forget all that. That's just by way of setting the context. This is what was stated in an order by the Douglas County District Court December 11, 2011. A postconviction motion had been filed by Carey Dean Moore, not in connection with trying to have the death warrant revoked because that had happened, but to have sanctions against the Attorney General for having obtained that death warrant knowing that no drugs were available to carry out the execution. And this is what the judge wrote in his December 11, 2011, quote, order dismissing the postconviction motion, unquote, of Moore: Notwithstanding fairly persuasive proof that the Department of Correctional Services obtained controlled substances of unknown efficacy from a foreign distributor and manufacturer not inspected, registered, or approved by the FDA or DEA and a lack of transparency and candor even with the Nebraska Supreme Court and Douglas County Attorney's Office by the AG's Office beginning on January 24, 2011, and such acts require accountability, it is not available through postconviction relief--a very strong rebuke of the Attorney General for having done this. And the Supreme Court was not happy about having issued a death warrant which it had to withdraw. So I, in a piece that was printed by the Omaha World-Herald July 22, 2011, made the following statements. And if I read it, it will be more succinct than if I try to narrate, but it's in a feature called "Midlands Voices": My review of mountains of documents and court filings and orders disclose that communications between the Nebraska Department of Correctional Services and the U.S. Drug Enforcement Agency established as early as April 11 that state officials knew that sodium thiopental, one of the three drugs specifically named by law, would be unavailable for use in carrying out a judicial execution by lethal injection. And that knowledge was in the possession of the Attorney General prior to seeking that death warrant. I'm skipping material to come to a type of analogous statement in another Nebraska Supreme Court decision. This episode is analogous to one addressed by the Supreme Court in the case of State v. Joubert where then Attorney General Don Stenberg asked the court to set an execution date while a federal stay was in place. The Supreme Court then stated in its Opinion: The Attorney General asks us not only to perform a useless act, he asks us to perform a lawless one. The legal barriers that exist to protect against the unlawful execution of a death sentence separate the unlawful killing by a person and the lawful killing by the state. If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon. So

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there was one death penalty case a death warrant had been issued. I want to get behind sodium thiopental. Coming a little farther...and this case was referred to constantly by some of the senators on the floor when we were discussing abolition of the death penalty. It involved Michael Ryan and the heinous murders he committed. Ryan was under a death warrant. His lawyer wanted to try to obtain relief. The Supreme Court refused. However, it stayed the execution two weeks from the date it was to be carried out and here's why. This article is from the World-Herald, May 8, 2014. "Ryan came within two weeks of being executed in 2012 when the State Supreme Court stayed the execution so he could appeal the way Nebraska officials obtained the now-expired drug." The drug expired because while those proceedings were going on, the drug expired before they were completed. So Michael Ryan was not executed. And it was all because of this thiopental that had been obtained from a sleazy scumbag who was known to have diverted drugs which he procured under false pretenses and sold to the state of Nebraska. I wanted to give you that little background and ask you this question again: You were not aware at any point during your dealings with Harris of what I read here, is that true or is that incorrect? [LR34]

SCOTT FRAKES: I can't recall at this point. [LR34]

SENATOR CHAMBERS: You can't recall? [LR34]

SCOTT FRAKES: Not all those details, no. [LR34]

SENATOR CHAMBERS: Not details. Are you aware that there were two death penalties that were not carried out because of the manner in which this thiopental had been procured? You're not aware of that? [LR34]

SCOTT FRAKES: I cannot recall whether or not... [LR34]

SENATOR CHAMBERS: But you're aware of it now if what I said...read is true. [LR34]

SCOTT FRAKES: Yes. [LR34]

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SENATOR CHAMBERS: From what I can read in the papers, you and the Attorney General and the Governor are continuing to deal with this Harris to try to get these drugs sent from him to Nebraska. That is true, isn't it? [LR34]

SCOTT FRAKES: Yes. I am doing that, yes. [LR34]

SENATOR CHAMBERS: There is a statement in one of these articles that when Harris...well, I'll get to that. When we were debating the bill...this article is from May 16 of this year: The Governor added another dimension to the debate Thursday night when he announced the state has made purchases to restock its supply of lethal injection drugs. During first-round debate, some argued it was pointless to keep an unenforceable punishment on the books. The state paid \$54,400 to purchase sodium thiopental and pancuronium bromide from Harris Pharma, a distributor in India, according to invoices, both of which you saw, released Friday by the Governor's Office, although I didn't get mine from the Governor. The only thing I could get from him...I can't use the language which somebody would use to describe his attitude that would lead him to give me what would be the only thing I could get from him. That's a little aside. The state Department of Correctional Services has an unexpired supply of the third drug, potassium chloride. Senator Jerry Johnson of Wahoo said news that the state had secured the lethal drugs caused him to reconsider his earlier support for the repealed bill. But when it came time, he voted to advance the legislation. That was the first go-around. Chambers accused the Governor of timing the announcement, called it disingenuous and the lowest form of political chicanery. Taylor Gage, the Governor's spokesman, said the information was released to the public on the same day the state made the final payment for the drugs. The shipment was yet to arrive. When you were talking to my colleague, whom I refer to the "Professor" but he is known officially as Senator Schumacher, a discussion was being had relative to the purchase of some mattresses. If I paid attention and heard correctly, you stated that payment would be authorized after you could be assured that the mattresses had been delivered and received. Did I hear you correctly? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: That's not what you did in this case, is it? [LR34]

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SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: What did you do in this case? [LR34]

SCOTT FRAKES: The offer was to provide the product that we needed. The payment was required in advance. [LR34]

SENATOR CHAMBERS: Wait a minute. I didn't hear that. What about payment? [LR34]

SCOTT FRAKES: Payment was required in advance. [LR34]

SENATOR CHAMBERS: By state statute? Why would we...? [LR34]

SCOTT FRAKES: By the seller. [LR34]

SENATOR CHAMBERS: Oh. Harris said, pay me in advance? [LR34]

SCOTT FRAKES: That is correct. [LR34]

SENATOR CHAMBERS: The thief said, trust me. But at any rate, that's why you paid, because the only way you could get what he knew you needed and knew you couldn't get anywhere else, he knew that it was no longer manufactured in America, he knew that no member of the EU would allow it to be sold for purposes of executions, so he knew that he had this drug you needed and it was the only place you could get it. So you paid much more than the market value of that drug, didn't you? You paid a great deal more than what that amount of drug would be available for on the market. Isn't that true? [LR34]

SCOTT FRAKES: He set the market value. [LR34]

SENATOR CHAMBERS: Say it again. [LR34]

SCOTT FRAKES: He set the market value. [LR34]

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SENATOR CHAMBERS: But you knew that what he specified was making the state take it in the shorts because he was the supplier of what you needed and couldn't get anywhere else. If you could have procured that drug from some manufacturer or distributor in Europe, you wouldn't have had to pay that much for the amount that you got, would you? You could have gotten it much cheaper, couldn't you? [LR34]

SCOTT FRAKES: I have no way of knowing. It was not available. As you stated, it's not available. [LR34]

SENATOR CHAMBERS: Have you heard of the term, "all the traffic will bear," when it comes to the cost of something? [LR34]

SCOTT FRAKES: I have. [LR34]

SENATOR CHAMBERS: And that's what...that was the principle according to which Harris was operating with you, isn't it? If what I said is true, that he grossly overcharged you--and I read that, I'm not an expert on that--but if what I read is true and if what I told you that I read is true, he was able to grossly overcharge you. Now let me put it a different way. If you knew that this was a gross overcharging, you would have paid it anyway, wouldn't you, because you wanted that drug. Isn't that true? The Lord is watching, and all liars shall depart in the lake that burns with fire and brimstone where their worm dieth not and the fire is not quenched, Holy Bible. Now, you would have...you remember the question. What would your answer be? [LR34]

SCOTT FRAKES: Fair market value, I would have paid fair market value. He determined what the market was. By statute, I need to procure the drugs required to carry out the sentence as imposed by law. [LR34]

SENATOR CHAMBERS: And he determined the market value because he was the only market from which you could purchase the drugs. Isn't that true? [LR34]

SCOTT FRAKES: Yes. [LR34]

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SENATOR CHAMBERS: And if I wanted to buy heroin on the street, I would pay whatever the drug dealer charged me if I wanted that heroin, wouldn't I? [LR34]

SCOTT FRAKES: Never bought heroin. [LR34]

SENATOR CHAMBERS: If I could get it someplace else for half that amount, this drug dealer is not...going to say, that cuts no ice here, you're buying this drug from me, you'll pay me what I ask for or you won't get it. Isn't that was Harris said, take it or leave it at this price? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: What did he say? [LR34]

SCOTT FRAKES: He said he had the product available that I needed. He said this was the minimum purchase quantity because he needed to meet manufacturing levels. And I had no other option in terms of establishing a fair market price. It's not a competitive market. [LR34]

SENATOR CHAMBERS: But you know now that he was not manufacturing anything, don't you? You know that now, don't you? [LR34]

SCOTT FRAKES: I know that he works with a manufacturer. [LR34]

SENATOR CHAMBERS: What manufacturer did he work for that you found out? What was that manufacturer's name? [LR34]

SCOTT FRAKES: I don't have a name. [LR34]

SENATOR CHAMBERS: He told you he did though, didn't he? [LR34]

SCOTT FRAKES: Yes. [LR34]

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SENATOR CHAMBERS: And a thief will also lie. He stole from you and he lied. Now, under Nebraska law, how is it that you paid for services not rendered, goods not received, and that those checks were cashed? Do you know that? Are you aware of that, that they have been cashed? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: So you gave taxpayer money...let me back up. I don't want the question to presume that which is not in evidence. The Governor is rich. His father is rich. They paid a lot of money toward a campaign on a petition drive. Was this money personal money from the Ricketts family? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: It was taxpayer money? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: And the taxpayer wants those who spend their money to be good stewards of their money. Is that correct? [LR34]

SCOTT FRAKES: Absolutely. [LR34]

SENATOR CHAMBERS: Since the law requires that warrants not issued for services not rendered or products or goods not received...but you sent that money to this person about whom you knew nothing. Had you undertaken research, you could have found what I told you. So without following due diligence as a steward of taxpayer money, in consultation with the Attorney General and the Governor--stop me anywhere along the way if I'm saying something not accurate--the three of you determined that it was all right for you to send this money to this man up-front because he ordered you to do that if you wanted to get these drugs. [LR34]

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SCOTT FRAKES: I made that decision after conferring with contract resources. That may not be the correct term, but in consultation with resources from Department of Administrative Services. I would say it's the contracts division. I did want to be clear that there was legal grounds to make payment prior to receiving the product, because it is unusual; it's unusual to me. [LR34]

SENATOR CHAMBERS: Who told you that it was legal for you to do that? [LR34]

SCOTT FRAKES: I got that confirmation from my deputy director over at Administrative Services for the department. But she... [LR34]

SENATOR CHAMBERS: Wait a minute. I don't want hearsay, what she says somebody told her. To whom did you talk who gave you the assurance that it was legal to do what you did? [LR34]

SCOTT FRAKES: Robin Spindler. [LR34]

SENATOR CHAMBERS: Who? [LR34]

SCOTT FRAKES: Robin Spindler. [LR34]

SENATOR CHAMBERS: All right. Now that we know who told you, whom did she tell you she talked to who assured her that it was legal for you to do this? [LR34]

SCOTT FRAKES: Someone in DAS. [LR34]

SENATOR CHAMBERS: Someone. She would be able to give you the name of that person now that it has become an issue, wouldn't she? [LR34]

SCOTT FRAKES: Should be able to, yes. [LR34]

SENATOR CHAMBERS: Will you provide that name to the committee? [LR34]

SCOTT FRAKES: I will. [LR34]

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SENATOR CHAMBERS: Thank you very much. Now I'll proceed. This article is from the Lincoln Journal Star, May 16, a prediction, of all things. "Chambers questioned Ricketts' late afternoon announcement Thursday that he had purchased the three drugs necessary to carry out the death penalty. 'Nebraska has not procured these drugs,' he said." That was a true statement, wasn't it? And I hadn't talked to you, the Governor, or anybody else, but I stated it with absolute certitude, "Nebraska has not procured these drugs," despite the Governor having said that he procured them. He said, they've procured them. I said they hadn't. That was a true statement I made, wasn't it? [LR34]

SCOTT FRAKES: When was that statement made again? [LR34]

SENATOR CHAMBERS: It doesn't matter when I made it. Have you procured those drugs? [LR34]

SCOTT FRAKES: That is fair. One of the three. [LR34]

SENATOR CHAMBERS: So if you haven't procured those drugs as of now, it doesn't matter what the date was. But the date of this article is May 16, 2015. So people can check to either verify or challenge the validity of what I'm saying. [LR34]

SCOTT FRAKES: Senator, can we have a restroom break? [LR34]

SENATOR CHAMBERS: Say it again? [LR34]

SENATOR SEILER: Sure. [LR34]

SCOTT FRAKES: Could we? [LR34]

SENATOR SEILER: We'll break from now till 4:00. [LR34]

SENATOR CHAMBERS: He might need a little longer than that. I'm just kidding. Right, right. [LR34]

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BREAK

SENATOR SEILER: Senator Chambers, you're be on the hook. [LR34]

SENATOR CHAMBERS: Thank you, Mr. Chairman. And I'll try to move it along a little faster, if I can. While everybody was out of the room my seatmate, whom I refer to as the "Professor," pulled one of those magical little gadgets out of his pocket to do a little checking on what some of these prices would be. What did you determine on your gadget? [LR34]

