

**EBKE:** [00:00:02] It is 1:30 and we're going to go ahead and get started. Members are-- I've seen a couple of other members who are here and I think they stepped out for a minute but they'll be back. So we'll start the preliminaries. Good afternoon. Welcome to the Judiciary Committee. My name is Laura Ebke. I chair the committee. I represent Crete, District 32. I chair this committee and I'd like to start off by having my colleagues introduce themselves. Senator.

**HANSEN:** [00:00:31] Senator Matt Hansen, District 26, northeast Lincoln.

**EBKE:** [00:00:34] And Senator Baker is here. His cup is over there. And Senator Halloran's bottle of water is there. I know that-- that they're here. I believe everybody else except for Senator Krist will be here as well. Assisting the committee today is Elice Hubbert. She is our pinch-hitting committee clerk on loan to us from-- from Transportation and Telecommunications Committee. Our regular committee clerk had a family medical emergency that she needed to attend to. Dick Clark is our legal counsel for the day. Our committee pages are Rebecca Daughtery of Doane University and Sam Baird from the University of Nebraska. On the table over there you will find some yellow testifier sheets. If you are planning on testifying today, please fill one out and hand it to the page when you come up to testify. This helps us to keep an accurate record of the hearing. There's also a white sheet on the table if you don't wish to testify but would like to record your position on a bill. Also, for future reference, although there's not much left, we're-- I think there's only two committees still meeting. If you are not testifying in person on a bill and would like to submit a letter for the official record, all committees have a deadline of 5:00 p.m. the day before the hearing. We will begin bill testimony with the introducer's opening statement. Following the opening we'll hear from the proponents of the bill, then opponents, followed by-- followed by those speaking in a neutral capacity. We'll finish with a closing statement by the introducer if he or she wishes to give one. We ask that you begin your testimony by giving us your first and last name. Spell them for the record. If you're going to testify, I ask that we keep the on-deck chairs, the front row with the yellow-- the yellow signs filled. If you have any handouts, please bring up at least 12 copies and give them to the page. If you don't have enough copies we can help you make some more. We use a three-minute light system. So once you begin your testimony, the light on the table will turn green. The yellow light is your one-minute warning. And when the red light comes on, we ask that you wrap up your final thought and stop. We have an audible beep that goes off at three minutes and 30 seconds so you are encouraged to wrap it up when it hit-- when the light turns red. As a matter of committee policy, I would like to remind everybody that the use of cell phones and other electronic devices is not allowed during public hearings. Senators may use them to take notes or to stay in contact with their staff. So at this time I'd like everybody to double check, make sure that your cell phones are in silent or vibrate mode so that they won't go off and embarrass us all. Verbal outbursts or applause are not permitted. I doubt that that will be a problem; it usually isn't here. One more thing, you may notice that committee members come and go. This really doesn't have anything to do with the importance of your bills but, rather, as senators may have bills to introduce in other committees or other meetings that they have to attend to. So with that, we will begin today's hearings with LB763, Senator Harr. Is this the last time?

**HARR:** [00:03:44] This finally is, yes.

**EBKE:** [00:03:50] OK.

**HARR:** [00:03:50] Madam Chair, members of the Judiciary Committee, my name is Burke Harr, H-a-r-r. I represent Legislative District 8, which is Dundee, Benson, and parts of Keystone and, of course, Creighton Prep. I am here on LB763. LB763 creates the offense of obstructing a public power district employee and would classify such offense as a Class I misdemeanor. Obstruction is defined in the bill as occurring if an individual threatens or uses violence, force, or physical

interference, or knowingly obstructs, impairs, or hinders a public power employee from doing their duty in the construction, maintenance, or repair of the district's facilities or equipment on customers' premises. This issue was brought to my attention by the Omaha Public Power District because their employees will be working in the field and encounter disgruntled employees who threaten the employee even though the employee is simply involved in the normal course of their business. After talking with OPPD-- OPPD, we thought this bill would be the best method to provide employees the protection they need to safely conduct repair and maintenance work. Ultimately this bill is about ensuring the safety of these employees. A representative from OPPD will be following after me. I will just quickly say I was once a summer intern for OPPD and in the summer of '92 there was a lot of rain and I was mowing lawns and I couldn't mow the lawns a lot. And so on those days I learned the term "inclement weather" and the beauty of it. But some days they would send me out to do meter reading and I also had to bore holes in the poles to test them. And I learned that there are a lot of people out there that do not like utility workers. And so that's one reason why I think this LB763 is so important and I would appreciate the committee's support on this bill and would entertain any questions anyone may have.

**EBKE:** [00:05:53] Any questions for Senator Harr? I don't see any.

**HARR:** [00:05:53] Thank you.

**EBKE:** [00:05:54] Thanks. First proponent.

**TOM RICHARDS:** [00:06:07] Good afternoon. Chair Ebke, members of the Judiciary Committee, my name is Tom Richards, T-o-m R-i-c-h-a-r-d-s. I'm the manager of governmental/community relations for the Omaha Public Power District. I'm here on behalf of OPPD and the Nebraska Power Association. Safety is always top of mind of public power utilities across Nebraska. On a daily basis our employees perform duties that can mean life or death. But safety doesn't only include typically dangerous situations such as climbing poles and working with energized equipment. Employees can often encounter customers who are angry about disconnection, wary of utilities' motives, and generally resistant to the completion of work. There are times when these encounters involve outbursts, intimidation, threats-- and threats. It's unfortunate but it has become a reality. When these incidents occur, utility workers duly report them to law enforcement. Without specific legal protection these incidents can devolve into a hearsay argument very quickly. It has been suggested that concerns addressed by LB763 came from our current laws that address disturbing the peace and obstructing governmental operations. While the individual employee is encouraged to file charges, obstructing governmental operations is not a charge commonly known among law enforcement agencies, county attorneys, and citizens perhaps. Even utility workers themselves don't know that we're political subdivisions. Those people do not realize that political-- power-- that public power utilities are governmental subdivisions. LB763 specifically addresses public power workers as a way for the utility to advocate for legal action to be taken on the employee's behalf when these kind of incidents occur. This bill focuses on construction, maintenance and repair of district facilities or equipment, or the provision of service on or near a customer's property. Some will claim this bill is an attempt to interfere with political processes. It is not that. Situations identified in this bill are past political decisions. The employees are proceeding with work that has been approved and is lawful. It is a middle-of-the-road approach that addresses the larger issue of employee safety. It is a way to protect our employees and a way to address-- to address encounters that may pose a danger to them while they're working in the field. Thank you for your time, and I'll welcome any questions.

**EBKE:** [00:08:30] Thank you, Mr. Richards. Any questions? I don't see any.

**TOM RICHARDS:** [00:08:34] OK.

**EBKE:** [00:08:34] Thanks for being here. Next proponent.

**JILL BECKER:** [00:08:45] Good afternoon, Senator Ebke and members of the committee. My name is Jill Becker, spelled J-i-l-l B-e-c-k-e-r, and I am a registered lobbyist on behalf of Black Hills Energy. We'd like to appear today in support of LB763 and encourage the committee to extend its provisions to include natural gas workers. As the previous testifier mentioned, sometimes the situations that our employees face are both difficult and dangerous. As our company serves the public, it-- we must often gain access not only to customers' outside property, where most of our meters are located, but sometimes we also have to go inside a-- inside a customer's house, with their permission, especially when required to respond to a gas leak. This access can sometimes result in concern or possible danger when the state of mind of the customer is unknown or the customer is upset or frustrated for a variety of possible reasons. While these situations are rare--thankfully so--I did want to provide a couple of examples that our employees have faced. One of our service technicians attempted to shut off a gas line when a customer doubted who that technician was and if he was with our organization. The customer waved a machete at the technician before police arrived and the situation was ultimately resolved with the gas being disconnected. A customer suffering from post-traumatic stress disorder engaged in threatening behavior during a gas call leak by the customer. Our public safety requirements require that we follow through with a check inside the home when an outside leak was detected, and during the investigation the customer made his gun visible to our service tech-- technician, made general threats of violence if we entered his home, and refused entry. We had another customer call our call center threatening to turn the customer's gas on by himself, which obviously could pose some public safety issues. We had a member of the public make threats against our organization for planned construction. And we have had numerous customers say some very not-nice things to our call center representatives, and I'll just leave it at that. Ultimately, we view a bill like this as enhancing what can sometimes be difficult situations to resolve with our customers. Like I said, thankfully, they're rare and don't happen very often but certainly it is not a good position for our employees to be in. And with that, I'll be happy to answer any questions.

**EBKE:** [00:11:19] Thank you, Ms. Becker. Any questions? I don't see any. Thanks.

**JILL BECKER:** [00:11:23] Thank you.

**EBKE:** [00:11:25] Next proponent.

**KRISTEN GOTTSCHALK:** [00:11:31] Senator Ebke, members of the Judiciary Committee, my name is Kristen Gottschalk, K-r-i-s-t-e-n G-o-t-t-s-c-h-a-l-k. I'm the government relations director and registered lobbyist for the Nebraska Rural Electric Association. We have 33 rural electric providers that are members. They serve customers over 85,000 miles of distribution line in the most rural areas of the state. And our workers are often alone in the-- the prospect of doing their-- their work and conflicts do arise, as you've heard from previous testimony, and I-- the two biggest areas where we have the most conflict in rural areas are when we have to do maintenance on trees, tree trimming, and also collections and meter reading. Now rural areas can be remote and there is a great concern for our employees. We do want to thank Senator Harr for introducing this legislation. We have seen our line workers harmed, threatened with guns. We have had traps placed at the base of poles. Our poles have been modified to do harm to a line worker when they attempt to climb them, as well as other issues, and verbal attacks are-- are a fairly common property. The establishment of a misdemeanor violation for obstruction of a utility worker I think will go a long way to quell additional types of conflicts, especially for those that are repeat offenders. I did want to point out that this type of provision in statute is not new. In Section 14-2149 there is currently a provision for any person who willfully interferes with or obstructs any employee of the Metropolitan Utilities

District, so that is on-- on statute and that is a Class III misdemeanor. With that, I conclude my testimony and would be happy to answer any questions you may have.