SENATOR SCHUMACHER: Well, at least the gadget says that Texas, as of sometime in the fairly recent past, was able to get the whole cocktail of drugs for \$83. [LR34]

SENATOR CHAMBERS: (Exhibits 18 and 20) Eighty-three dollars. The drug dealer set the value for you to the tune of over \$26,000 for that which Texas got for \$83. But you gave your rationale and I'm not going to make you repeat it. I'm going to just go ahead and read this statement that I wanted to read to show how I saw through what the Governor was doing. This was, again, dated May 16, 2015, from the Lincoln Journal Star: Chambers questioned Ricketts' late afternoon announcement Thursday that he had purchased the three drugs necessary to carry out the death penalty. "Nebraska has not procured these drugs," he said. "No company in America produces sodium thiopental. There is none that will be exported by European countries." The answer is going to have to show...the Governor is going to have to show where these drugs came from, he said. "So the timing of this announcement is very problematic," Chambers said. The Governor and Attorney General Doug Peterson hoped that they could mislead members of the Legislature into thinking the drugs were here and that the Nebraska Supreme Court will issue death warrants, Chambers said. "But I guarantee you that is not going to happen. When you implement something like this you unleash a whole new series of appeals that will start at the state level and go through the federal level." This is an article dated May 23, which would be six days later, and it has to do with the ACLU raising questions. This will give a little background. "On Friday, ACLU of Nebraska released documents it obtained through a public records request with the state, seeking information on the purchase of two lethal-injection drugs from a broker in India, Christopher Harris. The documents showed that Harris first contacted the state via email on April 14, offering to sell 'a few thousand vials' from a 'batch' of

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drugs being manufactured for two other states. A string of emails between Harris and State Corrections Director Scott Frakes followed. They indicated a series of problems in getting invoices sent. But eventually, a purchase agreement was reached on May 13 for 1,000 vials of sodium thiopental, for \$26,700, and for 1,000 vials of pancuronium bromide for \$27,700." I'm skipping down, but it's still in the same article. "In 2011, Nebraska purchased a supply of sodium thiopental from Harris, prompting legal challenges and accusations that the supply was stolen. But the drug expired before questions about the purity of the drug and whether it was imported legally could be answered." The next article is dated May 27, which would be four days following the one I just read, and these are brief excerpts. And if you want to stop me anywhere along the way, just hit the table if you feel the need to comment. Since the Governor has been able to procure...this is a statement from Senator Jerry Johnson explaining why he would now vote to uphold the Governor's veto, whereas he had voted to advance the bill previously. "Since the Governor has been able to procure execution drugs, has made executions a high priority and has vowed to move as fast as possible on executions, Johnson said, he'll support Ricketts' veto. Ricketts said Tuesday the state has purchased the drugs. Chambers noted that the Governor has just one of the three drugs for lethal injection in hand. 'If he has paid the money as he said, mail delivery is not that slow.'" There was a notation, an article in the The New York Times repeating some of the things that I had said. But the date of that article, if anybody is interested, would be May 28, where they discussed the lengths that were being gone through by the Governor to deal with this guy Harris to get these drugs. This article is dated May 30, headline, "Push for executions runs into the FDA." "A push to execute 10 condemned men despite the repeal of Nebraska's death penalty was confronted with yet another hurdle Friday when a federal agency said the state cannot import a critical lethal injection drug." Now that article is dated May 30, so at least on May 30 you knew that the FDA said these drugs could not legally be imported into America. Is that true? [LR34]

SCOTT FRAKES: I was aware of that point. I'm not in agreement that it's correct, but I was aware of that point. [LR34]

SENATOR CHAMBERS: What don't you know is correct? [LR34]

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SCOTT FRAKES: It's still very much in question about whether or not the FDA's authority extends to that level. [LR34]

SENATOR CHAMBERS: But you know that the FDA said that it would be illegal. You know that has been said, don't you? [LR34]

SCOTT FRAKES: I know that's what they said, yes. [LR34]

SENATOR CHAMBERS: And you don't believe the FDA knew what it was talking about? Is that what I understand you to be saying now? [LR34]

SCOTT FRAKES: I believe that they are not correctly interpreting a court ruling. That's what I believe. [LR34]

SENATOR CHAMBERS: They're not correct in saying what? [LR34]

SCOTT FRAKES: Not correctly interpreting a court ruling. I'm not an attorney and I'm...so... [LR34]

SENATOR CHAMBERS: Why would you have to interpret that which the court says in plain language? It told...it issued its order with reference to the FDA and what it could and could not do. But you're saying that those clear English words were not correctly interpreted or understood by the FDA, which was the subject of that court ruling. Is that what I'm understanding you to say? [LR34]

SCOTT FRAKES: I believe they are overextending through their interpretation. [LR34]

SENATOR CHAMBERS: Okay. Continuing with the article: Governor Pete Ricketts said he agrees with the Attorney General that Nebraska should be able to execute its death row inmates upon receiving the drugs it recently bought from a broker in India. In Nebraska, the intentions of the Governor and Attorney General were thrown into doubt Friday when an official with the U.S. Food and Drug Administration said the state cannot legally import one of the two drugs, an

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anesthetic called sodium thiopental. And that's where you said the FDA is misconstruing what the court ruled. Correct? Okay. [LR34]

SCOTT FRAKES: That's my understanding of it, as a nonattorney, yes. [LR34]

SENATOR CHAMBERS: And as a nonattorney, you arrived at that conclusion by talking to somebody who is an attorney, didn't you? [LR34]

SCOTT FRAKES: I had conversations, yes. [LR34]

SENATOR CHAMBERS: And that attorney has a name, doesn't he? Doesn't he? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: And he works for the state, doesn't he? Was he elected? Is he an elected official? [LR34]

SCOTT FRAKES: I think we are moving into the area of attorney/client... [LR34]

SENATOR CHAMBERS: I couldn't understand you. [LR34]

SCOTT FRAKES: I think we are moving into that area of attorney/client privilege. I'm not quite exactly clear... [LR34]

SENATOR CHAMBERS: Well, I'm not asking...okay. Then did you talk to the Attorney General about this question that you and I are discussing now? It's not attorney/client privilege to tell me whether you talked to him or not. He's not wanted for committing a crime, is he? [LR34]

SCOTT FRAKES: Discussing the contents of the conversation, though, is privileged. [LR34]

SENATOR CHAMBERS: So you refuse to answer on the grounds that it might incriminate the Attorney General? [LR34]

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SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: Then answer. You talked to him, didn't you? [LR34]

SCOTT FRAKES: I've had conversations with the Attorney General. [LR34]

SENATOR CHAMBERS: About this subject we're discussing, correct? [LR34]

SCOTT FRAKES: I believe that's protected conversation. [LR34]

SENATOR CHAMBERS: Protected conversation, okay. [LR34]

SCOTT FRAKES: I believe...I...as you said, this isn't a hearing. And so I believe it is protected. [LR34]

SENATOR CHAMBERS: Okay. You're protecting him. "After being informed of the FDA's statement, James Foster, a spokesman for the Nebraska Department of Corrections"...do you know who James Foster is? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: Who is he? [LR34]

SCOTT FRAKES: He's my public information officer. Actually, his official title is legislative liaison. [LR34]

SENATOR CHAMBERS: Is he authorized to speak for the department, as he did in this instance? [LR34]

SCOTT FRAKES: Yes. [LR34]

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SENATOR CHAMBERS: Can we consider the words he expressed on behalf of the department to be an accurate reflection of the department's position? In other... [LR34]

SCOTT FRAKES: Would you repeat those again? [LR34]

SENATOR CHAMBERS: Can we... [LR34]

SCOTT FRAKES: No. Would you repeat what you... [LR34]

SENATOR CHAMBERS: ...accept his words as true? [LR34]

SCOTT FRAKES: Are you asking me specifically about what was written there? [LR34]

SENATOR CHAMBERS: Okay, I'll read the article. "After being informed of the FDA's statement, James Foster, a spokesman for the Nebraska Department of Corrections, said the agency has been advised by the Attorney General that its actions are 'proper and legal.'" Was he... [LR34]

SCOTT FRAKES: That's an accurate statement. [LR34]

SENATOR CHAMBERS: Isn't that attorney/client privilege that he violated? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: Did he tell what the substance of the discussion was between the department and the Attorney General? [LR34]

SCOTT FRAKES: No, he did not. [LR34]

SENATOR CHAMBERS: And you...they had been advised by the Attorney General that its actions are proper and legal. I'll let the article speak for itself. So I'm going to read this.

"Chambers (said he) told his fellow senators during debate on the repeal bill that the state would

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not be able to obtain the drugs. On Friday, he maintained that stance and predicted that the Governor and Attorney General would not succeed in their effort to carry out an execution. The Attorney General would first have to request a death warrant for one of the inmates, which would have to be approved by the Nebraska Supreme Court. Chambers said the court would carefully consider any legal questions surrounding the lethal injection drugs before setting an execution date." Departing from the article for a second, I could say that because the Supreme Court had already shown an interest in that subject. Back to the article, and this is a direct quote from me. "'The Governor and the Attorney General aren't dealing with politicians now, they're dealing with judges who respect the law and the constitution,' Chambers said. The Attorney General's Office earlier had generally agreed that the men on death row would obtain de facto reprieves under the repeal. But Peterson now says that upon further review of court cases, he believes there remains a legal controversy over what happens to the 10." This article is dated May 23: "Records show that Chris Harris, CEO of the India-based Harris Pharma LLP, contacted state officials April 14 to ask if they wanted 'a few thousand vials extra' of sodium thiopental, one of three drugs used in lethal injections. Sodium thiopental renders the recipient unconscious. The message made its way to Corrections Director Scott Frakes, who told Harris in an April 15 e-mail that he would like to connect as soon as possible." Is that accurate? [LR34]

SCOTT FRAKES: Sounds correct. [LR34]

SENATOR CHAMBERS: (Exhibit 9) Okay. I don't want to get Mr. Foster in trouble. I wouldn't know him from Adam's house cat. This article is dated May 31. But I think he's speaking out of school, based on what your position is, and he ought to follow his boss. James Foster, a spokesman for the Nebraska Department of Corrections, said that the agency has been advised by Peterson's office that its actions to obtain the drugs...the drug are legal. "There is no FDA rule or case law that the agency is aware of that would categorically preclude the importation of these two drugs," Foster said. You wouldn't have said that here, would you, because you didn't want to tell us what the Attorney General advised you? Isn't that true? So Foster said more to the media than you would say to this committee, based on the facts before us. Isn't that true? You wouldn't even tell me that you talked to the Attorney General about it. And he mentioned the content of the discussion, but I'll let that speak for itself. This is from The Atlantic magazine, June of this year. It was talking about its opinion of what the Governor was doing. The headline is,

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"Nebraska's Governor Threatens to Execute Prisoners Out of Spite." Subheadline: After his state abolishes the death penalty, Governor Pete Ricketts vows to apply it to the ten inmates still on death row. Then the article proceeds to mention impediments to the Governor doing what he would choose to do, and those I won't go into. But here is what is relevant: Layer three--as an impediment--is the bootleg...what...is the bootleg...do you know what the word "bootleg" means? You don't have to define it, but you know what that term means? [LR34]

SCOTT FRAKES: From a Prohibition standpoint, I certainly do. [LR34]

SENATOR CHAMBERS: "Layer three is the bootleg sodium thiopental. Ricketts says the state has ordered and paid for (but not yet received) this drug, part of the standard three-drug 'cocktail' used since the 1980s for lethal injection, from a distributor named Harris Pharma, run by Chris Harris. The state bought some thiopental through Harris Pharma once before. The federal Drug Enforcement Administration seized that shipment because the company isn't approved to sell it." Now, how could the FDA seize the shipment if it didn't have the authority to do so? Why did not the Attorney General go to court and have the court order the FDA to release those drugs? Because they believed the FDA had the authority, isn't that right? That's what we can conclude, can't we? Well, anyway...Harris had gotten the drugs from a Swiss company by lying about what he was going to do with it. Now the Food and Drug Administration is under a 2013 order from the D.C. Circuit to seize all sodium thiopental coming into the United States from unregistered dealers like Harris Pharma. That's what the court case says. But you say, when the FDA read that the circuit court...I'm the FDA. The circuit court said, Chambers, you seize any thiopental that comes into this state from...this country from overseas. How many ways can that be interpreted? [LR34]

SCOTT FRAKES: The key word there was "unregistered." So if the drug, in fact, is registered, then it could be imported. [LR34]

SENATOR CHAMBERS: Is he registered? [LR34]

SCOTT FRAKES: That process is underway. I don't know all the details at this point. [LR34]

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SENATOR CHAMBERS: Do you remember being asked that question at a committee hearing and you would not answer it? Put your thinking cap on now. [LR34]

SCOTT FRAKES: No, but I... [LR34]

SENATOR CHAMBERS: Okay, well, if you don't remember it, I won't push you to recollect what you've already said you don't. But anyway, the court ordered him to seize these drugs, the FDA. "Nebraska isn't bound by the D.C. Circuit decision, Attorney General Peterson told a newspaper; the state wasn't a party to the case. True enough: The order binds the FDA, not the government of any state."..."under the court's order, the FDA is required to seize any shipment at the border. There's no way for Nebraska to get its drug supply--'unless they plan to smuggle it in in someone's backpack.' The Governor's Office did not return a call." I don't know if you can answer this question or not. You've talked to the Governor about this matter that we're discussing here. Is that true? Let me make it broader. Have you discussed with the Governor the effort to procure these drugs from Harris Pharma in India? Have you discussed that matter with the Governor? Let me change the wording. Have you and the Governor exchanged words related to this subject? Let me ask it a different way. Does your silence indicate that you and the Governor have never discussed this matter of procuring these drugs from Harris Pharma? You've never discussed it with the Governor. Is that true? We have the media here. I want you to come clean or stay away dirty. You've never discussed it with the Governor, true? [LR34]

SCOTT FRAKES: I'm just trying to recall, to make sure that... [LR34]

SENATOR CHAMBERS: You're trying to recall whether you talked to the Governor about this? Do you have a lunch engagement with the Governor tomorrow about noon? [LR34]

SCOTT FRAKES: An award ceremony, yes. [LR34]

SENATOR CHAMBERS: You remember that, don't you? [LR34]

SCOTT FRAKES: It's tomorrow. [LR34]

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SENATOR CHAMBERS: But you can't remember whether you talked to the Governor about this subject, which has been in all the newspapers. You know that shipments of these drugs that came into Arizona and Texas were seized by the FDA. You know that, don't you? [LR34]

SCOTT FRAKES: I am aware of that. [LR34]

SENATOR CHAMBERS: But you don't remember whether you ever talked to the Governor about any of this? Okay. [LR34]

SCOTT FRAKES: I'm just trying to remember an early conversation about whether or not we would be able to procure the drugs and what my experiences were in Washington State. [LR34]

SENATOR CHAMBERS: Does the Governor know that you're trying to do...oh, you wouldn't know what the Governor knows. Since he hasn't talked to you, he wouldn't have told you, would he? Do you think from reading the newspaper that the Governor is aware of what you're trying to do with reference to procuring these drugs? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: Do you think the Attorney General may have talked to the Governor? You don't know it, but speculate. Do you think the Governor and the Attorney General may have discussed this matter in the same way that the Attorney General and you have discussed it? [LR34]

SCOTT FRAKES: No, I won't speculate. [LR34]

SENATOR CHAMBERS: You don't want to speculate. [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: Would an ordinary, reasonable, and prudent person conclude that the Governor and the Attorney General have discussed it, in view of all the things they've read in the

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newspaper? Would an ordinary person get that impression? You don't want to speculate what an ordinary, reasonable, and prudent person would do. Is that correct? [LR34]

SCOTT FRAKES: That's correct. [LR34]

SENATOR CHAMBERS: (Exhibit 16) This article is from June 12 of this year: "For drugs, Nebraska may try to skirt FDA." Subhead: "But relying on DEA for import approval 'unlikely' to work, spokesman says." Reading from the article: "The last time Nebraska imported a lethal injection drug, four years ago, state officials worked closely with the Drug Enforcement Administration," DEA. "Nebraska's prison director," which would be you, Mr. Frakes, "is banking on the same approach this time, recently obtained documents show, even though the U.S. Food and Drug Administration says the hard-to-get lethal drug can't be legally imported." So at the point of this article being written, you were counting on the DEA going around the FDA and allowing the drug to come in anyway. Is that true or false? [LR34]

SCOTT FRAKES: That's not true. [LR34]

SENATOR CHAMBERS: What were you trying to get the DEA to do? [LR34]

SCOTT FRAKES: I was not trying to get the DEA to do anything. I was definitely trying to make sure that I had filled out and provided the correct paperwork required by the DEA so that under our importer license we had done the things we were supposed to do. [LR34]

SENATOR CHAMBERS: And if the DEA said yes, then what? [LR34]

SCOTT FRAKES: Just that covers one of the bases required to bring... [LR34]

SENATOR CHAMBERS: Which agency deals with export and import of food and drugs into this country, the DEA or the FDA? [LR34]

SCOTT FRAKES: When it comes to controlled substances, there's an overlap. [LR34]

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SENATOR CHAMBERS: No, you're drawing...you're jumping to a conclusion. You're speculating. This drug is not classified as a controlled substance, is it? [LR34]

SCOTT FRAKES: Sodium thiopental is, yes. [LR34]

SENATOR CHAMBERS: That would be under the DEA's control? [LR34]

SCOTT FRAKES: In terms of Schedule--whichever it is--Schedule III drugs. [LR34]

SENATOR CHAMBERS: And if the DEA said yes, then the FDA would have to allow it to be imported. Is that what you're telling me? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: Oh, okay. So you were really wasting time and spinning your wheels and speculating when you went to the DEA, is that correct? [LR34]

SCOTT FRAKES: No, that was part of the required process. I have to fill out and submit, I think, the D236 form that says that I'm... [LR34]

SENATOR CHAMBERS: Okay, and after you got it filled out, what were you going to do with it? [LR34]

SCOTT FRAKES: I submitted it to the DEA. [LR34]

SENATOR CHAMBERS: To the DEA or the FDA? [LR34]

SCOTT FRAKES: The DEA. It's a DEA requirement. [LR34]

SENATOR CHAMBERS: But you...okay, now you're dealing with the DEA. I'm asking you, why were you dealing with the DEA? [LR34]

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SCOTT FRAKES: Because I was importing a Schedule...I think it's Schedule III narcotic drug that's under the drug enforcement side of this issue. And I'm required to fill out and submit the proper paperwork to allow me to import the drug under those rules and their regulations. That does not address the FDA's issues. [LR34]

SENATOR CHAMBERS: To whom would you have submitted that documentation that you're talking about that you just had filled out? To whom would that be submitted? [LR34]

SCOTT FRAKES: I don't recall the name. It was the appropriate location address. [LR34]

SENATOR CHAMBERS: What agency? [LR34]

SCOTT FRAKES: Drug Enforcement Agency. [LR34]

SENATOR CHAMBERS: And what did they tell you when you submitted that to them? [LR34]

SCOTT FRAKES: Initially, they expressed concerns. And then they came back and said that the paperwork was correctly filled out and that was the end of their part of it because I have a drug importing license. [LR34]

SENATOR CHAMBERS: Did you know what...do you think they knew why you were trying to get this information from them? Did you let them know that the FDA has said that if you brought that drug or attempted to bring it into this country, and if it made it here, the FDA would confiscate it? You did not want that to happen, therefore, you were trying to get this declaration from the DEA. You did not explain that to the DEA. You just asked them on which schedule would you find sodium thiopental. Is that the only question you put to the DEA? [LR34]

SCOTT FRAKES: I really didn't put a question to the DEA. I filled out the required paperwork and submitted it, as is required by the DEA. There was no attempt to subvert, go around, hide the ball. I kept all of this very much open in the terms of making sure that people were notified that needed to be notified, fully expecting that the FDA would have their own processes that needed to be addressed. [LR34]

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SENATOR CHAMBERS: Have you heard a song the title of which is "That's Amore"? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: What is a moray? [LR34]

SCOTT FRAKES: Isn't that love? [LR34]

SENATOR CHAMBERS: It's an eel. It's an eel. A moray is an eel and eels are very slippery. I might dub you, when I see you, "that's a moray." But anyway, let me go on. I'm just trying to lighten the mood a little bit. [LR34]

SCOTT FRAKES: That was pretty good. [LR34]

SENATOR CHAMBERS: Gave you a chance to take a little drink of water. [LR34]

SCOTT FRAKES: Yeah. [LR34]

SENATOR CHAMBERS: I'm going to go on with the article. "State officials have been vague about how they intend to get past the apparent FDA roadblock, saying only that they have followed proper channels and still expect to receive the foreign-made sodium thiopental. But based on records recently provided to a committee of state senators, prison officials are trying to have the drug shipped, not as a medicine through the FDA, but as a controlled substance through the DEA." So you did contact the DEA for the purpose of trying to get this drug into the state. Isn't that true? You weren't just filling out papers; you were trying to get them to get it on into this country. Isn't that what you were trying to do? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: Okay. Then I think the reporter lied. Who wrote this article? Joe Duggan got it wrong. Let me read it: Based on records recently provided to a committee of state senators, prison officials are trying to have the drug shipped, not as a medicine through the FDA,

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but as a controlled substance through the DEA. You're saying the reporter got that wrong, aren't you, if that's what he wrote? [LR34]

SCOTT FRAKES: That's incorrect. [LR34]

SENATOR CHAMBERS: "Such an approach faces little chance of success, according to federal officials. 'If the FDA says you cannot import it, we would not ignore that,' said Barbara Carreno," C-a-r-r-e-n-o, "a spokeswoman for the DEA. The DEA falls under the control of the U.S. Department of Justice. When asked whether"...hmm, something must be cut off here. Oh. "When asked whether Nebraska could import the drug as a controlled substance for use in a lethal injection, a department spokesman said: 'It seems unlikely.'" Going further into the article: In his latest..."The last time the state obtained sodium thiopental from the same Indian supplier, in 2011, it did so using an importer's license issued by the FDA (sic--DEA). That supply expired in early 2014." So the importer's license mentioned here is the one possessed by your department as the importer. That part is correct, isn't it? [LR34]

SCOTT FRAKES: I believe it's a DEA license. [LR34]

SENATOR CHAMBERS: The holder of the importer license would be you. [LR34]

SCOTT FRAKES: I do have an importer license, but my memory is it's a DEA license, not an FDA license. [LR34]

SENATOR CHAMBERS: If the last time the state obtained sodium thiopental from the same Indian supplier in 2011, the department did so using an importer's license issued by the FDA...by the DEA. If the DEA issued the license, it's not the...DEA doesn't have a license. If the DEA issued an importer's license, it's issued to somebody or some entity. To what entity was that DEA importer's license issued? [LR34]

SCOTT FRAKES: Nebraska Department of Correctional Services. [LR34]

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SENATOR CHAMBERS: (Exhibit 15) Okay. That's all you had to say in the first place. Well, I'll be. Continuing with the article, "Frakes did not answer a committee question about whether the manufacturer is FDA approved, but instead provided a copy of the department's DEA importer's license." Don't that beat all. You wouldn't answer the question then. "When contacted recently," and this article is dated June 12, "When contacted recently, several committee members said they were not yet prepared to comment about the director's responses to their inquiry." I'm getting close to the end now. In a May...this article is dated June 19: "Lethal Drugs Not Yet Shipped from India. Checks issued by state haven't been cashed by company." That's as of June 19, but as of today they have been cashed. Going down into the part that might be of interest to you, "In a May 28 letter to Frakes, the FDA's Domenic Veneziano," V-e-n-e-z-i-a-n-o, "said he had notified Nebraska prison officials in 2012 that a federal judge had ordered the FDA to block shipments of foreign-manufactured sodium thiopental. The letter to Frakes"--he wrote that information to you in a letter dated May 28--"the letter to Frakes--a former Washington prison executive appointed by Ricketts to run Nebraska's prisons earlier this year-- included the federal court orders pertaining to sodium thiopental." Did you receive such a letter May 28 with a copy of this court order? [LR34]

SCOTT FRAKES: I remember the letter. [LR34]

SENATOR CHAMBERS: Okay. Quote, and see if this quote rings a bell with you, "Please note, there is no FDA-approved application for sodium thiopental, and it is illegal to import an unapproved new drug into the United States," the letter stated. Does that ring a bell to you? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: So the problem here is that the drug is unapproved,... [LR34]

SCOTT FRAKES: At that time. [LR34]

SENATOR CHAMBERS: ...not that this guy is not registered. That's just another issue. "On May 29, in response to questions from the World-Herald, the FDA said the drug would be refused

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admission into the U.S. On the same day, Frakes sent an e-mail to the Indian broker, asking for a call back to discuss the FDA's stance." Is that true? Did you send such an e-mail? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: Okay. "'Will give you a call tomorrow, as I don't have coverage here,' replied Chris Harris, the drug broker." Was that his reply in substance to you, that he would call you later? [LR34]

SCOTT FRAKES: Sounds right. [LR34]

SENATOR CHAMBERS: Okay. Corrections spokesman James Foster said Thursday...here's where he's getting like you now. He finally caught on. "Corrections spokesman James Foster said Thursday that Frakes and Harris later discussed the FDA matter over the phone, but Foster declined to describe the conversation or what resulted from it." He caught on that you don't spill the beans because we're dealing in illegal drug deals and we don't want any of this out there. If it was all on the up and up and honest, why couldn't it be said? So I'm going to ask you--you're not a lawyer, Harris is not a lawyer--what did you and he discuss on the telephone about that FDA matter? Or do you choose not to answer? I'm not going to try to make you do something you don't want to do. If you just choose not to answer, that ends it. Would you rather not answer? [LR34]

SCOTT FRAKES: I'm willing to answer. [LR34]

SENATOR CHAMBERS: You're...okay, so tell me what you guys talked about, to the best of your recollection. [LR34]

SCOTT FRAKES: I believe...I would say we...I'm trying to recall the conversation. I don't clearly recall the conversation. I asked him questions about the letter, where we were at with the process. We talked about the FDA drug registration process that was in motion. And that's about how much I recall. So that's the key piece of this is...and why we're where we're at today. [LR34]

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SENATOR CHAMBERS: Okay. [LR34]

SCOTT FRAKES: There's not been any effort to try to important an illegal substance. There's not been an effort to hide the process any more than just minimizing the amount of furor around all of these issues. [LR34]

SENATOR CHAMBERS: Well, if there's no attempt to hide anything, you've certainly done a good approximation. When the moon in the sky like a big pizza pie, that's amore. Continuing. That's to lighten the mood. "An e-mail message sent to Harris by the World-Herald was not returned Thursday. In the meantime, Nebraska will continue to try to get the drugs using an importer's license issued by the Drug Enforcement Administration." That's despite your having been told that it's not likely that it will happen. [LR34]

SCOTT FRAKES: That's not a correct interpretation of the facts. [LR34]