**EBKE:** [00:13:41] Thank you. Any questions? Senator Halloran.

**HALLORAN:** [00:13:41] Thank you, Madam Chair. This is more-- more a statement than a question. But I'm just forever in awe of what people do. I mean when my power goes out, you know, I get down on my knees and I go like this, you know, because you all are there bringing power back [INAUDIBLE]. And if you want to trim my trees, trim my trees.

**KRISTEN GOTTSCHALK:** [00:14:03] We appreciate that and wish that that was the case more often than not.

**HALLORAN:** [00:14:07] [INAUDIBLE]

**KRISTEN GOTTSCHALK:** [00:14:07] And I know that you all received a letter from one of our rural systems where the customer has gone to extremes with concerns.

**HALLORAN:** [00:14:16] Shut their power off. No, but seriously, thank you.

**KRISTEN GOTTSCHALK:** [00:14:17] There are statutes that prevent us from doing that.

**HALLORAN:** [00:14:23] Thank-- I understand that. I understand. But thank you for all-- all-- all you do and all the folks that work with you.

**KRISTEN GOTTSCHALK:** [00:14:28] We appreciate that. Thank you.

**EBKE:** [00:14:29] OK. Thanks. Other proponents? Do we have any opponents? Mr. Eickholt is making his way up and he's actually going to stand because he has a back injury that's--

**SPIKE EICKHOLT:** [00:14:46] Thank you. Hopefully I can pick up on a mike, and I'm sorry to do this. It's awkward. Madam Chair, members of the committee, my name is Spike Eickholt, S-p-i-k-e, last name is E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association, opposed to the bill. I just want to state that our opposition is not directed toward anyone in this room who has experienced anything like this or anyone who knows someone who's experienced this type of harassment. It is inappropriate, it is offensive, and it is criminal already, and that really is our reason for opposing the bill. I've had passed out some statutes. One is 28-901. It's obstructing government operations. It's a Class I misdemeanor. If you look at the elements of that existing crime, it matches almost verbatim all of the proposed new crime in LB763. And I think that Mr. Richards said earlier when he testified on behalf of NPPD that perhaps prosecutors or law enforcement don't realize that public power employees or power district employees are government employees and interfering with their official act is government-- is obstruction of government operations. Well, I don't know if a new law, if current law enforcement and current prosecutors don't know what existing law is, I don't know what the goal adding a new bill is going to do. I also passed out some other statutes with respect to the assault statute, a general assault statute, a Class-- third-degree assault, and also terroristic threats. I did talk to Tom Richards and a few other people and Senator Harr when the bill was introduced to see perhaps what the motivation for the bill was and they related some of the instances that you've heard here today, the machete instance, the threatening somebody who's-- who's at someone's door or on someone's property. Those things are already criminal and there's a whole series of fines that you can prosecute for people who do, do that to public power employees. The concern that we have is that this is another instance of perhaps overcriminalization. In other words, if this law-- if this bill is passed into law and someone is

prosecuted for violating it, there's nothing limiting that person from being charged with terroristic threats, third-degree assault, obstructing government operations under existing law, or anything else that may have happened. And that's part of the reason that we have them. Finally, another reason we're opposed to this bill is that this is what I would submit sort of the beginning steps of creating a new designation of a specific victim. Now typically what we've seen historically, at least in this state, is that when you identify, whether it's a peace officer or a healthcare employee or someone like that, the tendency the following year or the following time the statute is looked at is to simply increase that penalty for that designated class. So for those reasons we are opposed to the bill.

**EBKE:** [00:17:29] Thank you, Mr. Eickholt. Questions? Thanks for being here. Other opponents? Do we have anybody in a neutral capacity? Senator Harr. We have some letters, I think.

**HARR:** [00:17:50] Thank you.

**EBKE:** [00:17:52] Let me read those while-- we have a letter-- some letters in support, one from Rocky Weber of the Nebraska Cooperative Council, one from Thomas Rudloff of Elkhorn Rural Public Power District, one from Rick Kubat from the Nebraska-- the Metropolitan Utilities District, and then one in opposition from the ACLU, Spike Eickholt.

**HARR:** [00:18:10] And I believe he testified as well.

**EBKE:** [00:18:15] For the defense attorneys, yes.

**HARR:** [00:18:15] Oh, OK.

**EBKE:** [00:18:20] Yes.

**HARR:** [00:18:21] Belt/suspenders.

**EBKE:** [00:18:21] That's right.

**HARR:** [00:18:21] Thank you, Madam Chair. Again, it goes back to this-- the need is real. I do know. I mean I firsthand have witnessed some of the conflicts that arise when an individual tries to go on someone else's property in the course of their duties. So to me, I see the real need for this bill. As far as Spike mentioning 28-901, yeah, it can help public officials but not all public power. But in your co-ops, they don't get that protection. And so we're trying to create some additional corrections for your co-operative power companies, and as well as public power, because we have a real duty. We want safe, reliable energy in this state. More and more we're relying on that, having energy, to power our homes, to power our businesses. And when there is a problem, we want that energy, we want our service restored as quickly as possible, and what we don't want is someone out there creating a bunch of problems. And so this is a way of the Legislature saying, yes, you are important and, yes, we think what you do deserves some extra protection. So with that, I would ask for your support and ask that you please Exec and pass out LB763. And I would entertain any questions anyone may have.

**EBKE:** [00:19:42] Thank you, Senator Harr. Senator Chambers, question?

**CHAMBERS:** [00:19:43] First of all, Senator Harr, I was not late because of your bill. I was at the Executive Board and I left early so I could get down here. But the question I'll ask you: Did you prioritize this bill?

**HARR:** [00:19:55] I did not.

**CHAMBERS:** [00:19:58] OK. I don't have any more questions. Thank you.

**HARR:** [00:20:00] Thank you.

**EBKE:** [00:20:01] Senator Baker.

**BAKER:** [00:20:02] Thank you, Chairwoman Ebke. Senator Harr, if I follow what you just said, if it's the municipal utilities, then that person would be a government worker. But if it's a co-op, that person would not be a government worker?

**HARR:** [00:20:19] That's what I understand. Correct.

**BAKER:** [00:20:21] Thank you.

**EBKE:** [00:20:23] Anything else? OK. This closes the hearing on LB763. We will move to, gosh, LB872, Senator Harr.

**HARR:** [00:20:32] Thank you, Madam Chair. Members of the Judiciary Committee, my name is Burke Harr, H-a-r-r. I represent Legislative District 8 and I am here on LB872. LB872 is a bill to reform the appeal process for criminal matters. The goal is to simplify the appeal process for both evidential rulings and final disposition of cases. The desired goal of the legislation is to have similar process for both prosecutors and defense attorneys. Additionally, the bill allows prosecutors to appeal sentences on misdemeanors without making any changes, subject to, of course, double jeopardy objections. The city of Omaha's city prosecutor, Mr. Matthew Kuhse, requested this bill. It was unanimously approved by both the mayor and the city council of Omaha to seek such a change in the law. Mr. Kuhse will be following me later to more fully explain the necessity of the bill. And with that, I would entertain any questions you may or may not have, understanding that this is the last time I'll be in front of the committee and you'd want to leave a good taste in my mouth. [LAUGHTER].

**EBKE:** [00:21:50] Senator Chambers.

**CHAMBERS:** [00:21:52] Did you prioritize this bill?

**HARR:** [00:21:53] I did not.

**CHAMBERS:** [00:21:57] Thank you. I don't have any other questions.

**EBKE:** [00:21:57] OK.

**HARR:** [00:21:57] I think the committee did.

**EBKE:** [00:22:03] OK. First proponent.

**MATT KUHSE:** [00:22:14] Good afternoon, members of the Judiciary Committee. My name is Matt Kuhse; that's M-a-t-t K-u-h-s-e. I'm the city prosecutor for the city of Omaha. I am here in support of this bill. The bill has three components to it. The first one is to simplify and create some equity between prosecutors and the defense community in terms of how a case is appealed. The current statutory framework is rather cumbersome and what the bill proposes to do is to allow prosecutors to pursue their appeals the same way a defense attorney would be, which would be to file a notice of appeal with the court and move on from there. The current framework is rather

cumbersome. I think many of the steps contained in it are unnecessary and I really can't see any reason why a prosecutor shouldn't be allowed to appeal a case any different than a defense attorney could in a criminal case or, quite frankly, attorneys who practice in civil cases. The other issue that the bill takes up with is to more clearly define a line in the statute about double jeopardy. The current statute uses a rather innocuous phrase in it, being-- being "placed legally in jeopardy." I think a more substantial or clear statement would be to say you-- involving someone being subjected to jeopardy pursuant to the double jeopardy clause of the United States Constitution. Lastly, it will allow for prosecutors to appeal misdemeanor sentences that a prosecutor feels are excessively lenient. The current statute only allows for this to take place on felonies. The impetus arises-- from this bill arises from situations where, with regards to the sentencing, judges make mistakes. They make mistakes in sentencing people where they forget to do something, omit to do something, such as taking someone's license away for a period of years, removing a handgun and having that taken away from them, in addition to a sentence that could be excessively lenient. That's the motivation behind the request for that. With regard to the process overall, my bottom-line position is just I think that prosecutors should be allowed to pursue their appeals in the exact same manner as all other lawyers do. And I see little need for the extra steps that the current statute has for prosecutors to pursue an appeal. I ask the committee to advance LB872 out of committee and to General File.