SENATOR CHAMBERS: Okay. Let me go on. "Foster said prison officials have been in talks with the DEA. A spokeswoman for the DEA has said the agency would not allow a foreign drug in unless it was approved by the FDA." Do you remember her telling you that? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: But despite her telling that, you all are still trying to get her to get the DEA to go against the FDA, isn't that right? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: Then what are you trying to do with all these continuing efforts? [LR34]

SCOTT FRAKES: Trying to make sure that we supply the correct paper to the DEA...the correct paperwork to the DEA to ensure we've covered that part of the process. It's not a singular process. The drug... [LR34]

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SENATOR CHAMBERS: Let me stop you though... [LR34]

SCOTT FRAKES: Sure. [LR34]

SENATOR CHAMBERS: ...before you repeat more than you have to. The holdup is not your paperwork to the DEA. Your holdup is that the DEA said it's in line with the FDA. And no matter what you write, no matter what you say, as long as the FDA says it cannot be imported, it's not going to be imported. You didn't get that understanding from what the spokesperson for the DEA told you? [LR34]

SCOTT FRAKES: We ultimately agreed that the paperwork supplied was correct and we were given the correct number that supports that. And that took care of that piece of the process. [LR34]

SENATOR CHAMBERS: Okay. "Nebraska Treasurer Don Stenberg said Thursday that it would be possible to cancel payment on the checks." But he didn't do that, did he? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: And the checks were cashed, weren't they? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: You paid for goods never received, didn't you? [LR34]

SCOTT FRAKES: Not yet received, yes. [LR34]

SENATOR CHAMBERS: And you did it because the person from whom you purchased told you you'd better do that. Correct? [LR34]

SCOTT FRAKES: That was the offer. [LR34]

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SENATOR CHAMBERS: My counsel: "Though prepayments are not illegal, per se, they are in conflict with the normal claims process...State Accounting reserves the right to review all prepayment requests." Did you go through State Accounting before you paid up-front to this man who had been shown by the documentation available if you all had exercised due diligence...did they approve you paying this rascal up-front for drugs that the FDA said could not be imported? That's too long a question, too difficult to fabricate and...? [LR34]

SCOTT FRAKES: It leaves a lot of factors in there. Specific to the question about approval to prepay, I asked specific questions. I believed that I had the authority to make the purchase and to prepay. [LR34]

SENATOR CHAMBERS: (Exhibit 13) This article...as you notice, I'm letting you go on that. This article is...I'm almost at the end now. August 7 headline: "Ricketts is confident executions will happen. Ricketts: He offers no timeline (sic) on when execution drugs may arrive." Reading from the article: The state has not yet imported the drugs it bought in May from a broker in India. An office (sic--official) with the U.S. Food and Drug Administration has said one of the two drugs Nebraska purchased cannot legally be imported. Ricketts said Thursday that state officials remain in discussions with the Drug Enforcement Administration to get the drugs shipped. He offered no timeline (sic), however, on when the drugs could arrive. A DEA official has said the agency is working in tandem with the FDA on the issue, suggesting that Nebraska would not be able to use one federal agency to go around another. This is what I want to emphasize for your consideration, "Ricketts said Thursday that state officials remain in discussions with the Drug Enforcement Administration to get the drugs shipped." Are you one of those state officials involved in these discussions with the DEA? [LR34]

SCOTT FRAKES: So again, I don't know if that's a misquote or if there was just confusion, as there was earlier. It's easy for FDA, DEA in conversations to get interchanged. My... [LR34]

SENATOR CHAMBERS: Did you want me to read this paragraph again (inaudible)... [LR34]

SCOTT FRAKES: No, I understand what it says there, but my interaction has been... [LR34]

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SENATOR CHAMBERS: Well, let me ask you, are you aware that the Governor has made public statements that state officials remain in discussions with the Drug Enforcement Administration to get the drugs shipped? Are you aware that state officials are continuing those discussions with the DEA? Are you aware of it? [LR34]

SCOTT FRAKES: I'm not... [LR34]

SENATOR CHAMBERS: You're not aware that they are? [LR34]

SCOTT FRAKES: I'm not aware of conversations at this point in time with the... [LR34]

SENATOR CHAMBERS: Say it again. [LR34]

SCOTT FRAKES: I'm not aware of conversations with the DEA at this time. [LR34]

SENATOR CHAMBERS: (Exhibit 12) Okay. That's fair, because this article was in August. This one is in September, the 18th, World-Herald. "FedEx says drug package never left India. Improper paperwork thwarted an effort by Nebraska prison officials to import a disputed shipment of lethal injection drugs earlier this month. Despite warnings from the U.S. Food and Drug Administration" ...I'll go by that again because you were drinking water and you may have missed it. "Despite warnings"--hey, listen up, red light, red flag, stop, don't pass go--"despite warnings from the U.S. Food and Drug Administration that it is illegal to import foreign-made sodium thiopental, the state proceeded with plans to obtain the drug from a pharmaceutical broker in India." Is that true or false? Did you all continue proceeding to try to get these drugs despite those FDA warnings that importing them would be illegal? Were you still trying to import them? [LR34]

SCOTT FRAKES: What is correct is that I am still continuing to work to import them legally. [LR34]

SENATOR CHAMBERS: That's what you're doing now? [LR34]

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SCOTT FRAKES: That's what I've been doing all along. I've never... [LR34]

SENATOR CHAMBERS: Well, let's talk about now. [LR34]

SCOTT FRAKES: Okay. [LR34]

SENATOR CHAMBERS: You're doing that now? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR CHAMBERS: So what are you doing? How are you doing that? [LR34]

SCOTT FRAKES: Sitting patiently and waiting for Mr. Harris to see if he is able to procure what he needs from the FDA. [LR34]

SENATOR CHAMBERS: So you work by sitting and waiting. That's how you describe working? [LR34]

SCOTT FRAKES: It's not... [LR34]

SENATOR CHAMBERS: You said you were working to get this done. Are you talking to anybody about this, anybody in a position to do something if they chose to do so? In other words, are you in discussions with any federal agencies, spokespersons for any agency, workers for any federal agency? Do you have any contact with anybody, with any federal agency relative to trying to obtain importation of these drugs? If I didn't make myself clear, I'll repeat it. [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: I didn't make myself clear? [LR34]

SCOTT FRAKES: You were very clear. No, I'm not engaged in conversations. I know what the FDA's stand is. [LR34]

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SENATOR CHAMBERS: Okay. [LR34]

SCOTT FRAKES: So I'm allowing the people that understand how to legally import drugs, how to gain FDA approval, how to do that process, those slow... [LR34]

SENATOR CHAMBERS: So right now... [LR34]

SCOTT FRAKES: That's Mr. Harris' responsibility. That isn't my responsibility. [LR34]

SENATOR CHAMBERS: So to describe your position right now, you're in the pause mode. You're not doing anything. You're hoping, but you're not actually party to any discussions or activity to make this happen. You're not talking to anybody. Is that true? [LR34]

SCOTT FRAKES: Other than getting updates from Mr. Harris on occasion just to see where things are at. [LR34]

SENATOR CHAMBERS: When was the last time you were updated by Mr. Harris, who is now on the lam from what I can gather? [LR34]

SCOTT FRAKES: Probably less than a week ago. I can't remember... [LR34]

SENATOR CHAMBERS: And where was he at the time you got that update? [LR34]

SCOTT FRAKES: I believe he was in India. I didn't ask him what his location was. [LR34]

SENATOR CHAMBERS: Where in India? You got an e-mail from him though, didn't you? [LR34]

SCOTT FRAKES: It's been awhile since I had an e-mail. [LR34]

SENATOR CHAMBERS: Well, how did he...you said last week or a week or so ago. How did he... [LR34]

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SCOTT FRAKES: Yeah, talked by telephone. [LR34]

SENATOR CHAMBERS: How did he contact you? [LR34]

SCOTT FRAKES: Telephone. [LR34]

SENATOR CHAMBERS: Oh, telephone. You know why they wouldn't let it come through? "Improper or missing international paperwork' filed by the drug exporter prompted FedEx to return the shipment before it left India, Jim McCluskey," M-c-C-l-u-s-k-e-y, for the benefit of the transcribers, "a spokesman for FedEx, said Thursday. The company sends information about all imported drugs to the FDA and U.S. Customs officials in advance of their delivery, McCluskey said. 'If the shipment is authorized, we will deliver it to the recipient,' he said. 'If it is not, we will return it to the foreign shipper.'" So the problem, the fault lies with this shyster who did not properly fill out the paperwork to have these drugs shipped. Isn't that correct? Maybe you don't think he's a shyster, so let me ask it without those loaded terms. The honorable Mr. Chris Harris, highly respected and believed in and trusted by Nebraska officials, especially Mr. Scott Frakes, Director of the Department of Correctional Services, that Mr. Harris did not properly fill out the paperwork, is that correct, and that's why these drugs were not allowed to leave India? [LR34]

SCOTT FRAKES: There was an issue with the paperwork. I'm not going to say it was Mr. Harris didn't fill it out correctly or FedEx didn't feel they had what they needed. [LR34]

SENATOR CHAMBERS: Who didn't fill it out correctly, the gremlins? [LR34]

SCOTT FRAKES: I do not know. I don't know the specifics of what the issues were. [LR34]

SENATOR CHAMBERS: Oh. You won't speculate that Mr. Harris, who is in this deal with you, is the one who filled out these papers to send the drugs to you that he said he would get to you. You will not speculate that he is the one who did not properly fill out the papers? [LR34]

SCOTT FRAKES: I will not speculate. I do not know what the specific issues were with the paperwork. It's Mr. Harris' responsibility to provide and ship...get them here to America. [LR34]

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SENATOR CHAMBERS: Okay. This article is September 19 and it's my last one. Headline: State may be breaking law in attempts to import drugs. "A federal prosecutor has asked the U.S. Food and Drug Administration to weigh in on whether Nebraska officials are violating the law in their efforts to import a disputed death penalty drug." And this article is from the World-Herald, September 19. "Last month, the ACLU of Nebraska prodded federal prosecutors to investigate Nebraska's attempts to import sodium thiopental, one of three drugs the state needs to carry out an execution. The FDA has said the drug is not approved in the U.S., and it would be illegal to import a foreign-made version of the substance. U.S. Attorney Deborah Gilg," G-i-l-g, "said in a recent letter that her office was unable to determine whether criminal or civil laws were broken. She has since sought further guidance from the Office of the Inspector General of the FDA. Jan Sharp," S-h-a-r-p, "chief of the General Crimes Unit at the U.S. Attorney's Office in Omaha, said Friday that he was awaiting the FDA's response. Gov. Pete Ricketts has said, the state is communicating with federal officials in its efforts to obtain \$54,400 worth of lethal injection drugs that it purchased earlier this year from a broker in India. Earlier this month, however, a shipping company returned a package of the disputed drug that was bound for Nebraska before it even left India." When was the last time you spoke to the Governor, if you can remember that and if it's not shielded by some principle or scruple or law or other? [LR34]

SCOTT FRAKES: About 1:20 today. [LR34]

SENATOR CHAMBERS: About when? [LR34]

SCOTT FRAKES: One-twenty p.m. today as I walked here to this room. [LR34]

SENATOR CHAMBERS: And if you remember, roughly how long prior to that was it before you talked to him? How long did you talk to him today? For how long a period of time, would you say? [LR34]

SCOTT FRAKES: Less than five minutes. [LR34]

SENATOR CHAMBERS: Did he...did you tell him what you were going to talk about when you got here? [LR34]

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SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: And he didn't ask you? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR CHAMBERS: So what did he say, hi, "Amore," how are you, I'm fine and hope you are the same, and that was about the extent of it? When was the last time you had a discussion of any length with him? And by any length, I would say at least ten minutes. Or don't you talk to him for that long a period of time? Do you... [LR34]

SCOTT FRAKES: It was Monday or Tuesday. I just... [LR34]

SENATOR CHAMBERS: Okay, but whenever... [LR34]

SCOTT FRAKES: It's been quite a long week. [LR34]

SENATOR CHAMBERS: Okay. But whenever you talked to him, however long ago it was, however long you talked to him, you and he never talked about this issue of trying to get these drugs? That's what you said earlier. You still stick by that now? [LR34]

SCOTT FRAKES: I'm trying to recall if we have had those conversations and I'm not pulling them up, so. [LR34]

SENATOR CHAMBERS: I'm going to say like the lawyers say: For a man who remembers in detail every exculpatory "t" crossed, "i" dotted, certainly has difficulty remembering significant things such as whether he talked to the Governor about the thing which is an obsession with the Governor, a thing about which the Governor is rabid, a thing about which the Governor talks incessantly and yet the man who he appointed to head the agency, whose job it is to oversee state killing, he never discussed this issue with you. So what about your job has he discussed with you? I don't mean in detail. What subject has he discussed with you about your job? [LR34]

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SCOTT FRAKES: We've talked about, in broad terms, programming needs. We have talked in broad... [LR34]

SENATOR CHAMBERS: About what? [LR34]

SCOTT FRAKES: Programming needs, construction needs, general budget issues. [LR34]

SENATOR CHAMBERS: Construction needs, okay. But he didn't talk to you about trying to get these drugs? [LR34]

SCOTT FRAKES: As I said earlier, we had a conversation in February, I believe it was, just about the ability. [LR34]

SENATOR CHAMBERS: That's all I have, and thank you very much. I'm through, Mr. Chairman. [LR34]

SENATOR SEILER: Any further questions? [LR34]

SENATOR PANSING BROOKS: Some on the death penalty but some on other things, too, because I...this is my turn. [LR34]

SENATOR SEILER: You don't clear them with me. You're on turn. [LR34]

SENATOR PANSING BROOKS: My turn, okay. This is my turn? Is this my turn? [LR34]

SENATOR SEILER: Yes. [LR34]

SENATOR PANSING BROOKS: Okay, good, thanks. Thank you, Chairman Seiler, I appreciate it. And thank you, Director Frakes. I think I guess I just am trying to look at what seems to be sort of a dangerous precedent to pick and choose which laws we're going to follow because Judiciary in...let's see, overrode the veto on May 27 and it became law on August 30. Did you participate in attempts between August 30 and October in trying to talk to the FDA to try to get

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these drugs brought in here? Did you talk during that time to Harris? Which I think it's really unfortunate that he's named Harris, because we have Harris Labs here and people are getting this confused all over the place, that this has nothing to do with the Harris Labs that is here in Lincoln. But have you been working consistently on this at times or how has that gone? [LR34]

SCOTT FRAKES: I have just maintained contact to see how the process was going to obtain the necessary paperwork, to legally ship the drug here and go forward with the process, recognizing that the FDA is going to challenge, and we would follow the process from there, so. [LR34]

SENATOR PANSING BROOKS: Okay, so you went forward with this even though the law here in Nebraska at that time was that it was no longer a valid form of punishment. [LR34]

SCOTT FRAKES: I feel an obligation that I paid \$54,000 for a product, feel an obligation to follow through with that even if, in fact, it ends up not being of any value. [LR34]

SENATOR PANSING BROOKS: What was the date that that check was cashed, do you know? [LR34]

SCOTT FRAKES: I think it was beginning of July I thought I saw something. I expected it to happen sooner. The agreement was payment pretty much on receipt of the purchase order. [LR34]

SENATOR PANSING BROOKS: And have you made any effort to go after that money or are you just...are we assuming that the drugs are still going to come? [LR34]

SCOTT FRAKES: I'm still going with the belief that the drugs will be brought to the country. [LR34]

SENATOR PANSING BROOKS: Even though it's illegal. [LR34]

SCOTT FRAKES: Not illegally. [LR34]

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SENATOR PANSING BROOKS: Pardon me? [LR34]

SCOTT FRAKES: Not illegally. That is part of the reason that they are still sitting in India. [LR34]

SENATOR PANSING BROOKS: But it's been stated that it's illegal, that they are illegal drugs and that they will not be brought into the country. [LR34]

SCOTT FRAKES: There is an FDA registration process and that's the process that's being followed. It's not being made easy because of all of the controversy and all of the challenges around that. But there is a...it isn't that the drug can never be imported. The FDA's responsibility is to assure purity, to determine that the product is as described, and to authorized legally labeled products. That's how much I understand about the FDA registration process. I don't want illegal drugs. They'd be of no value. [LR34]

SENATOR PANSING BROOKS: Okay. I'm going to switch gears here for a little bit. I was wondering about the restrictive housing. You talked a little bit about the fact that you're adding bunks, is that correct, to the restrictive housing unit at Tecumseh? Is that right? [LR34]

SCOTT FRAKES: Repurposed half of the...what was the restrictive housing unit. [LR34]

SENATOR PANSING BROOKS: So what does that mean? [LR34]

SCOTT FRAKES: It means it's no...that half of the unit referred to for now as SMU-West, just because it's a convenient descriptor, that half of what was originally built as a 200-bed restrictive housing segregation unit, took 100 beds, SMU-West, double bunk those. You're housing maximum custody, level 4 security inmates and we are actively in the process of making it operate like a general population living unit for high security, level 4. [LR34]

SENATOR PANSING BROOKS: Okay. It's my understanding that there are certain standards for beds and certain square-footage standards. [LR34]

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SCOTT FRAKES: That's correct. [LR34]

SENATOR PANSING BROOKS: What about that? If you're changing that unit into double-bunked areas, are you meeting the standards? [LR34]

SCOTT FRAKES: Yes. [LR34]

SENATOR PANSING BROOKS: How can you take a room that's a cell, put two beds in it, and still meet the standard, because it wasn't built...it was built way bigger than the standard? What is the square footage? [LR34]

SCOTT FRAKES: There's a variation between what one can...I can't quote you off the top of my head. I just know that I verified that the cells were big enough to house two people. [LR34]

SENATOR PANSING BROOKS: So they were built double their size, double their capacity? [LR34]

SCOTT FRAKES: No, because that's not how the standard works. I can get back to you and give you more information on that. I'd be glad to do that. [LR34]

SENATOR PANSING BROOKS: Okay. I had just seen...I'm of course having trouble finding it, but there were all sorts of statistics about what the ACA requires and suggests for housing. So what about staffing for the extra people? I know that you said that you don't really need more staffing at Tecumseh, but you're adding more people there. [LR34]

SCOTT FRAKES: Because, again, that unit was the one unit, because it was originally designed as restrictive housing, run as a segregation unit, the staffing level was significantly higher than any other unit in that facility, typical of segregation units. At this point I have not changed that staffing. So even though we're in the process of converting it to a higher security but general population living unit, it still has the same staffing level as a segregation unit. So it could, in fact, be overstaffed but for now I'm quite happy to have it staffed as it is. [LR34]

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SENATOR PANSING BROOKS: Okay, so what's happening on the other side? You said you split it in half. So are you taking some of that staff from that other side to be able to meet what is a double-staffed area? Is that what I'm understanding? [LR34]

SCOTT FRAKES: No, no. [LR34]

SENATOR PANSING BROOKS: Okay. [LR34]

SCOTT FRAKES: Again, staffing for the entire unit, think of it as what was originally a 200-bed segregation unit, had the highest staffing level of any living...any unit that we have. It's not a living unit because restrictive housing is not considered capacity beds. So the staffing, and I can't quote you what the staffing is, just that it is significantly higher in our segregation/restrictive housing units, repurposed one-half of the unit. Don't think of it in the terms of like I put a wall down the middle. It's literally...there's 100 beds on one end of it and then there's office space and corridor and there's 100 beds on the other end of it, like...it works well as two separate living units. Repurposed what was 100 beds, went to double bunking, still within standards for two people within a cell, did not change the staffing level that was allocated to that space. So that's a staffing level that's based on restrictive housing or segregation, highest staffing level that we put in any units. I left that staffing level in place. We'll do the staffing analysis and we'll determine at some point whether or not that's the number of staff that it truly takes to run the unit. If we agree that it does, I won't make any changes. As I said, I would... [LR34]

SENATOR PANSING BROOKS: And you talked about protective custody staffing coming in. So will...I presume that grouping needs more mental health help. [LR34]

SCOTT FRAKES: We're making sure that those that have higher mental health needs and require protective custody stay here at the Lincoln Correctional Center. [LR34]

SENATOR PANSING BROOKS: Okay. So how many mentally ill are right now in restrictive housing? [LR34]

SCOTT FRAKES: I don't have an answer for that question. [LR34]

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SENATOR PANSING BROOKS: Can you find that out? [LR34]

SCOTT FRAKES: I'll see what I can do. [LR34]

SENATOR PANSING BROOKS: Okay. And do you have an idea of how long you plan to keep people with mental disabilities in segregation? [LR34]

SCOTT FRAKES: That is one of the very important questions that comes out of LB598 that we'll have resolved before the end of the year. My goal right now would be, if someone has a major mental illness diagnosis, that we are doing an immediate review, determining whether or not there is a need to move them to Lincoln Correctional Center where I have the secure mental health beds. Even though they have a major mental illness, if they are stable, medication is stable, responding to therapy and treatment, it may be appropriate to continue that placement while we figure out what it is...what issues need to be addressed and where they should be housed. If they are not stable, then we're going to take them to Lincoln, doesn't matter if they're at Tecumseh, at the penitentiary. Some cases could be even at Omaha. It does happen occasionally. [LR34]

SENATOR PANSING BROOKS: And do you feel that Lincoln has enough beds? [LR34]

SCOTT FRAKES: That's part of what we're trying to get a real good sense of as we look at our whole behavioral health system. There may be enough beds today, but I'm certainly not satisfied that what we're using as secure mental health is the right answer. We'll be talking at some point about what we need to do to create the correct space for that most...the deepest end of our population. But for now, at least, we do have dedicated space. The programming chair, security programming chairs have arrived and they'll be installed in the day room, so they can start doing some group...I won't say therapy, but at least group programming in that unit. And we're doing...we're making good headway within the limitations we have in terms of space, somewhat with staffing, in creating a transitional system unlike what we've had up until now. So if someone is actively psychotic, not med compliant, we've got some space we can house them in. We have interventions that we can deliver quickly. And as they become stabilized, we have some...not the best programming space, but we have programming space and it's safe and usable, get them a

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little further along. And we've got the 84 beds next door that are more kind of a medium/max, under our current definition, residential mental health treatment. They continue to do well and stabilize, as I talked about very early today, we will have soon 64 more beds that can provide transitional space for people that need...don't quite need residential mental health treatment anymore but still need a safety net, which is the best design I know of because it's then that easy to literally say, let's just go back next door for awhile. In some cases that might just be, let's go over there for the day and see the guy that you were...you know, the mental health provider that you have a relationship with. In a perfect world some percentage of those people get back on track; the issues are addressed; we find appropriate housing for them. That could be Unit 1 at Tecumseh where there's kind of a...I'll use the concept "safe harbor." When we talk about the strategic plan, I will get into a lot more details around what I mean with that. But we want to build a system where we have appropriate places for people to live where they feel safe, where they can take advantage of programming, and they can get the treatment benefits that they need. We turned one-half of one pod in Unit 1 at Tecumseh, 64 beds, into what we call the active senior unit. So right now we're going 50 and above. I'd like to maybe go a little bit later because sometimes even 50-year-olds can still kind of be...but they're people that are behaving well. They are people that just want to do their time, receive the programming and other things that are accessible, and they don't want to be involved in all of that drama. So that's a great example of how you can provide safe housing for a piece of the population. They're happy with each other. They behave. They don't engage in violence. For the most part, they don't engage in other undesirable behavior. You continue to grow that concept across the prison and then across the system, you have a much healthier prison system than we have today. [LR34]

SENATOR PANSING BROOKS: How can we help with programming? [LR34]

SCOTT FRAKES: Give me enough time to complete a good assessment, come back and say, this is where we need to spend our money. [LR34]

SENATOR PANSING BROOKS: How much longer? We're patient. [LR34]

SCOTT FRAKES: It will be next biennium. It will be next biennium... [LR34]

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SENATOR PANSING BROOKS: Next biennium? [LR34]

SCOTT FRAKES: ...because I've got to do the risk needs assessment piece. I'm not sure if we actually finished. We've already done the RFP. We've received the submittals, so the review process is going on. I don't think though...they haven't come to me and told me this is the one, but we should be very close to that; 30 to 45 days to award a contract. We'll establish a training schedule. If we can kick it off the ground before January is over, that would be excellent.
[LR34]

SENATOR PANSING BROOKS: So you're just talking about a specific program? [LR34]

SCOTT FRAKES: No, that's the tool we need to use to train staff then so that we can assess inmates' risk to reoffend, the criminogenic needs that we can address so that we have reduced their risk to reoffend, and their responsivity so that we make sure that we're getting them in the right bed in the right program at the right time. I say that really easy because it rolls off the tongue. It's not simple. There's a complexity to it and the fact that we are a very compact system makes it that more complex. One of the challenges that we deal with right now, community custody beds, we've got about 570-580 community custody beds. We technically have the same number of people classified as community custody. There's at least 200 more that are sitting in the queue that the moment a bed opens up, magically, now they're ready and they can be that 4A/4B custody. So it's real clear. And I think after we...I talked about revising our classification tool to make sure that it also addresses prison behavior and not just past criminal behavior and validating that tool with UNO. I think we're going to have a bigger number. I really do believe that our community custody numbers will be closer to 15 percent of the population, which would be 750-780. And our minimum population will be bigger than it's currently classified. That's where you will see me continuing to focus. I know that I can support 160 additional beds that I'm talking about right now. I believe I will be able to come back and say we need more than that. But until I have some data, until I have proof of that, I'm not going to come in and say we not only need to expand CCCL, but let's add 150 beds to the community center at Omaha, and then two years later they're sitting empty because we really don't have the inmates that belong in those beds. On the programming side, I believe the risk needs responsivity tool. We'll start immediately using it with the people that come into D&E at intake. We're also looking at the

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tools that probation uses for the presentence investigation to make sure we're making the best use of those tools. And then we'll have the...and then we're going to work our way across the population because we're not...it's not just a matter of starting to use it and the rest of the people that have been with us don't benefit. We will use that tool across our entire population except for the small piece that we don't get to before they parole. Then that will give us the data to say we need more substance abuse, we need more sex offender, we need more...cognitive behavioral interventions would be the primary focus. [LR34]

SENATOR PANSING BROOKS: But surely best practices in...would allow you to know certain people definitely need drug rehab, certain people definitely need sex offender programming. So to wait for another biennium and not put these people in I think puts them at a risk of ever letting the Parole Board conscientiously parole people. They aren't prepared or ready. So, I mean, certainly there are some other classes that may be more particular. Job training types of things, those I suppose are particular to the needs of the inmate. But isn't there a standard across the nation of drug rehab, sex offender, all certain classes that...programs that need to be in the prisons? [LR34]

SCOTT FRAKES: No, I would not say that there's a national standard. There is... [LR34]

SENATOR PANSING BROOKS: Wow, that's interesting. [LR34]