**EBKE:** [00:24:51] Thank you, Mr. Kuhse. Senator Chambers.

**CHAMBERS:** [00:24:54] Welcome.

**MATT KUHSE:** [00:24:54] Hello, Senator.

**CHAMBERS:** [00:24:55] When you said the prosecutors should be like any other lawyer, actually, a prosecutor is not. Isn't that true?

**MATT KUHSE:** [00:25:01] Correct.

**CHAMBERS:** [00:25:03] The prosecutor has the entire panoply of the power of the state at his or her disposal.

**MATT KUHSE:** [00:25:07] Correct.

**CHAMBERS:** [00:25:08] Sometimes an individual represents himself or herself because he or she cannot afford a lawyer, and that should be unfair. That person should not even have to go to trial, but he or she must. And if he or she happens to prevail, then the prosecutor, again, with all the power of the state, with all the resources he or she needs, with the gadgets, with access to all of the legal precedents, can then marshal all that against this one person. Now I've handled cases for myself and I've won. I beat the city when they wanted to put up red light cameras, traffic cameras. And you know what I did? First thing I did was went to the constitution. And something I knew, that they apparently didn't, is that a traffic offense is a crime. And when there's a crime, it must be committed in the presence of the one who is arresting. But in this case there was not even an arresting officer and there was no way that the one who was charged could cross-examine the one making the accusation because it was a machine, not a person. And to make a long story short, I won. Now I don't know if a lawyer would have won that case, but I know the steps that would be taken when you take something to trial. And I'm curious as to a situation, a concrete situation that would justify this, and I don't mean the kind where a person may have committed a violation. For example, there was a cop and he made a prostitute perform oral sex. She was smart enough to use a plastic card and she kept his semen in her mouth and deposited it on the card, and it was that which led to his conviction. And the judge gave him probation. Now maybe a prosecutor would appeal

because the sentence was too mild. Maybe in those kind of cases what you're talking about would obtain. So to get that kind of situation out of the way by giving you an example, give me an example, even if it has to be hypothetical, that would justify what you're doing with this bill.

**MATT KUHSE:** [00:27:42] To one issue that you made when you made a comment about how you wanted trial and that the state could marshal its forces against you, the statute currently already-- if you prevail at trial and I seek an appeal, it doesn't do anything to change your acquittal.

**CHAMBERS:** [00:27:59] No, here's the point I'm making. I was able to represent myself. But an ordinary-- a person not trained in the law could not do what I had done. I had the knowledge. So the point I was making, it's an unfair contest in the first place because the state always has lawyers. Not everyone who is accused has a lawyer. And if he or she has a lawyer, it's not often a good lawyer. And there have been lawyers who in death penalty cases actually slept at the table; they came to court intoxicated. I read cases where this is what was known at the time. So the point I'm getting across, prosecutors are not like those who are unfairly situated. They always have the advantage, always. So give me an example, because you're saying that if a person was found not guilty then this is not going to-- once that has been entered, then that's it. You're not going to change that.

**MATT KUHSE:** [00:29:06] No.

**CHAMBERS:** [00:29:06] So tell me what the purpose of this is and why that purpose cannot be achieved under the law as it stands now.

**MATT KUHSE:** [00:29:14] Well, with regard to the excessively lenient sentences and misdemeanors, that currently doesn't exist. The statute only currently allows for the prosecutor to appeal an excessively lenient sentence on felonies. It doesn't exist on misdemeanors.

**CHAMBERS:** [00:29:31] Why should we drop it to the misdemeanor level? And here's what I'm getting at so you'll know where I'm going. The Legislature creates crimes. No crime exists in this state unless the Legislature makes it a crime. There are no common-law crimes. It must be made a crime by the Legislature. So if the Legislature feels that this conduct engaged in should be criminalized but not to the level of a felony, and what you're asking for is not allowed where misdemeanors are concerned, why-- give me an example of a misdemeanor where you think this might come into play.

**MATT KUHSE:** [00:30:11] I can give you two concrete examples of instances that have happened. In certain weapons cases the law requires that a handgun be seized from the person and turned over to the police. For whatever reason, a judge omitted that in his or her order and it technically is part of the sentence. There is nothing that I can do to correct that other than to seek an appeal. And since it is part of a sentence, I would have to appeal it as part of a sentence. Another example being--

**CHAMBERS:** [00:30:47] And what are you-- what are you seeking when you bring that appeal?

**MATT KUHSE:** [00:30:50] That I want--

**CHAMBERS:** [00:30:50] You want the person to get a harsher sentence or what?

**MATT KUHSE:** [00:30:52] No, and that's-- in that particular situation, what I'm asking for is for the appellate court to find that the law requires that the gun be taken and turned over to police because that-- it was part of his sentence but the judge didn't do it for whatever the reason was. Another concrete example is on certain DUI offenses it requires a mandatory license revocation. For example, if you receive an incarceration sentence on a third-offense misdemeanor DUI, the law

requires that your license be revoked for 15 years. Sometimes judges forget to do that and don't include the license revocation on there. I have to appeal that as an excessively lenient sentence or, if I was able to as an excessively lenient sentence, to have an appellate court change that and enter that in, or at least tell the lower court to do it. Those are two particular situations. And then the hypothetical world, there are situations where a defendant receives a sentence of whatever. We can even use your example of the probation sentence in that felony case but let's say it was a misdemeanor for purpose of this hypothetical. Let's say I as the prosecutor feel that, based on the facts and circumstances of the case, that that sentence is excessively lenient. I think that the prosecutor should have the ability to then ask an appellate court to review that and either say yea or nay as to whether that sentence was excessively lenient or not.

**CHAMBERS:** [00:32:23] But here's what I'm looking at. And remember: I'm a policy maker; you're a prosecutor.

**MATT KUHSE:** [00:32:29] Right.

**CHAMBERS:** [00:32:29] You're interested in convictions. I know they say you're interested in justice but I want to get away from that so we can focus on what we're talking about here. I believe that power could be used in a discriminatory way in the same way prosecutorial powers are used in a discriminatory way now. There are prosecutors who know that racial profiling occurs. They don't do anything about it. When you have a juvenile detention facility and 70 percent of the persons there are black and they don't make up anywhere near that amount of that percentage of the population, if it were Nazi Germany and you had 70 percent Jews and they don't make up much of the population, they say that's anti-Semitism, but when it comes to us they say, no, no, you're just more criminal. But then we can show cases where black children get put in the youth center where white children who did the same thing, their parents are called and they go home. Now you all can deny that all you want to, but anytime I see where something is going to be put into the law that might freeze into law a discriminatory system, I have to oppose it. But I'm asking you these questions to give you a chance to put on the record why you really think you should do it. And here's the question that I'm going to ask you now. Why don't you seek to have the judge reprimanded for not doing his or her job instead of what you're trying to do?

**MATT KUHSE:** [00:34:04] Because I don't think that judges are necessarily doing this intentionally. If they were doing-- there's a difference between doing something intentionally and doing something accidentally. If they were doing something intentionally and intentionally avoiding the law, that's one situation. I think the more common occurrence is that the judge is-- made a mistake.

**CHAMBERS:** [00:34:24] Well, let's say that a person forgets that he or she is carrying a gun and is not intentionally doing that. Do you think that the prosecutor will say OK and not file a charge?

**MATT KUHSE:** [00:34:38] In that situation?

**CHAMBERS:** [00:34:39] Um-hum.

**MATT KUHSE:** [00:34:39] Probably not.

**CHAMBERS:** [00:34:41] And do you think if the charge was filed a judge would say, well, the person said he forgot he had the gun so I find him not guilty? Do you think that is likely to happen?

**MATT KUHSE:** [00:34:51] In that hypothetical, I can't really answer but it is possible that a judge would find somebody guilty in the scenario that you've mentioned.

**CHAMBERS:** [00:34:59] Here's what I'm-- here's why I'm trying to give examples that might seem outlandish. You need something that is kind of stark to bring the issues into sharp relief, like I'm trying to do. Don't think I'm attacking you for what you're doing. Don't think I'm criticizing you for what you're doing. If I want to bet on football games, I'd like to be able to place my bet after the game is over and nobody would blame me for trying to do that. But the bookie is not going to let it happen. So you're trying to stack the deck to an even greater extent for the prosecutors than it is now. That's the way I view it. And I haven't heard anything so far that would change my mind. So if there's more response you'd like to give, and I'm not going to ask you any more questions, to what I've said than what you've said already, then the opportunity is there.

**MATT KUHSE:** [00:35:53] With regard to the misdemeanor, asking for the ability to appeal misdemeanor sentences, I didn't really have anything to add to that. I think the only thing I would ask is-- is-- at the conclusion is just I-- I think that we should be able to appeal our cases, though, in the same manner as a defense attorney does in terms of filing for a notice of appeal, asking for bills of exception, things of like-- things of that nature. There's really-- and other states do it the same way. The only state I could find that was-- had a comparable statute to Nebraska was Wyoming when I looked at our surrounding states. With regard to that issue, I really do think that there's really no difference why there should be a different way to appeal something for the prosecutors as it would be for the defense attorneys.

**CHAMBERS:** [00:36:40] Mr. Kuhse, have you been before this committee before?

**MATT KUHSE:** [00:36:44] I was here last year, yes.

**CHAMBERS:** [00:36:45] Have you and I had conversations before?

**MATT KUHSE:** [00:36:49] Outside of the committee?

**CHAMBERS:** [00:36:49] Uh-huh.

**MATT KUHSE:** [00:36:49] Yes.

**CHAMBERS:** [00:36:51] And were they at least cordial?

**MATT KUHSE:** [00:36:53] They were very pleasant.

**CHAMBERS:** [00:36:54] And that's so the record will be clear that I'm not picking on you or jumping you. We've been through some things before, so I think you understand what I'm getting at even if you don't agree with where I'm going.

**MATT KUHSE:** [00:37:05] I do.

**CHAMBERS:** [00:37:05] Now who's the older, you or that gentleman sitting over there on the end of the line?

**MATT KUHSE:** [00:37:10] That-- that would be the gentleman that you really should pick on.

**CHAMBERS:** [00:37:14] Now which of you is the-- which of you is the older?

**MATT KUHSE:** [00:37:17] He used to be my boss so I really don't want to say.

**CHAMBERS:** [00:37:20] OK. Now, when you were a child, did you ever hear a fairy tale called "The Billy Goats Gruff"? A troll lived under the bridge.

**MATT KUHSE:** [00:37:28] Yes.

**CHAMBERS:** [00:37:29] And they wanted to get across the bridge to get to the pasture and the troll heard these little-bitty like footprint steps. And he said, who's that walking on my bridge? And the-- he said, it's I, the little billy goat gruff. He said, I'm going to eat you up. He said, wait until my bigger brother comes. So then they went through all the other and they all gave same excuse. Then there was this thunderous sound coming across the bridge. It shook it. And the troll said, who's that crossing my bridge? And the big billy goat gruff said, whose name just happened to be Stein or Rhine or something like that--it rhymed with it--he had no fear. He said, the big billy goat gruff. And the troll said, I'll come and eat you up. He said, come on and bring it. And as the story ended, the billy goat gruff disemboweled him and they were able to cross the bridge and so was everybody else. So are you kind of telling me to wait for the big billy goat gruff or you don't want to answer that question either?

**MATT KUHSE:** [00:38:34] Well, all I can tell you is that before the committee started we did have a conversation about who was going first.

**CHAMBERS:** [00:38:42] OK. That's all that I have. Thank you.

**EBKE:** [00:38:46] Any other questions? Thanks, Mr. Kuhse.

**MATT KUHSE:** [00:38:46] Thank you.

**EBKE:** [00:38:48] Next proponent. It's the big billy goat gruff? Hey.

**DON KLEINE:** [00:38:48] I heard him say that. Good afternoon, Senators. My name is Don Kleine, D-o-n K-l-e-i-n-e. I'm here as the Douglas County Attorney and I represent the Nebraska County Attorneys Association in favor of this bill. I'll be very brief. It-- it doesn't change anybody's-- anybody's rights from a defense counsel's rights or a defendant's rights with appeal. It just changes-- simplifies the process with regards to appeal. Our office handles all the domestic violence misdemeanors in Douglas County and all the domestic-- all the misdemeanor motor vehicle homicides, so those are the only misdemeanors we're really assigned in Douglas County. The only change would be is it simplifies the process if we wanted to appeal an issue from the lower court to the district court, and also gives us the ability to appeal a sentence that we felt was excessively lenient on a domestic violence case. Similar to the case you mentioned, that was a case that we handled prosecution of an officer who was convicted of first-degree sexual assault. We felt the sentence was excessively lenient. We appealed that to the Supreme Court of Nebraska. Senator Chambers is correct. So we want to have that option also with regard to these misdemeanors cases. And as I said, as Mr. Kuhse pointed out, it just simply simplifies the process. It doesn't change any of the burdens on-- on the defense or the prosecutor, doesn't make it any easier from the standpoint of the burden. It just makes the process simpler for us to be able to file. Previously we've had to go to the judge who was the judge maybe who handled the trial and ask their permission to make an appeal and we-- that wouldn't be part of the process. And it also, as Mr. Kuhse pointed out, gives us the ability to-- to appeal what we think might be an excessively lenient sentence. So with that, I'll be happy to answer any questions.

**EBKE:** [00:40:43] Questions for Mr. Kleine?

**CHAMBERS:** [00:40:44] I got all my questions on the record and the big billy goat gruff is here so

I don't have any more questions.

**EBKE:** [00:40:49] OK. Don't want to get disemboweled, huh? OK. Thank you. Are there any other proponents? Do we have any opponents? I suspect Mr. Eickholt will stand again.

**SPIKE EICKHOLT:** [00:41:11] Thank you. Good afternoon, Madam Chair and members of the committee. My name is Spike Eickholt, S-p-i-k-e, last name E-i-c-k-h-o-l-t, appearing on behalf of the Criminal Defense Attorneys Association in opposition to the bill. Our first general objection to this bill was articulated by Senator Chambers and that is we do not accept the suggestion from the proponents that the state is entitled to be treated the same in criminal procedure as defense and defendants are when it comes to rights of appeal. The rights of appeal, the various protections in the criminal statutes related to defendants, all have some sort of at least basis or nexus to your constitutional rights against the government. The government does not have constitutional rights. The government does not have a right to due process or anything like that. The government has the power to inflict punishment and sanctions on its citizens and our founders protected--or meant to protect--the citizens, the people from the government. And that's what's lurking in some of these different things that we've been talking about. Whether it's a Fourth Amendment right, or Fifth or Sixth or even Eighth Amendment right, those are things that belong to the defendant and not the state. And to assume and to argue that everyone is entitled to a separate playing field like civil cases, like private parties in civil cases, misses the fundamental issue when you're talking about criminal law. Another concern that we have about the bill is the terminology in the bill itself. The state wants to argue that they should be able to appeal just by filing a notice of appeal within 30 days. And if you look at page 2, lines 6 and 7, within 30 days of an entry of a judgment decree or final order, the-- generally, and it's not clear what the statute proposed language means, but generally you can only appeal a final order from a trial court. This seems to do a little bit more than that. It allows the state to appeal a judgment or a decree. I'm not sure if those terms automatically or necessarily mean they're going to be final judgments. In other words, say a defendant wins a motion to suppress before trial. This seemingly, arguably, could allow the state to appeal that immediately before trial. That's problematic for a couple of reasons. One, the reality is in this state, the money bond system, a lot of people are in jail, particularly people who are poor, cannot afford to post their bond. If the state is allowed sort of to appeal before trial, or even after trial, those people are going to be sitting in jail because as a practical matter the appeal bonds that the judges set are no better than the trial bonds-- pretrial bonds the judges set. I'm-- we're also troubled with the language that's proposed in the bill that replaces when a defendant has been put in-- legally in jeopardy with-- that a conviction or order should not be reversed when doing so would violate the double jeopardy clause. Jeopardy attaches in a trial level, if you're trying a case in front of a judge, when the first witness is-- is called and sworn, and in a jury trial when the jury is empaneled and sworn. That's when jeopardy attaches. In other words, this bill, when passed, would allow, in my opinion, a defendant who was acquitted, found not guilty at a trial, and the state can appeal because the protection against double jeopardy doesn't kick in until the appellate court is prevented from reversing or in any manner affecting what was done at the trial level. So those are some of the concerns that we have with the bill and we would oppose it.

**EBKE:** [00:44:29] Thank you, Mr. Eickholt. Any questions? I see none. Thanks. There any other opponents?

**CHAMBERS:** [00:44:35] He-- he--

**EBKE:** [00:44:35] Somebody's moving.

**PANSING BROOKS:** [00:44:36] There's someone.

**CHAMBERS:** [00:44:36] Oh, I thought he was recognizing the error of his ways and coming as an opponent.

**EBKE:** [00:44:41] Are you an opponent, ma'am?

**KELLEE KUCERA-MORENO:** [00:44:43] Yes.

**EBKE:** [00:44:44] OK.

**KELLEE KUCERA-MORENO:** [00:44:49] Hi. My name is Kellee Kucera-Moreno, K-e-l-l-e-e K-u-c-e-r-a, hyphen, M-o-r-e-n-o. I'm sorry. I have this to pass around.

**EBKE:** [00:45:07] Go right ahead.

**KELLEE KUCERA-MORENO:** [00:45:08] OK. My husband was incarcerated in 2005 and has been reformed and in recovery since then. He's got sent back twice because of-- number one was a violation. He used chemicals. You cannot incarcerate people because they have a disease. He was sent back for one year because he's chemically dependent. This time he violated parole-- or, no, he broke-- he got a new charge. He was pulled over with a knife in a safe, in a locked safe. He had taken it away from somebody so they would not threaten himself or someone else. He did not dispose of it soon enough so he was charged with felony in possession of a deadly weapon. This that I just passed out is LB558, went through 46-0, stating that you need to look at intent. From the time my husband was arrested, in February 22 of last year, until currently, there was nothing about this process that has been fair. We are poor. He would not-- he could not be-- I couldn't bail him out. I didn't have \$2,000. I had \$1,000. Between the time that the prosecuting attorney and the-- our lawyer, who was a prosecuting attorney and just turned lawyer, but between the time that they made the deal of charging him with that and the time that the judge sentenced him, this bill went through. The prosecuting attorney, our attorney, the judge, nobody would take a look at the simple fact that all we're saying is-- Senator Schumacher suggested maybe take a look at intent. Nothing about the prosecuting process is fair. Most people-- half the people incarcerated are there because they're chemically dependent. If there's a misdemeanor, why do you want to keep locking people up, especially for a misdemeanor? Thank you.