SCOTT FRAKES: There are different opinions about what the level should be. There are different opinions about the dosage that is needed. Just as important, as I talked about earlier, there's also a capacity issue. I'd said this in Appropriations in the spring. I appreciate the funding for behavioral health and it was nice to have it ultimately end up in our budget because the first piece we were able to do was create the chief of psychiatry position. That was a wonderful thing. But we still have vacancies in behavioral health that we can't fill because there just are not people to be found to fill the positions, even here in a large urban area, because it is such a competitive field. So even if I had more money that I'm not really exactly sure how we should best spend it, I can't roll it out, I can't implement it. And in many cases they either don't have any space to do anything more and/or I don't have the additional staff that's needed so that there's some security oversight. So those are all those components that we're going to put much more

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thought and plan to. And I agree. I don't sleep a lot, I have to tell you. I spend a lot of time thinking at night and a lot of time at about 2:30 in the morning thinking about what are we going to do today to continue to move forward. [LR34]

SENATOR PANSING BROOKS: I appreciate your frugality for our state. I do worry that it seems like some definite issues exist that could be addressed with more social workers, more different types of employees that could help make it safer for the employees and for the inmates. Certainly paying \$100,000 in overtime, as we saw with the Auditor's report, that would not normally be a goal of the department, I presume. So, again, I just...it's hard for me to understand how again you come to us and say, no, I don't want money, I need to keep thinking what's going to happen and when I think it's pretty clear that there are a lot of things that need to be happening and...so I don't know. This is...it's sort of confusing to me. The other thing is we had heard in one of our previous meetings about diversity issues, and I hope that you are on top of that matter. We are hearing that it is not diverse, especially in the upper echelons of people that are working there. And we certainly don't need a lawsuit in our state against our state for discrimination in employment. So I hope you're highly aware of that and have heard of that concern. [LR34]

SCOTT FRAKES: I'm aware of it. I am a longstanding proponent of the value of diversity within the work force. I've done my best so far to try to demonstrate that. That includes how we recruit, how we make sure that we get job opportunities out to people. I've made personal phone calls. I've reached out to folks. It also means making sure that our hiring panels are diversely represented so that there's a variety of voices in the room to help make those decisions and... [LR34]

SENATOR PANSING BROOKS: Because there are pockets of our state where there is real need for jobs, so...and I don't know what kind of education is necessary, but certainly there are pockets where people could be hired and valuable. So I'm hoping that you're looking at those as well. [LR34]

SCOTT FRAKES: We are. We just engaged someone from north Omaha, Willy (phonetic), but I can't think of Willy's last name right now, who has said that he is connected into hiring systems and will help us make sure that we get out. One of the challenges...I have to speak to this

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because it is important to me. There's always this desire that the staff makeup of a facility represent the people that are incarcerated there. That's a great goal to shoot for. It was challenging in the state that I came from that had a greater amount of diversity across the west side of the state, certainly not the east side of the state, definitely a challenge here in Nebraska where, you know, we're not an overly ethnically diverse state. So the assessments we have are that the makeup of the staffing in general is representative of the makeup of Nebraska diversity. I think we...I don't think, I know we're clearly underrepresented in our leadership positions. I'm taking a hard look at that. And having said all that, we still need to aggressively recruit, look for, have fair hiring practices and, more important than anything else, make sure that our workplace recognizes the value and is supportive. I don't want...I would be appalled to have another lawsuit, to even have the allegations that came out of the lawsuit out of the penitentiary. [LR34]

SENATOR PANSING BROOKS: Okay, just a couple other things. I understand that death row has been moved to the restricted housing unit and that there's something about their access to the computers and to the library which makes a difference on their attempts to appeal. So are you aware of this and what is it and... [LR34]

SCOTT FRAKES: I know that there was a concern expressed about legal library access. I hadn't heard it again, so I was under the belief that it had been addressed. My direction has been clear. I wanted the level of activities, access, quality of life, as I like to call it, that they have in Unit 1 be as good, if not better, in this new space within a tier on the...that is the restrictive housing unit. But they are not to live like people that are placed in restrictive housing. Again, if there is...yeah, if there is...nothing has come...I don't think I've seen any complaints specifically across my desk from any of the people, but I haven't been back to talk with that population either in probably three months, so. I do occasionally pop in and say hello. [LR34]

SENATOR PANSING BROOKS: Well, again, I just want to say that communication is the key thing for all of us. And I think again I feel that you really do intend to have this communication valuable and open among all parties, including the inmates and administrators, among the Department of Corrections and the Legislature and the executive branch. We do need to communicate for what is the best for Nebraska. And, you know, the letter that we sent to you, I think that Senator Seiler sent to you on September 24, listing a whole range of things that we

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wanted to ask you questions on and you came prepared for one of them, which was the strategic plan. And I for one didn't feel comfortable even being able to discuss it because what we were handed was a very broad summary, I presume, of whatever your plan is, so we didn't feel that... [LR34]

SCOTT FRAKES: No, that is really...that is the plan document. As I said, it's not...doesn't stand by itself. It's a process that requires interaction. That's what I was going to come today and actually walk through it and interact and answer the questions. And so sorry, though. I cut you off and that wasn't... [LR34]

SENATOR PANSING BROOKS: No, that's okay. But it just seems really broad when I look at it with not very many specifics about how you are going to handle overcrowding or mandatory overtime or any of those things that we've been specifically concerned about. So that's why I think that this committee expected you to go on with the other things. And so again, communication is key because we all had different expectations there. So thank you for your time today and hopefully we'll see you again at some point to discuss the strategic plan. [LR34]

SENATOR SEILER: Senator Mello. [LR34]

SENATOR MELLO: Thank you, Chairman Seiler. And thank you, Director Frakes. I apologize for having to step out a little bit during some of the questions some of my colleagues asked. A couple issues in regards to the department's attempt to acquire the illegal sodium thiopental drugs. Was there a...is the contract with Chris Harris a sole-source contract? Is that how the department chose not to put an RFP out through existing state contract laws and statutes is that you decided it was a sole-source contract? [LR34]

SCOTT FRAKES: I believe that would be the correct term, I believe. [LR34]

SENATOR MELLO: Okay. Can you provide this committee a copy of that contract? [LR34]

SCOTT FRAKES: Again, the purchase order was the contract. [LR34]

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SENATOR MELLO: That was the contract; the purchase order was the contract. So we passed a law that requires all state contracts to be published on-line through the Department of Administrative Services. We've been unable to find that contract on-line through the Department of Administrative Services' searchable Web site. So it's safe to say for the public record that a purchase order was the contract, not a typical contract you would enter into with a service provider, like any other typical RFP process. [LR34]

SCOTT FRAKES: Yeah, single purchase. [LR34]

SENATOR MELLO: Okay. [LR34]

SCOTT FRAKES: I could be mixing up the terminology but, yes, there is no other contract document. [LR34]

SENATOR MELLO: And I'm sure you've got very capable staff that are here today that I can follow up with afterward in regards to getting some more of those details. I think it's just more in the sense of procurement law, looking at challenges we've seen in regards to how agencies procure products and services. This is one issue that I think we need to just have a more better understanding of what decision and how that decision was made. In respects to the question Senator Chambers asked about the prepayment process, it does state in the DAS, I believe, contracting manual is what I think Senator Chambers was reading out of in the sense that it's to the contrary to do any normal type of prepayment on a contracted service. Was the reason you chose to do a prepayment was because it was a sole-source contract or was it the agreement that you made and the purchaser? What made you decide to go the prepayment route instead of waiting to get the illegal drugs and then pay him? [LR34]

SCOTT FRAKES: I wasn't trying to purchase any illegal drugs. But the decision was made because the seller, the vendor, said, these are the terms of the agreement that I offered you. I reviewed those terms. I asked for advice. I was told that there was a proper and legal way to make that purchase. [LR34]

SENATOR MELLO: Who did you ask advice from? [LR34]

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SCOTT FRAKES: Robin Spindler, my deputy director. As I've said, my memory is that she interacted with someone from DAS just to further make sure that we were not doing something that we shouldn't be doing. [LR34]

SENATOR MELLO: Do you know who in the Department of Administrative Services approved the ability to allow you to do a prepayment? [LR34]

SCOTT FRAKES: No, I don't. [LR34]

SENATOR MELLO: Because they are...in the manual, I believe--Senator Chambers can refresh us--I think it says they have to sign off on this. So there was someone in the Department of Administrative Services that had to sign off on your decision to make a prepayment. [LR34]

SCOTT FRAKES: Okay. [LR34]

SENATOR MELLO: You do not know who that was? [LR34]

SCOTT FRAKES: No, I do not know. [LR34]

SENATOR MELLO: Does Robin Spindler know who that person is? [LR34]

SCOTT FRAKES: I believe she would. [LR34]

SENATOR MELLO: Could you provide this committee that information in regards to who ultimately was the one in the Department of Administrative Services who signed off on the prepayment process? The final question I've got in regards to the sodium thiopental contract/purchase order issue is now that we're in...the best way to describe it is a quagmire in respects to the reality is I've heard your Q&A back with Senator Chambers. The likelihood is that we're not ever going to receive these drugs. And the question I've got as the Chairman of the Appropriations Committee is, what process do you have in place to recoup our \$54,000, because you chose to go through a prepayment process which in state...not state law, a state manual clearly says this is out of the norm, we don't do this, but you can do it, but someone in the

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Department of Administrative Services who does answer directly...who does Department of Administrative Services answer to? Who is the boss of DAS? [LR34]

SCOTT FRAKES: Isn't that Byron Diamond? [LR34]

SENATOR MELLO: Who's Byron's boss? [LR34]

SCOTT FRAKES: The Governor. [LR34]

SENATOR MELLO: So DAS would answer directly to the Governor. Someone had to sign off on that to allow this process to happen. I just have to assume, and I will expect a response back from you and/or Byron on behalf of DAS to the committee of what the process that you're going to utilize to recoup the \$54,000 that we prepaid for a sole-source purchase agreement or purchase contract, understanding that we are not going to get these drugs and understanding that, yes, you said today on the public record you're continuing to try to do that. The reality is there will be a time frame somewhere down the...I've only have roughly 14 months left in the...13 months left in the Legislature so, in theory, this could be happening well after I leave the Legislature. And it's more for the record's sake and for the future, I would say, of how we are going to look at state contracting law, how to some extent we're going to be able to evaluate when an agency decides to enter into a contract and not receive those services. If this was any other agency, there would be a process in place of how we would recoup a prepayment. I'm going to give the opportunity to get back to this committee, get back to the Legislature how you're going to recoup this funding and what process you're going to put in place to do that. And I'll let you defer to DAS since they were the ones who, my understanding, signed off on this that I think to some extent the taxpayers, they had to sign off on you doing it. I understand processwise you decided to do it, but you had to get approval from them. They ultimately had to make the decision. Whoever gave them the approval to do it, I'm sure at some point in time we will find that out also. But I will give the opportunity to come back to us and explain how you're going to recoup this funding, because it's not so much that this committee needs to the know or the Legislature. We'll develop a process to be able to identify ways to make sure this doesn't happen again. The question though goes back to the taxpayers in the sense that taxpayers may agree with your decision but we know there's a number of taxpayers who disagree with your

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decision. And after your decision happens and it does not yield the results that you have wanted to do, the state then is ultimately going to be out \$54,000 unless you find a way to get it back. So I'm going to put that onus back onto you, Director. I know that you've got very capable legal staff in the department, you have a very good leadership team, and you will be able to work with DAS to find a mechanism to recoup this \$54,000 back from Mr. Chris Harris. The last question I've got, and it's nothing to do with this. And by the way, I assume we are going to have another hearing with you in December, so we'll give a little time. Hopefully you can provide us that feedback at a future hearing to discuss the strategic planning issues that I know Senator Pansing Brooks started to mention. And I think a number of us are very, very interested in hearing about your strategic plan, looking at a number of issues that need to be addressed that can incorporate a number of recommendations from the Legislature over a number of years to address these issues. The one question I've got, and I am breaking my...I'm breaking the one thing I mentioned earlier because it's dealing with the budget and the budget request. I have a tough time understanding that every state agency was required to provide their budget request by October 23 of everything they had requested, both capital constructionwise and/or operationally. How is it that your agency didn't provide your capital construction request that is apparent--I'm drawing inferences from your strategic plan--that you want money to be appropriated to build something onto a community corrections facility. How did that information not get provided to the Legislature back on October 23 instead of it being provided to us yesterday afternoon at 3:15? [LR34]

SCOTT FRAKES: My understanding was the deficit budget request was required to be submitted on October 23. The ability to bring forward request for capital construction was not tied to that date. That's my understanding. That's...still learning a lot about these processes. [LR34]

SENATOR MELLO: I see. And I will talk with an individual afterward from your department to find out a little bit more of how that did not happen in regards to it's the only budget request essentially that is a new request that did not follow, quote unquote, the process that we normally follow when it comes due, capital facility requests in a deficit year. With that, I appreciate you being here today. Thank you, Director Frakes. [LR34]

SCOTT FRAKES: Can I ask one clarifying question? [LR34]

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SENATOR MELLO: Yes. [LR34]

SCOTT FRAKES: So I will move fairly quickly to get the information specific to how did we determine that it was appropriate to move forward with the prepayment, sole-source contract, all those questions. Until the point when I decide that Mr. Harris is in default or Mr. Harris has failed to deliver as required, then I'm not moving forward to go out and pursue other issues, go out and pursue how I would recover the funds. So it could be some time and I don't know when that time point is. I just didn't want you to think that next time you see me I'll tell you. [LR34]

SENATOR MELLO: Well, we'll see you tomorrow, as the note kind of...a colleague kind of politely reminded us that you will be here tomorrow on some other issues. [LR34]

SENATOR CHAMBERS: I just... [LR34]