**EBKE:** [00:47:19] Thank you. Any questions? Don't see any. Thank you for being here. Are there any other opponents? Any neutral? Now, Senator Harr, your swan song before the Judiciary Committee, right?

**HARR:** [00:47:36] Right? I think I was just so excited for that.

**MORFELD:** [00:47:39] Wasn't your last bill four bills ago?

**PANSING BROOKS:** [00:47:43] Yeah.

**HARR:** [00:47:43] I know. I was hoping. Thank you for all the testimony here today. You know, all power resonates from the Legislature, as Senator Chambers said, and we decide what is a crime and what isn't a crime and what is the proper sentence for that crime. And yet you heard a prosecutor from the city of Omaha come and say that occasionally judges will thumb their nose at the Legislature and think the law doesn't apply to them or to the people they're sentencing and they come up with their own sentence outside of what the law says. It's basically law doesn't apply to you. And that's just not true. And so we have to have safeguards in our system when judges take the law into their own hands and act in a rogue manner. We can do the complaint route, which Senator Chambers is more than adequate and knows the process for that. But there's also the fact that you

have an individual who may or may not supposed to have a license, may or may not supposed to have a gun or a knife that still has it. Yeah, we can go after the judge. But in the meantime, there's a person who we in the Legislature have determined shouldn't have a certain right or ability and yet they do. And so that's what we're looking for in this bill. And the other is, you know, I think about the case of a child who has been sexually assaulted and a judge rules and says, you know what, when that kid made that hearsay statement, it wasn't an excited utterance, I'm going to overrule it, I'm not going allow that statement in. And so that excited utterance doesn't come in, the statement of that child doesn't come in and, lo and behold, the whole case falls apart. For whatever reason the [INAUDIBLE] whatever the reason, but the case falls apart and there's nothing the prosecutor can do, can't appeal it. This allows that prosecutor to leave the ability to have an appeal and to do it in the same manner the-- the defense attorney can do it. Yes, there-- I listened to what Spike said. There are interlocutory appeals and then there are appeals made after. And that's why you have the different times of when the appeals are done. It's going on how the statute currently is. And again, it's, yes, it is giving the same powers to the defense-- or prosecutor as a defense attorney has. And again, you're right, we have the power of the state, but we are the power of the state and we can decide what the power of the state should or should not be. And so I want to make sure that there-- the rules are applied equally. The state does have some advantages over a defense attorney, but at the end of day the state has to prove beyond a reasonable doubt, which is a really high standard. And I think it should be a high standard for a good reason, right? We shouldn't be sending innocent people to jail. But at the same time we shouldn't be saying, hey, we want to hold you accountable, prosecutor, but we're going to tie one arm behind your back. And so this is looking at how-- and coming up with a compromise, say, how can we make sure that the field is level and that we can make sure that those who deserve to be punished or prosecuted are properly prosecuted? With that, I would entertain any questions you may have, knowing this isn't prioritized.

**EBKE:** [00:51:11] Thank you, Senator Harr. Senator Chambers.

**CHAMBERS:** [00:51:11] I want this swan to sing a bit more before he dies. That's where "swan song" came from.

**HARR:** [00:51:18] I will squawk.

**CHAMBERS:** [00:51:18] The swan always sings before it dies.

**HARR:** [00:51:22] [LAUGH] Yeah.

**CHAMBERS:** [00:51:22] Well, some swans should die before they sing. But anyway--

**EBKE:** [00:51:26] Yeah.

**CHAMBERS:** [00:51:26] -- you've read Nebraska Supreme Court Opinions, haven't you?

**HARR:** [00:51:31] Yes.

**CHAMBERS:** [00:51:31] OK. And when they have those-- that syllabus, they'll say, we will not judge as to the credibility of the witnesses, we will not re-weigh the evidence. Have you heard that where they said we will not re-weigh the evidence?

**HARR:** [00:51:46] Generally, yes, at a jury-- when there is a jury trial, yes,--

**CHAMBERS:** [00:51:48] So there-- you--

**HARR:** [00:51:50] -- or a discretionary.

**CHAMBERS:** [00:51:50] You can raise that, if you want to, if you are the one who happens to be the defendant, but you're not going to get the court to re-weigh the evidence. I think when you talk about appeal-- proving--and it must be every element--beyond a reasonable doubt, there are lower court judges who will allow inadmissible evidence to be admitted even over an objection.

**HARR:** [00:52:21] Fair.

**CHAMBERS:** [00:52:21] The court, if you raise that on appeal, the court, the appellate court will say that should not have been admitted. And if that's critical to crucial, then they'll either call for a new trial or dismiss. But the point is this. The evidence is inadmissible whether I object or not. But if I sleep it and I'm the defendant, that inadmissible evidence is considered and can be the basis for convicting me.

**HARR:** [00:52:54] Yes.

**CHAMBERS:** [00:52:54] And the Supreme Court is not, on its own motion, going to undo that. That's why sometimes in a lower court-- I don't practice law but I'm trained in the law. When the judge renders a decision, ask the judge to state on the record the basis for his or her decision. And sometimes these judges, not being as smart as somebody who finished law school but didn't take the bar and doesn't practice law, will say, well, a judge, having stated his or her reason for the decision, gave a reason that is not sufficient to sustain the judgment, so it's thrown out. Had that defendant not required the judge to state the basis for the decision, the appellate court, trying to help their brother judges, will say, well, maybe that would have been a basis, but that was not necessarily the - the basis. There was other evidence and the judge could have been using that other evidence as a basis for finding guilt, and if we make that presumption, then there was sufficient evidence to convict. Now I've been-- my matters were speeding tickets except when I got a grand jury report expunged. And I would object and naturally, being who I am, just like in the Legislature, the judges didn't respect me. But when we got to the appellate court and I wrote my brief and I cited my cases and the law, then the case would be overturned and I would win. What you're asking for is a rewriting of the rules, really, isn't that true?

**HARR:** [00:54:57] Not the rules, the law.

**CHAMBERS:** [00:55:00] Well, I'm saying-- let me-- I'm using an analogy: the rules by which this game is played.

**HARR:** [00:55:06] Oh, fair, fair.

**CHAMBERS:** [00:55:07] So--

**HARR:** [00:55:07] I'm trying to level the playing field, if that's what you mean, yes.

**CHAMBERS:** [00:55:10] When the judge blunders, the state should not to get-- get the benefit of that. It is like a game. When you were a prosecutor, what would you say the percentage of convictions would have been?

**HARR:** [00:55:27] For me?

**CHAMBERS:** [00:55:28] In general for prosecutors.

**HARR:** [00:55:29] At trial or over our cases filed?

**CHAMBERS:** [00:55:34] All of them, take them all.

**HARR:** [00:55:35] I would say that the office did a very good job of screening out cases that didn't meet that level of-- the high level of guilt beyond a reasonable doubt. I think our police officers do a good job. I think we read the police reports and overall the police reports are generally honest and that we do a good job of filing cases and we're very capricious in how we file those cases so that-- we rigged the system so we had a great win percentage, yes.

**CHAMBERS:** [00:56:04] And what-- it was above 90 percent, wasn't it?

**HARR:** [00:56:07] I would hope so, yeah, because I don't-- because I would hope we wouldn't file a case in which we didn't have that.

**CHAMBERS:** [00:56:13] Well, your wishing and hoping and singing and praying--

**HARR:** [00:56:15] Yeah.

**CHAMBERS:** [00:56:15] -- is not what I'm talking about. I'm trying to make a point here, not to hound you.

**HARR:** [00:56:19] Yeah.

**CHAMBERS:** [00:56:20] And when we include plea bargains, there are people who plea-- who have pled guilty to crimes they didn't commit. I got a long article in The New York Review of Books where this federal judge laid out the high percentage of people who plead guilty to crimes they didn't commit. The judge knew it. The person's lawyer knew it. And the lawyer would say, because he was going to be convicted anyway, we took the plea because there was no way that he'd have a chance to win, sometimes because of the way the person looked, sometimes because of the person's color. But it was established that people plead guilty to crimes they didn't commit. But judges don't intervene to stop it. The prosecutors already have everything stacked in their favor and they overcharge people and frighten them into a plea.

**HARR:** [00:57:14] And I hope that doesn't happen. Now I will say there are times--

**CHAMBERS:** [00:57:17] But you know that it does happen.

**HARR:** [00:57:18] Well, but I will tell you I--

**CHAMBERS:** [00:57:20] You're obfuscating.

**HARR:** [00:57:20] -- I can personally talk of cases where people pled to--

**CHAMBERS:** [00:57:23] OK, swan.

**HARR:** [00:57:24] [LAUGH] Yeah. Go ahead.

**CHAMBERS:** [00:57:25] Go ahead.

**HARR:** [00:57:26] I know of cases where people have pled to crimes they didn't commit, but it was part of a plea bargain in which the crime they pled to was less than the crime charge that we

probably could have convicted them of. For instance, you might plead to attempted manslaughter. There is no such thing as that, right? But you plead to it so that you can get to a Class IV felony, so that you can get to a lesser sentence. So, yeah, it does occur. I'm not denying that. But I would say also, to your comment earlier where you have attorneys who allow evidence in that probably shouldn't, we have a fail-safe--ineffective assistance of counsel--in those situations. Now the other case you spoke of--

**CHAMBERS:** [00:58:05] Well, defendants a lot of times get dumb lawyers. You have to get what you-- take what you can get. But that-- that's all that I wanted to do to get to the point.