SENATOR MELLO: So I wouldn't expect you to do it tomorrow, but... [LR34]

SENATOR SEILER: He's first, then him, then you, then... [LR34]

SENATOR MELLO: But in... [LR34]

SENATOR SEILER: Hey, I get some questions. [LR34]

SENATOR MELLO: In a response to that, Director Frakes, I can understand in the sense of maybe this is not something you're going to get back to us maybe in a month; it may not be something you get back to us in January. The reality is though, under every indication from the Food and Drug Administration, these will never be imported into the United States. So the question is, is there a political charade going on in the sense of making it seem like this is going to continue to happen and we're going to parse statements of we will communicate or are communicating with the federal government or we're seeking to try to acquire them? I'm smart enough and I think my colleagues are smart enough to get when words change of seeking, we're communicating with, we're...and that's what's frustrating is I've just resigned myself that we're never going, obviously, to see what you want to happen. And I think the public needs to probably

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know that. I'm more concerned of this sets up a new precedent that when an executive branch agency chooses to do something, prepays money to try to acquire something it's never going to get, and/or tries to acquire a service it's never going to get, it puts the state at risk fiscally in the sense that there's no process you had built up prior to doing this contract of, what if we never do get these drugs, what do we do then? And I guess for me that is just a basic question I would ask not just you but any state agency director which is, if you go this route, you can legally do it, and I'm not saying you can't, but what are you going to do in case this doesn't happen? And I think for you not to have thought or your agency not to say, here is our backup plan, here is maybe what we should have just in case this never materializes. If you don't want to give that to us now or in the near future, okay. But I assume that you have some...you've got to have something developed. You can't have just entered into this thinking, yeah, we're going to get this, we're going to get these drugs, and we're going to be fine. And if...I'll let you answer that. And if that was the case, then that...then maybe you do need to go back and spend time with the team to figure out how will we develop this process. And I'm not trying to get you to admit publicly that you are never going to get these drugs. I know you're never going to get these drugs. I think my colleagues know you're never going to get these drugs. It more cuts to the precedent of how we're operating government and that to some extent you were choosing to bypass processes to achieve a political outcome to acquire something that we know you're never going to get. And now we're out \$54,000 that could have been spent on behavioral health programming, could have contracted those behavioral health services out with contracts in Lincoln or Omaha, could have provided more inmate programs,... [LR34]

SENATOR PANSING BROOKS: New officer. [LR34]

SENATOR MELLO: ...could have paid for a corrections officer...well, only for a year. But my general point is, if you can't provide us that information in the near future, it is my hope and request that the last 14 months I do have in the Legislature we will be...I will be asking you for that one way or another. It's not admitting guilt. It's not admitting any omission or admission. It's simply there has got to be a process that needs to be identified and put in statute and/or DAS regulations of how this moves forward because this is for me, take the issue of what we're trying to talk about here, this is a process issue as much as anything else because you've uncovered a way for an agency essentially to spend money, never get a service and, yeah, we don't get it, then

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it's just a loss and the state will move on. And I don't think taxpayers expect that from state government. I don't think they expect it from the Legislature. And I know the Governor wouldn't expect that either. [LR34]

SENATOR SEILER: Senator Mello, that's the most exciting news I've heard today. Since you sit on my right, my hearing will come back in 14 months when you're gone. Senator Williams. [LR34]

SENATOR WILLIAMS: Thank you, Chairman Seiler. And, Director Frakes, first of all, before I do ask a couple of tough questions, I want to thank you for what I consider to be your contemplative and measured approach to getting dumped into a pretty tough bucket in our state. And I still remember when you sat in that chair at your confirmation hearing here. And we promised to be your partner in helping achieve these successes. And you talked about the amount of time that you have spent and the efforts and how long that's been and being awake at 2:30 in the morning. And then you have the Tecumseh thing that we have spent a lot of time over the last day talking about. What I would like to ask as a difficult question though is, with that in mind...I'm trying to figure out in my brain why we would spend so much time and effort trying to obtain these drugs, and I won't use the term "illegal drugs," try to use...obtain these drugs unless it's simply politically motivated. Can you explain a reason, other than it being politically motivated, why you would have spent that critical time during this period? [LR34]

SCOTT FRAKES: In terms of actual time consumed, other than responding to the media and some of those pieces, but even then it wasn't a significant amount of time. Statute says that I need to carry out sentences issued by the court, and I need to be prepared to do that. And one of those responsibilities is to procure the drugs that are needed to carry out the death penalty. That's my responsibility. I realize that there was legislative action that changed that. But at the point that I moved forward, again, I said it was a conversation, brief, but a conversation that I had with the Governor in February about the ability to...I could speak to that, Senator Chambers, about the ability to carry out and to procure the drugs. So I saw that as a responsibility that I needed to pursue. Once I had made the commitment to make the purchase, now my responsibility is to ensure that that purchase is carried out and completed. [LR34]

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SENATOR WILLIAMS: I agree. It's my understanding the state of Washington has a death penalty. [LR34]

SCOTT FRAKES: There is...there's a moratorium. [LR34]

SENATOR WILLIAMS: It's my understanding they use a three-drug protocol that includes sodium thiopental. [LR34]

SCOTT FRAKES: They switched to single drug, just with the sodium thiopental but, yes, sodium is the primary. [LR34]

SENATOR WILLIAMS: That's still the primary drug. Did you have any experience there purchasing the drugs? [LR34]

SCOTT FRAKES: I didn't actually make the purchase. I supervised the employee who was responsible to make the purchase. There was shield laws in place to protect the compound pharmacist that produced the product. [LR34]

SENATOR WILLIAMS: When we send out a purchase contract to purchase 1,000 vials--and we keep using that term, 1,000 vials--how much product is that? [LR34]

SCOTT FRAKES: It's more than we would need to carry out the ten executions of the ten people that are currently sentenced to death. That was the minimum sales amount. He wasn't willing to go to a lesser amount. [LR34]

SENATOR WILLIAMS: How much more than to carry out ten executions? [LR34]

SCOTT FRAKES: I know, Senator, that I did do some rough math, but I can't recall off the top of my head. It's significantly more. [LR34]

SENATOR WILLIAMS: Do you know how much a vial is, how many grams a vial is? [LR34]

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SCOTT FRAKES: I believe those are 2 milligram per milliliter solution. I just...I'm sorry that I don't have those numbers, but it's very reasonable to say that it's way more sodium thiopental than we would actually need. [LR34]

SENATOR WILLIAMS: Okay. Was this top on your priority to be working on or were you directed by someone else to get those drugs? [LR34]

SCOTT FRAKES: Other than the conversation that I had with the Governor about need to be prepared to carry out the death penalty and see if drugs were available, so I saw that as something... [LR34]

SENATOR WILLIAMS: And the reason I'm asking that is because I'm hoping that when we are finished today that we will be moving on to talk about the plan for the future rather than these issues. So those were a few cleanup questions from me. Again, I think you've heard it from us and will continue to hear it from us. And I know you've got a moving target with LB605 and what it's hopefully going to do to the numbers, you know, making all that work in this. Thank you for your commitment. Thank you. [LR34]

SENATOR SEILER: Senator Schumacher. [LR34]

SENATOR SCHUMACHER: Hopefully, I can get through these questions rather quickly as it's getting supertime almost. Who was present, besides yourself and the Attorney General, while you were having what you believe to be protected discussions regarding the topic that Senator Chambers was questioning you about? [LR34]

SCOTT FRAKES: I'm sorry. I'm not trying to stall. I'm just trying to recall who would have been in the room, other AGs...what I can recall is there being other AGs present. That's the piece that's clear in my mind. I'm just trying to recall. I don't want to put people in the room that weren't there. [LR34]

SENATOR SCHUMACHER: Was the Governor there? [LR34]

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SCOTT FRAKES: I want to be honest and I'm just...I'm not sure. I know you're looking at me but...yeah. [LR34]

SENATOR SCHUMACHER: You realize that you have...it's your decision whether to claim or not claim attorney/client privilege, not the Governor's and not the Attorney General's. You realize that. So if you're claiming privilege today it's because you choose to do it. [LR34]

SCOTT FRAKES: I'm not even clear exactly what that means, but okay. [LR34]

SENATOR SCHUMACHER: You claimed attorney/client privilege. You declined to answer Senator Chambers' question citing attorney/client privilege. And I'm just asking, you do realize that claiming attorney/client privilege is not mandatory, not required? Lots of times people will talk in public about what thing their attorneys say. That's your decision as a client to claim the privilege. [LR34]

SCOTT FRAKES: Okay, I understand. [LR34]

SENATOR SCHUMACHER: And you're still choosing to claim it? [LR34]

SCOTT FRAKES: Well, not specific to the question you asked a minute ago, but whatever earlier conversation. [LR34]

SENATOR SCHUMACHER: I'm still a little confused on the mechanics of the deal and the check. You get an e-mail from somebody in India. I get them from Nigeria all the time offering me \$6 million if I...because I was named in a will over there and I always have my hopes up but they never come through and I never send my banking information. But you get an e-mail from somebody in India saying, say, I've got some execution drugs. And little e-mails back and forth and you decide, "shuckey-darn," we'll do this. And without talking to anybody you decide that you're going to...you get a purchase order, that you sign? [LR34]

SCOTT FRAKES: I believe so. [LR34]

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SENATOR SCHUMACHER: Did he e-mail you that purchase order? Was it faxed in? FedExed?
[LR34]

SCOTT FRAKES: I guess I don't...I want to say that it was by e-mail but I'm not sure at this
point. [LR34]

SENATOR SCHUMACHER: Okay. And then what, you attach an electronic signature or
something to say, okay, go for it? [LR34]

SCOTT FRAKES: I actually pen signed and scanned probably. [LR34]

SENATOR SCHUMACHER: So then...and then send back to him with your signature. Besides
quantity and price, was there any other terms on this purchase order? I mean every time, every
purchase order I've ever seen has on it small print on the back side. Was there small print on the
back side? [LR34]

SCOTT FRAKES: I don't remember there being any on the back side. [LR34]

SENATOR SCHUMACHER: Or on the front side? [LR34]

SCOTT FRAKES: There was tentative delivery dates. [LR34]

SENATOR SCHUMACHER: And that's all? There was nothing about warranties and
merchantability or whether it was fit for a particular purpose, nothing about reference to the
Nebraska Commercial Code, the law of what state or what country governed, none of that stuff?
[LR34]

SCOTT FRAKES: No, it was just simply a purchase order. [LR34]

SENATOR SCHUMACHER: No specification as to where the contract occurred and what court
or legal forum would have jurisdiction for litigation? [LR34]

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SCOTT FRAKES: No. [LR34]

SENATOR SCHUMACHER: None of that? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR SCHUMACHER: You do have an attorney in the department, right? [LR34]

SENATOR CHAMBERS: He thought he did. [LR34]

SENATOR SCHUMACHER: Ever run it past the attorney that, gee, you know...I mean this one sheet of paper with quantity and price, 300 times the quantity we need or whatever, ever run it by anybody? [LR34]

SCOTT FRAKES: As I said, I did talk with head of Administrative Services, probably had conversation with counsel as well. What was clear at that time was we were following the same process that we'd followed before to make the purchase. That was what... [LR34]

SENATOR SCHUMACHER: And which purchases failed? [LR34]

SCOTT FRAKES: One of which did but one didn't. [LR34]

SENATOR SCHUMACHER: So no question at all and you sign off on this purchase order, e-mail it back. Now how does a payment occur? I mean did you send a warrant, an order, or something over to somebody? [LR34]

SCOTT FRAKES: It was a warrant. [LR34]

SENATOR SCHUMACHER: To who? [LR34]

SCOTT FRAKES: Harris Pharma. I didn't take care of the logistics of... [LR34]

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SENATOR SCHUMACHER: Okay. So you sent them a form saying make a claim on the state?
[LR34]

SCOTT FRAKES: I'm sorry, when I say warrant, I think of a check. [LR34]

SENATOR SCHUMACHER: You sent them a check. Now do you have a machine over in your office where you issue checks or you've got to go to somebody? [LR34]

SCOTT FRAKES: No. I think that...I believe that those warrants were issued downtown, as they say, DAS. [LR34]

SENATOR SCHUMACHER: So somebody at DAS on a signed order from you issued a check? I mean they just don't send checks to India. [LR34]

SCOTT FRAKES: You know, I didn't manage the fiscal piece of actually paying the bank for the purchase, so that's...those are questions that I'll get answers to, but I can't answer those off of...I can't answer those because I didn't go write the check. [LR34]

SENATOR SCHUMACHER: So somebody with virtually no paperwork, other than a one-line purchase order which may contain your initials or signature or something, decides to mail a check or FedEx or something a check to India for \$56,000 without anything more, without the Governor knowing about it, nothing, just happens? [LR34]

SCOTT FRAKES: I made the purchase based on information that showed that we had made a similar purchase before. We used...to my knowledge, I was told we used the same process that we used before. [LR34]

SENATOR SCHUMACHER: So you must have sent something on your letterhead or with your stamp or with something to say, you know, hey, this is coming from pretty high up in the system, I'm the Director over here at Corrections, issue this guy in India a check for \$56,000. [LR34]

SCOTT FRAKES: I didn't...there didn't seem to be any challenge. [LR34]

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SENATOR SCHUMACHER: I mean you did send somebody in DAS or somebody in the Treasurer's Office such a note, a letter, or scrap of paper, e-mail, something? [LR34]

SCOTT FRAKES: No, either... [LR34]

SENATOR SCHUMACHER: How did they know to issue the check? [LR34]