**HARR:** [00:58:14] Right. But we have a good public defender's office.

**CHAMBERS:** [00:58:14] My point is that the deck is stacked in favor of the prosecution already. The prosecution has all of the advantages already.

**HARR:** [00:58:24] The defendant has truth on their side.

**CHAMBERS:** [00:58:29] You said what?

**HARR:** [00:58:30] The defendant has truth on their side.

**CHAMBERS:** [00:58:32] Has what?

**HARR:** [00:58:33] Truth.

**CHAMBERS:** [00:58:34] Truth. Oh. Oh, I don't have any more questions.

**HARR:** [00:58:37] And that's my final word.

**EBKE:** [00:58:38] You're done singing: truth. Thank you.

**HARR:** [00:58:43] I'm still an ideologue.

**CHAMBERS:** [00:58:46] OK.

**EBKE:** [00:58:47] OK. Thank you, Senator Harr. That closes the hearing on LB872. We will proceed to LB811. And thank you for being our guest here in the Judiciary Committee.

**HARR:** [00:59:08] Thank you [INAUDIBLE]

**EBKE:** [00:59:09] OK. Senator Lindstrom.

**LINDSTROM:** [00:59:09] All right. Good afternoon, Chairwoman Ebke and members of the Judiciary Committee. I'm Brett Lindstrom B-r-e-t-t L-i-n-d-s-t-r-o-m, representing Legislative District 18 out of northwest Omaha, and I'm bringing LB811 for your consideration today. I introduced LB811 to ensure Nebraska law reflects new pay-- payment card technology and the technique-- techniques criminals are using to steal payment information from customers. A similar bill passed last year in Arkansas. Bills like this have been introduced this session in Iowa, Colorado, and Missouri. Changes are needed because payment card technology and the skimmers used to steal information off payment cards in the United States are transitioning away from magnetic strips and stripes and towards computer chips. The updated definitions on page 2 of the bill will update Nebraska statute to-- statutes to recognize the new technology being used. On page 3 of the bill, the

proposed legislation broadens the code section by prohibiting the direct and indirect use of scanning and encoding machines so that all parties involved in a scheme to fraudulently obtain financial information may be charged. There will be retail representatives following me with more information about when individuals may be indirectly using these machines. Second, the bill removes the intent-to-defraud requirement for use of scanning devices and encoding machines. The unauthorized scanning or storing of payment cards' information is a sufficiently culpable act. Therefore, intent-to-defraud language is unnecessary. The proposed legislation also makes it a crime to possess a scanning device or encoding machine with the intent to obtain information or place on another payment card without authorization from the authorized user of the payment card, the issuer of the-- the issuer of the authorized user's payment card, or a merchant. With the passage of this bill, Nebraska will join 19 other states that criminalize possession of such devices with the intent to defraud or commit a-- commit a crime. This is important legislation to stop the rampant use of skimming devices and consumer fraud and I request your support of this bill. And with that, I'll be happy to take any questions. Thank you.

**EBKE:** [01:01:16] Thank you, Senator Lindstrom. Questions? Senator Chambers.

**CHAMBERS:** [01:01:20] If I hold my questions until the experts come, then don't think I'm disregarding you, but it'll shorten our committee time--

**LINDSTROM:** [01:01:24] Absolutely.

**CHAMBERS:** [01:01:24] -- and they might have more-- you know, the answers.

**LINDSTROM:** [01:01:27] Thank you, Senator.

**CHAMBERS:** [01:01:27] Thank you. Not that you don't have the answers--

**LINDSTROM:** [01:01:31] No, I understand. Thank you.

**EBKE:** [01:01:31] Other questions? OK. First proponent.

**JASON BASSETT:** [01:01:48] Good afternoon, Madam Chair, members of the committee. My name is Jason Bassett, B-a-s-s-e-t-t, and I'm testifying in support of the LB811 on behalf of Kum & Go convenience stores. We're a convenience retailer based in Iowa and we operate in 11 states, including a couple dozen stores here in Nebraska. Senator Lindstrom, thank you for bringing this legislation. And he highlighted a lot of the points I have in my remarks but I just want to cite a couple examples where this has really hit the fuel industry pretty hard. There's a current case in Colorado right now that, following a three-year investigation in-- involving FBI, Homeland Security, U.S. Secret Service and others, a federal grand jury returned six indictments charging a total of ten individuals with a variety of crimes related to theft and sale of diesel fuel. According to the indictment these individuals stole thousands of gallons of fuel using fraudulent credit cards obtained through skimming devices or purchased on the Dark Web. This issue isn't only reserved for fuel retailers. As recently as January 30, the Secret Service issued an ATM attack warning to tell retailers and banks of the crime involving standalone ATMs. Virtually anywhere you insert your card you're vulnerable to skimming and these people-- these devices are getting more and more sophisticated as the technology payment cards get more and more sophisticated. One of the most important changes is that we criminalize both direct and indirect use of skimmers. Our experience is these people travel from coast to coast and they're part of a vast network of people transporting, placing, retrieving skimming devices. There's also those in the group that harvest the data, make credit cards, or sell the information on the Dark Web. The terms "indirectly" or "directly" are meant to capture the broad range of unlawful activities that take place in this environment. I think the point

here is that there's really no legitimate business reason to have one of these devices, either to steal the information or to make a credit card. We've seen-- in the states where we operate, we've seen increased instances of people being arrested for possession. However, there's very few prosecutions because it's so difficult to prove and I think that's why some of the changes in this bill are necessary. And I'd be happy to take any of your questions.

**EBKE:** [01:04:07] Thank you, Mr. Bassett. Questions? Senator Chambers.

**CHAMBERS:** [01:04:09] And you have a copy of the bill?

**JASON BASSETT:** [01:04:10] I do.

**CHAMBERS:** [01:04:11] OK. Would you turn to page 3--

**JASON BASSETT:** [01:04:13] I'm here.

**CHAMBERS:** [01:04:16] -- in line 5. Now I can understand if you directly use this. How do you indirectly use it?

**JASON BASSETT:** [01:04:22] I think, as I said in my remarks, there are people that are-- that retrieve the data, that are pulling the data from the device. You-- there's technology now where the device is installed on an ATM or a gas pump or even a point-of-sale system inside a store, and the person can sit out in the parking lot and pull the data from that, so they're not caught with the skimming device but they're indirectly using it to obtain the credit card data stored on it. In fact, there's been notices to police departments to place these items in lead bags because these people can sit in the parking lot of the police department and purge the data from the skimmer to clear it.

**CHAMBERS:** [01:05:07] And that's how you indirectly use it?

**JASON BASSETT:** [01:05:10] I think, and like I said in my statement, there's many, many ways that people-- I don't-- "benefit" is not the right word, but use the skimming device, whether to-- whether you place it, whether you retrieve it, whether you're-- just transporting it. Like I said--

**CHAMBERS:** [01:05:26] Here's what I'm getting at. We're creating a crime and I want it to be crystal clear what we're talking about. So you've explained that the best that you can, so I'm not going to hound you on it. I just wanted a statement from you on that question. Now if you go down to line 14, we're talking about a person will possess this device with the knowledge that some other person intends to use it. Would you give me an example and explain what that means.

**JASON BASSETT:** [01:06:02] Now as, again, as I stated, I think that there's-- these people are part of large syndicates and they place devices, there's-- with people that they know they're going to pick them up. They know that they'll-- people in this organization, because it's oftentimes organized crime, will use hotel room keys and encoding machines to make credit cards, and that would be a way that someone would have knowledge that the-- that intends to use the scanning device to obtain the information.

**CHAMBERS:** [01:06:32] But I'm the one who possesses it.

**JASON BASSETT:** [01:06:34] Right. And I-- I-- I would--

**CHAMBERS:** [01:06:36] And with the knowledge that somebody else is going to use it?

**JASON BASSETT:** [01:06:39] I would say that it would be-- it would be difficult to envision a scenario where, if you're placing the device, you're not aware of what you are placing the device for.

**CHAMBERS:** [01:06:50] Then you're-- I'm-- I'm the one placing it.

**JASON BASSETT:** [01:06:52] Yes.

**CHAMBERS:** [01:06:53] This is you possess it with the knowledge that some other person intends to use it. That's what this language says.

**JASON BASSETT:** [01:07:01] Yes. So you-- you-- you put--

**CHAMBERS:** [01:07:04] "A" possesses the device knowing that "B" is going to use it.

**JASON BASSETT:** [01:07:09] Yes.

**CHAMBERS:** [01:07:09] Either I use it or "B" uses it. You don't say you provide the device to somebody you know is going to use it. There's no nexus here that I see. But anyway, I just want that on the record. Now, if we come down to line 25, "Possess an encoding machine with the intent to place" this information and so forth, how do you prove the intent? Is-- if it's merely possessing it, then you make the possession of it unlawful. If I possess this, how can you prove-- you can prove what my intent is?

**JASON BASSETT:** [01:07:56] I would-- I would say that possession is intent.

**CHAMBERS:** [01:08:00] That-- that's not good enough because it has to be with the intent to place information. The intent to do something with it, you don't make the mere possession of it a crime with the language of the bill, but that's what you're doing.

**JASON BASSETT:** [01:08:16] Would-- would--

**CHAMBERS:** [01:08:16] You're making the possession a crime with the language but it's not-- it's not prioritized, I don't think. OK, so it's not going anywhere, so I won't belabor the point. But I wanted to have it stated with reference to the way I was reading the bill.

**JASON BASSETT:** [01:08:35] If I could, just for--

**CHAMBERS:** [01:08:36] Sure. If I asked you a question, go ahead and answer it.

**JASON BASSETT:** [01:08:38] We had similar language that passed in Iowa yesterday, 98 to nothing, in the house and I believe it'll pass the senate there. Like Senator Lindstrom said, Colorado and Missouri are considering the exact same language. I hate to answer a question with a question, but would there be a legitimate business purpose that if, using you as an example, would possess an encoding device?

**CHAMBERS:** [01:09:03] It's not against the law for me to buy it, is it?

**JASON BASSETT:** [01:09:08] I-- I--

**CHAMBERS:** [01:09:08] Then it ought to be against the law for somebody to sell it.

**JASON BASSETT:** [01:09:13] What-- but what would be your legitimate business purpose for--

**CHAMBERS:** [01:09:14] It wouldn't make any difference what-- if-- see, if you want to make the possession of it a crime, that's what you have to say. But the Legislature, at least some of us, may not agree that the mere possession should be a crime. If you make possession-- let's say you're not licensed to carry a gun and you are caught with it. The mere fact that you have it is the crime. They don't have to say you're possessing it with the intent to shoot Senator Chambers. They'd say, but if that's your intent, then we'll look the other way anyway. But anyway, do you see what I'm getting at?

**JASON BASSETT:** [01:09:56] I do.

**CHAMBERS:** [01:09:57] You-- there are two things, two elements here, the possession of it, then you say--

**JASON BASSETT:** [01:10:04] Intent.

**CHAMBERS:** [01:10:04] -- if the intent is to do this with it, if you can't prove intent, then my possession of it is not a crime. The mere possession is not the crime. That's what I was getting at. And then to say that you possess it with the knowledge that somebody else is going to use it, I don't - I don't think you can be convicted of being a mind reader. If you say that two people were working together to commit a crime, then you might call it conspiracy, you might call it being an accessory. But when no act has been committed by anybody but the knowledge that you say I have, I know that you intend to use it, with you not having used it, I haven't used it, that would be a crime because I possess it. And like the question you asked, why else would I possess it if I didn't want to use it or have somebody else use it? Well, that's a jump that to my mind can't be made when you're creating a crime. And somebody after you may be able to address what I'm talking about, but I'm not going to belabor it with you. And I'm not criticizing--

**JASON BASSETT:** [01:11:17] No.

**CHAMBERS:** [01:11:18] -- the way you answered the questions, by the way. OK.

**JASON BASSETT:** [01:11:20] Appreciate the discussion.

**CHAMBERS:** [01:11:21] OK. That's all I that I have.

**EBKE:** [01:11:23] I wonder if this would be something, maybe it's a poor analogy, but something like the possession of printing plates for counterfeiting. I mean, is there any-- is there any other reason to have those?

**CHAMBERS:** [01:11:39] Can you possess counterfeit equipment without it being a crime?

**EBKE:** [01:11:43] I don't know. Can you?

**CHAMBERS:** [01:11:44] That's what you have to look at,--

**EBKE:** [01:11:44] Yeah.

**CHAMBERS:** [01:11:44] -- what has the law criminalized.

**EBKE:** [01:11:46] Yeah.

**CHAMBERS:** [01:11:47] They could try to criminalize the possession of it but there might be a basis for possessing it other than--

**EBKE:** [01:11:54] Right.

**CHAMBERS:** [01:11:54] -- to commit a crime.

**EBKE:** [01:12:00] OK. Any other questions? Thanks for being here today.

**JASON BASSETT:** [01:12:05] Thank you.

**EBKE:** [01:12:05] Are there any other proponents?

**JERRY STILMOCK:** [01:12:21] Madam Chair, members of the committee, my name is Jerry Stilmock, J-e-r-r-y S-t-i-l-m-o-c-k, testifying on behalf of my client, the Nebraska Bankers Association, in support of LB811 for the reasons given already by the previous two testifiers, of course, the senator included. It's an opportunity to update the current law--we're seeing more and more of this happening--but also update the current law because of the change in the product itself. We're seeing industry move away from, and maybe some of you that carry payment cards are going to the chip, and so it takes away the-- LB811, one of the main parts that we see is it takes away the focus on magnetic strips or stripes and opens up for technology where it is right now and that's with a chip. I've included in my written testimony a-- just a restatement of the different elements of LB811 so I won't trouble the committee with regurgitating all of that other than to say we support the legislation and urge you to advance it to the committee. Senator Chambers, I've been told from 1993 never to engage a question that wasn't asked of me by you but-- but let me try. Let me try anyway. I'm going to break that rule--

**CHAMBERS:** [01:13:40] Go ahead.

**JERRY STILMOCK:** [01:13:40] -- because I figure-- because I have the benefit of going third. You asked a question that made me ponder. What about possession, possession without intent, or more-- perhaps more clearly stated, how would the prosecutor behind me prove this language in-- in the portion that you-- you pointed to at page 3, line 14. So I have a gun, I possess that gun, but I have knowledge that somebody else is going to use that gun to commit a crime, and that's about as close as the analogy I can get. And should that for policy reasons be placed in criminal law? I guess on your side of the table, sir--

**CHAMBERS:** [01:14:29] That-- that wouldn't even hold up. Like I say, you could call somebody an accessory--

**JERRY STILMOCK:** [01:14:34] Sure.

**CHAMBERS:** [01:14:35] -- before or after, or an accomplice, but there has to be some nexus between this individual who did not do anything and the one who did. But you're not even requiring that anybody do anything with this.

**JERRY STILMOCK:** [01:14:54] The holder of it, as I read the language, the holder of it would not have to do anything with this, the scanning device, but it would be the second person that that person, that second person-- knowledge that some other person intends to use the scanning device to obtain illegal information.

**CHAMBERS:** [01:15:13] Well, suppose I have one of these devices--

**JERRY STILMOCK:** [01:15:16] Sure.

**CHAMBERS:** [01:15:16] -- and I throw it away, and I know that if somebody finds it they're going to do something wrong with it. Then, because I threw it away, knowing that if somebody found it they'd use it, then they trace back to the one who threw it away and then I'm-- I'm guilty of a crime?

**JERRY STILMOCK:** [01:15:35] Yeah, I-- I-- I know your-- your-- your question is hypothetically stated but, no, you're not because you don't possess it. You threw it away.

**CHAMBERS:** [01:15:42] But when I give it to somebody, I no longer possess it. I don't do anything with it.

**JERRY STILMOCK:** [01:15:52] Um-hum.

**CHAMBERS:** [01:15:52] The language says on page 3, in line 25, possess an encoding with intent to-- oh, that's the other one up here. Line 14: possess a scanning device with knowledge that some other person intends to use the scanning device. I'm-- I'm possessing it. I haven't used it. The other person hasn't used it. I'm possessing it.

**JERRY STILMOCK:** [01:16:26] Yes, sir.

**CHAMBERS:** [01:16:27] And that's the crime.

**JERRY STILMOCK:** [01:16:31] Yes, in the language of the bill, yes, sir, because you have-- you, the possessor, have knowledge that somebody else is going to use it illegally. I-- I-- yeah, I'll-- I'll stop there. Sorry.

**CHAMBERS:** [01:16:44] No, but I didn't ask you the questions because I had already asked them to the other gentleman--

**JERRY STILMOCK:** [01:16:45] OK.

**CHAMBERS:** [01:16:47] -- and I didn't want to seem that I was beating a dead horse.

**JERRY STILMOCK:** [01:16:49] All right.

**CHAMBERS:** [01:16:50] OK.

**JERRY STILMOCK:** [01:16:50] Then I'm going to escape with--

**EBKE:** [01:16:54] Escape [INAUDIBLE].

**JERRY STILMOCK:** [01:16:54] -- beating a dead horse.

**CHAMBERS:** [01:16:54] [INAUDIBLE] off the stand.

**EBKE:** [01:16:58] Yeah, OK.

**CHAMBERS:** [01:16:58] But he and I know each other. We've been around and around many times.

**EBKE:** [01:17:03] Yep. I see no other questions. Thanks.

**JERRY STILMOCK:** [01:17:04] Thank you, Senators.

**EBKE:** [01:17:05] Yep. Are there any other proponents?

**BRANDON LUETKENHAUS:** [01:17:17] Good afternoon, Senators. My name is Brandon Luetkenhaus, B-r-a-n-d-o-n, last name L-u-e-t-k-e-n-h-a-u-s, and I am here on behalf of the Nebraska Credit Union League and our trade association which represents credit unions in this state. And we are also here to testify in support of LB811. As previous testifiers have said, credit unions included, do now offer chip cards, many of them, to their consumers or their member owners to help in the prevention of fraudulent transactions and-- and we believe that the state statutes should be updated in some fashion to-- to provide for the new technologies that are-- that are coming out. So with that, I would open it up to any questions you might have.