SCOTT FRAKES: Either Robin Spindler or Inga Hookstra made the connection, got the approval. Again, I did not focus on the payment piece of it. I just made sure, for my satisfaction, that we were within the rules and regulations. [LR34]

SENATOR SCHUMACHER: When you thought you were going to come into possession to hundreds of injections of this stuff, did you have conversations with other states as to whether or not they could buy some from us? [LR34]

SCOTT FRAKES: No. [LR34]

SENATOR SCHUMACHER: What were you going to do with the extra stuff? [LR34]

SCOTT FRAKES: Hold it. [LR34]

SENATOR SCHUMACHER: It would have been easier to get into the state if it were just a small pack, bring into the country if it was just a small package, wouldn't it? [LR34]

SCOTT FRAKES: Sorry, would you say that again? [LR34]

SENATOR SCHUMACHER: It would have been a lot easier to get into the country in a small package than a big package with 300 vials, wouldn't it? [LR34]

SCOTT FRAKES: I've never done any drug smuggling, so. [LR34]

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SENATOR SCHUMACHER: (Laugh) Well, you'd just as well order a lot when you're doing it, right? You know, you talked about \$56,000 being spent with virtually no paperwork, virtually no instructions, virtually, you know, blowing past some regulations when it comes to getting what's probably politically motivated drugs, but it's going to take two years to deal with a crisis in mental health, in space in our prisons, because of what amounts to nothing we imposed, but what amounts to self-imposed administrative red tape. In an environment that's supposed to be operating government like a business, what business would survive with dire needs for two years while it spun itself in red tape? What business would survive where the department head or CEO or executive wouldn't say, we've got a problem here, let's roll it out? The Legislature or the fundraisers or the stock brokers are ready to raise the money. It's not an issue of money, let's get on with it, but tell us that, you know what, it's going to take two years. Well, then again, maybe three two-year series to get this job done? What? I mean that doesn't sound like something a business would do, does it? [LR34]

SCOTT FRAKES: Nor does it sound like... [LR34]

SENATOR SCHUMACHER: Government? [LR34]

SCOTT FRAKES: ...that a business should simply do this and decide how to spend money. [LR34]

SENATOR SCHUMACHER: Well, but businesses do act fast when they have dire needs. We're not talking about rocket science here. We're talking about need of space, need of personnel, need of cash. I mean this is something a business and a good board of directors could get done in a couple meetings, all right? So we're not running this like a business at all. This is sounding like government worse than the federal government. You know, today has been kind of a sad day. It's been a sad day because several of us went to bat for you. We have been up to our ears with attempts not to simply level with us, with claims of, well, lawyer/client privilege, claims of "I can't remember this but maybe I can remember that," when we knew in common sense your predecessors had to remember when they were sitting in that chair. There are things you don't forget, but there are things that you claim you don't remember if you want to protect yourself or others. And we thought you were going to be a real breath of fresh air that we could trust. And

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we could have been real...a lot harsher in some of the things we did in the legislation passed last year with regard to such things as solitary confinement. But we said, "lookit," give this guy a chance, we think he's going to shoot straight with us and he's not going to get squirrely with us, and he's not going to have texts back and forth with the Governor and he's not going to do the kind of stuff that we were seeing. And as a result, you're sitting in that chair. Senator Chambers asked you whether you had discussions with the Governor about this and were taking direction from the Governor, not just one conversation saying, well, you'd better get ready for death penalty because I'm going to start signing warrants one of these days and I'm going to do something that 17 years of other Governors haven't been able to do, but really about spending this \$56,000, about ordering this, about how this works through the quick-check mechanism at DAS. And really, it hurt me today when you sat there and said, I don't remember if I talked to the Governor about it, because if I were Mitt Romney and I had \$10,000 and gambling were legal in this state, I'd bet you that nobody in this room believes you. [LR34]

SENATOR CHAMBERS: Right. [LR34]

SENATOR SCHUMACHER: And as a result of that, when I want to believe you about the reforms that are on the way, that, you know, we've got things under control. It's really necessary to take two years to do something I know doesn't take two years, but I know it's a convenient excuse because we're going to fight on a tax-cut battle. I really want to believe you, and now I'm going to have a hard time doing it. Thank you, Mr. Chairman. [LR34]

SENATOR SEILER: You're welcome. Senator Chambers. [LR34]

SENATOR CHAMBERS: I think at this point really, since Senator Schumacher opened the way for me, Donald Trump would say you're fired. I know better than to accept certain things, but I told my colleagues that I would be nonconfrontational, I would be very low key, as I've tried to be with you. But I don't think you've leveled with us at all. And as I listened to the exchange between you and Senator Schumacher, I'm going to be my old self. You know how I think this order was written? On three-ring notebook paper with a crayon. And that's what made you accept it because probably some little child wrote this and children don't lie. And as naive as you are, Mr. Director, and you believed this lying, stealing trickster who tricked the state and others

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already, why don't you just call him and tell him, give us our money back? Be honest and up-front. There are people who call you a thief and all these other things. Show them that you're not a thief, send us that money back. Do you think he'd send it back? And I want an honest answer. Do you think if you contacted him, if you're able...did he leave a return number when he talked to you a week or so ago? [LR34]

SCOTT FRAKES: I have a telephone number, yes. [LR34]

SENATOR CHAMBERS: You got it? Call him and ask him will he give you the money back. But you're not going to do that. I know it and you know it. So I'm going to not ask any questions except one. He gave the order for you to buy far more of these drugs than you'll ever be able to use at an exorbitant price. I draw cartoons. The word "troika" is often taken to mean three, but it's really three horses running abreast who are pulling a cart in Russia. That's what a troika is. Now the troika that I see are you, the Governor, and the Attorney General. And this mountebank, this scoundrel, this thief, this liar, whipped you all into line and made you squander the taxpayers' money. Now you could get the Governor or his daddy to take it out of their pocket because TD Ameritrade obviously believes strongly in the death penalty. But when I draw my next cartoon, do you think it would be appropriate for me to either have three little chihuahuas on their hind little haunches like this with lying Harris holding a little piece of meat up? Or should I have him dressed like a superhero and three muscular, white steeds running at full speed with him standing on top of them with a whip saying, get up, giddy-up? Which one would you prefer to be depicted in, a nice little chihuahua or a big, muscular steed being whipped into line by a superhero, muscled individual? Which would you prefer, if you have a choice? Or you don't want to comment on that? [LR34]

SCOTT FRAKES: I have no opinion on that. Thank you, Senator. [LR34]

SENATOR CHAMBERS: That's all I have. [LR34]

SENATOR SEILER: Well, our record for this committee is 11:30 and I get now my chance to talk. (Inaudible) it's not going to be that bad. When you were in Washington, did you have a

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computer system for your whole system, prison system, running the pharmacy, running all your records? [LR34]

SCOTT FRAKES: There was still gaps in electronic medical records. I'm not sure about the pharmacy piece, but a pretty robust system around offender management. [LR34]

SENATOR SEILER: Compare that to the Kalos system you have for your pharmacy. Same? Better? Worse? [LR34]

SCOTT FRAKES: Yeah. I'm sorry,. I can't make a comparison because I don't know that system and I didn't know what system... [LR34]

SENATOR SEILER: Wow. After looking at this report, you don't know the system that we have here in Nebraska? [LR34]

SCOTT FRAKES: No, I do not know. I know that it's an issue that needs to be fixed and it's on our action plan but, no, I have not had time to go over and learn how to operate the pharmaceutical system. [LR34]

SENATOR SEILER: Oh, I don't mean operate it. I mean just what you can put in and what you can get out. I mean almost every small drugstore that I've represented has a computer system that they do quarterly inventories and they can tell you exactly what drugs are missing or not missing. And you're running a lot bigger pharmacy than these little drugstores. [LR34]

SCOTT FRAKES: But I'm not...it's not clear to me that the issues are around that. The issues were around the medical administration records that are manual, either... [LR34]

SENATOR SEILER: Yeah, that's what I'm saying: Get rid of the manual; get them on computers. [LR34]

SCOTT FRAKES: Yeah, we do need an electronic medical records system. [LR34]

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SENATOR SEILER: Right. [LR34]

SCOTT FRAKES: And we also need the right staff to issue the drugs. [LR34]

SENATOR SEILER: Okay. [LR34]

SCOTT FRAKES: And then it was the lack of inventory control on all the stuff that came back. [LR34]

SENATOR SEILER: So how about your hardware that you...the hardware, computers you have? Will they run a more sophisticated process? [LR34]

SCOTT FRAKES: I'm not sure. I believe so but I'm... [LR34]

SENATOR SEILER: Okay. Does your DEC do your classifications? [LR34]

SCOTT FRAKES: They do initial classification. [LR34]

SENATOR SEILER: And then is it modified after the prisoner leaves DEC and goes, is assigned to a facility? [LR34]

SCOTT FRAKES: There are annual reviews. [LR34]

SENATOR SEILER: Annual? [LR34]

SCOTT FRAKES: And that's also tied to length of sentence. [LR34]

SENATOR SEILER: Okay. [LR34]

SCOTT FRAKES: So it's not every year for every inmate. [LR34]

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SENATOR SEILER: Your DEC is completely overbedded, as I saw in the last set of records. Has that improved any since August? [LR34]

SCOTT FRAKES: It's better to go back a couple more months. We were at about 535 or 545 inmates in DEC this spring. This morning we were at 370, so we have improved, still need to get it down at least 70 more. [LR34]

SENATOR SEILER: Well, I don't know how you're going to dig your way out of that. I opened up the World-Herald and their inside page of the Midlands had about 15 people sentenced to come to you. I think maybe Douglas County thinks you're a private holding company for them. But, yeah, and I appreciate that problem because that's where...looks like that's where the overcrowding really begins to get big. [LR34]

SCOTT FRAKES: But that's definitely a reflection of lack of space throughout the system. It would be easier... [LR34]

SENATOR SEILER: And so that's your holding tank until you can find a bed? [LR34]

SCOTT FRAKES: Yeah. [LR34]

SENATOR SEILER: Are you still putting, like your predecessors, finding a body for a bed rather than a body for an appropriate facility? [LR34]

SCOTT FRAKES: I know that's still happening, not to the degree that I think it was, but it is still happening. We're working very hard to create a system approach to how we manage people. And Mike Rothwell is working closely... [LR34]

SENATOR SEILER: For instance, you and I have talked before about McCook. And is that improving any to be more of a vocational program rather than a high-security holding company? [LR34]

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SCOTT FRAKES: Other than the LB907, other than the funding from the reentry grants, so we do have the Prairie Gold Homes program that's going and that is going well. We haven't done anything else because we don't have space at this point. There is no programming space. [LR34]

SENATOR SEILER: I talked to you, or I'm pretty sure I talked to you about it, the vocational opportunity at Curtis where the irrigation company wanted to take a couple hundred people from your facility and train them. Did that ever get off the ground? [LR34]

SCOTT FRAKES: No, it didn't, unfortunately. I think Tecumseh was probably the biggest diversion and now...so I do have a new deputy director who is focused on classification and programming. [LR34]

SENATOR SEILER: Well, I hope he's directed to go talk to that irrigation manufacturer and see if you can get that running again because there's nowhere that people are going to make \$25 an hour coming out of your facility. The last thing I...it bothers me a little bit when we talk about raising the wages up to the Douglas County and Lancaster County jails. It's almost like we're bidding against ourselves, but that's what's happening as I understand it. You train them and then they pay more wages so they migrate to the other systems. [LR34]

SCOTT FRAKES: Some do. It's a number but I wouldn't say that it's our biggest issue. There are... [LR34]

SENATOR SEILER: Oh, I'm happy to hear that because I thought... [LR34]

SCOTT FRAKES: Yeah, because they only have so many positions and they don't have...you know, their turnover is whatever their turnover is, so. [LR34]

SENATOR SEILER: Okay. [LR34]

SCOTT FRAKES: But, yes, you do, you have staff that go to law enforcement and you have staff that come in that really want to be part of that world. What we find for the people that go to the county systems, many of them, many...some of which do come back to us is the trade-off is that

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there's few promotional opportunities and some of the other things that a prison system offers, so. But in terms of wages at the officer/corporal level, sergeant level, they certainly are above us. [LR34]

SENATOR SEILER: Okay, just the last issue. I remember very clearly appearing in front of the Appropriations Committee right before you did and I asked for a \$41 million LB999 program and made the pitch and then said, but hold this until Director Frakes has been here on the job for awhile. And since that time I've never heard from you or your staff until yesterday. I understand you said you had no intention of even talking about that at the press conference when JoAnne Young asked you that question. [LR34]

SCOTT FRAKES: Well, I'm sorry that I'm drawing a blank. Would you remind me again which project that is? I'm sorry. [LR34]

SENATOR SEILER: Well, it's still sitting there, but it was for a mental health program. And when we had our hearing in Hastings, the question was, do we have the professional staff? Well, at that time we had four psychiatrists in Hastings. Now we have six at Mary Lanning. And the university is interested in backing that program. And I hear through the scuttlebutt, though I haven't read it, is it true you said you weren't interested in developing that program? [LR34]

SCOTT FRAKES: I don't want to go to Hastings to build new beds and try to operate a program. I want to keep the offender population as centralized as possible, in particular the mental health component. [LR34]

SENATOR SEILER: Even though Mary Lanning has got the best reputation in the state? [LR34]

SCOTT FRAKES: Again, it's a logistics issue. It's a long ways away to send people. I do have concerns about hiring the custody staffing that are needed to operate. [LR34]

SENATOR SEILER: We've got 150,000 people within a 45-mile radius. Do you think that is enough people to supply you some employees? Come on. Done. Thank you. Any questions? Thank you very much. [LR34]