**EBKE:** [01:18:07] Any questions? Senator Chambers.

**CHAMBERS:** [01:18:08] You may have said it inadvertently, but you said update it in some fashion. I'm not opposed to doing that. But when you put in some of the kind of language that I've talked about, that's what, you know, I'm objecting to. And I'm not asking the same questions of everybody. I'm not opposed to it being updated to take into consideration the device, but I still think the device should have to be used in order for the-- to be the crime. That's what I'm getting at. But that's why I'm not going to ask you all the questions.

**BRANDON LUETKENHAUS:** [01:18:42] OK.

**EBKE:** [01:18:43] Other questions? I see none. Thanks. Are there any other proponents? Opponents? I see no opponents. Anybody in a neutral capacity?

**SPIKE EICKHOLT:** [01:19:06] Good afternoon, Madam Chair, members of the committee. My name is Spike Eickholt, S-p-i-k-e E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association. We are appearing in a neutral capacity. When we reviewed the bill, we did kind of at least appreciate what Senator Lindstrom is doing by this and we acknowledge as an organization that perhaps some updating to the statute should be made to accommodate for this new type of-- maybe not necessarily new type, but this different form of the same type of crime. The reason that we're testifying neutral is just to state on the record that we're not opposed to doing that so long as the penalty provision stays the same. And Senator Lindstrom does not propose to increase any of the penalties with respect to this crime and we appreciate that and we just want to say that on the record.

**EBKE:** [01:19:52] Thank you, Mr. Eickholt. Questions?

**CHAMBERS:** [01:19:52] Just-- not a question.

**EBKE:** [01:19:54] OK.

**CHAMBERS:** [01:19:55] I know why he's doing this, but I've always told people that Mr. Eickholt stands for justice like nobody I've seen. [LAUGHTER]

**EBKE:** [01:20:09] OK. Any other questions? OK. Senator Lindstrom.

**LINDSTROM:** [01:20:14] I'll be brief.

**EBKE:** [01:20:15] OK.

**LINDSTROM:** [01:20:15] Again, I think a bank skimmer, the device itself, there's really no legitimate reason to have one, own one, possess one so, moving forward, we'd be happy to work with the committee to shore up language that would satisfy the committee because obviously at this point in the session probably need consent calendar.

**EBKE:** [01:20:38] OK.

**LINDSTROM:** [01:20:38] So with that, I'll be happy to answer any final questions.

**EBKE:** [01:20:42] OK. Any questions? Senator Halloran.

**HALLORAN:** [01:20:43] Madam Chair, thanks. Thanks for bringing this to us. Can we, and maybe not in this specific legislation but maybe some other legislation, deal with maybe outlawing the device or is that-- I mean so that whoever has possession of it--

**LINDSTROM:** [01:21:01] That's the-- yeah, that is the intent. But if there's some other language--

**HALLORAN:** [01:21:05] All right.

**LINDSTROM:** [01:21:05] -- that would satisfy that, as the committee would see fit, be happy to do so.

**HALLORAN:** [01:21:08] OK.

**EBKE:** [01:21:08] Other questions? OK, we have two letters of support, one from Timothy Keigher of the Nebraska Petroleum Marketers and Convenience Store Association, one from Kathy Siefken of the Nebraska Grocery Industry Association. This closes the hearing on LB811. Thank you, Senator Lindstrom. Hey, can I see a show of hands how many people are planning on testifying on LB797? OK. We'll go ahead and push through then. I thought perhaps of taking a break but it looks like we're-- we're good. So, Senator McDonnell.

**McDONNELL:** [01:21:49] Good afternoon, Chairperson Ebke and members of Judiciary Committee. My name is Mike McDonnell, spelled M-i-k-e M-c-D-o-n-n-e-l-l. I'm from Legislative District 5, representing south Omaha. I'm here today to induce LB797. The concept of LB797 was brought to me, to my attention, by the arson investigators for the city of Omaha. As a former fire chief for the city of Omaha and as a firefighter, I can tell you that fire can be incredibly destructive, especially when used maliciously. The intent of LB797 is to change the penalties for second- and third-degree arson. The updates would be changing arson in the second degree from a Class III felony to a Class IIA felony and changing the classification for arson in the third degree, Class IV felony to a Class IIIA felony, Class I misdemeanor to a Class IV felony, Class III misdemeanor to a Class I misdemeanor. The testifiers behind me will be able to elaborate more about the significant impacts on both firefighters and on the victims of fire. But I wanted to tell you that when we sit and change criminal statutes, we need to consider the full impact on the victims of arson. While the fire is damaging, the victims must live with the damage after the fire has been put out. The damage to property is just a small part but it is the small part that we are able to see and assess and measure. We can quantify property damage when the only victim is the property. Being a firefighter for 24 years, being the fire chief for the city of Omaha for six years, we made on an average of over 40,000 calls a year. That means at some point a citizen, based on a medical event, based on a fire,

possibly a natural disaster, were calling the fire department for help. Now when you look at the beginning of a shift-- and my feeling was, no matter where you were in the city of Omaha--east, west, north, south--you should have the same service. So if you were going to have a cardiac event, no matter where you were in the city, you had the same chances to actually have that kind of service, same chances of survival, because the firefighters are going to be there, 90 percent of the time, within four minutes. When you look at a fire, you are moving equipment from different parts of the city and they are moving fast. They are staying within the law, but the idea is to be there as quickly as possible because we know that fire doubles in size on the average every 30 seconds. You're looking at doing that so now [INAUDIBLE] you look at that fire. And it's a dangerous job. Firefighting will always be dangerous. The job of management and the job of a fire union is to try to take a dangerous job and make it safer. Now you look at that situation. You're putting those people, the firefighters, the personnel, they're hitting the streets. Now you've got people moving around. Some people aren't paying attention. Some people aren't-- they got their radios on loud. They don't hear the equipment coming. So it's dangerous. Now you finally get that equipment there. The job they're going to do is dangerous. Knowing that on average, within four minutes, 90 percent of the time they've been there, now you look at that fire. Every 30 seconds it's doubled. Now they're going in there and they're doing a dangerous job. That's what they-- they took an oath to protect life and property. Now we look at it's an arson fire. Someone did this on purpose. Someone did this to destroy property or possibly harm or kill somebody within that property. Now it changes a little bit, not the duty of the firefighters, not the oath they took, but the idea of why did it happen. April 23, 1996, it happened in Omaha, Nebraska, on North 30th Street. John Patrick Goessling made a call. He made a call to a Family Dollar Store, as a number of other firefighters did. That fire was doubling in size every 30 seconds. It was in the roof. It wasn't seen immediately. John Patrick Goessling got cut off as a captain from his crew. John Patrick Goessling never left that building. A number of other firefighters were injured that day. He did his job. But it wasn't an accidental fire. It was an arson fire. The people that are going to testify behind me today: Douglas County Attorney Don Kleine; Assistant Chief John McCormick, who also is an arson investigator. Also, Doug Krysl is here as an arson investigator but he's also here as a soon-to-be grandfather. His daughter is actually in-- in labor right now in Omaha. And I know he was asking earlier about the time frame of the committee, so thank you, Doug, for-- for sticking around. They're going to answer more of your questions about the legal side of it and the idea of what they experienced as arson investigators. But I want you to just try to-- try to keep in-- keep in your mind that arson is-- is different and how many people it affects based on the people that are there, the family members, possibly their employment because of-- of the situation where the fire was set, but also the people that are responding to it. It is a different type of crime that really does affect a number of people. And as we know with John Patrick Goessling, he gave his life for an arson crime. Can I answer any of your questions?

**EBKE:** [01:27:45] Questions for Senator McDonnell? I see none. OK.

**McDONNELL:** [01:27:46] Thank you.

**EBKE:** [01:28:00] First proponent.

**JOHN McCORMICK:** [01:28:00] Good afternoon. My name is John McCormick, J-o-h-n M-c-C-o-r-m-i-c-k, I'm the assistant fire chief for the Omaha Fire Department. The Omaha Fire Department is a proponent of LB797. I oversee the fire investigation division. What the fire investigation division do, they are responsible for investigation of all fires, accidental and incendiary. If a fire is incendiary, a complete investigation is completed where evidence is collected, witnesses are interviewed, and suspects are developed; if warranted, arrests are made. The fire investigation division sees on a daily basis the devastation arson causes to victims, firefighters, and society. The Omaha Fire Department would request that the crime of arson, second

degree, be reclassified from a Class III felony to a Class IIA felony and the crime of arson, third degree, be reclassified from misdemeanor I, which is anything less than \$500 damage, a Class IV felony, anything between \$500 and \$1,500, and a Class IIIA felony, which is anything greater than \$1,500. The reason I support LB797 is because fire is a different kind of disruptive instrument when used during a criminal act. What I mean by different kind of destructive instrument is fire doubles in size every 30 seconds so by the time the fire department arrives on the scene, the fire could be quite large and causing great devastation, causing damage to more than the intended target by spreading to neighboring properties, thus putting firefighters and innocent bystanders in harm's way. In 2016, there were 24,325 fire ground injuries nationwide and 69 firefighter deaths. Fire is also very destructive, causing in-- intended and unintended consequences. Fire affects more than property damage. One's home, personal property, transportation, and place of work can be destroyed, thus affecting many parts of the victim's life. Society is also affected by the crime of arson by disruption of services, of-- or products, insurance costs, and tax revenue. Arson is committed for many reasons such as vandalism, crime concealment, extremist views, profit, excitement, and revenge. Therefore, elevating the crime of arson in LB797 would reclassify the crime of arson and allow a greater sentencing if warranted. I want to thank you for your consideration in this matter. I'll answer questions that you have. Yes.

**PANSING BROOKS:** [01:30:23] Thank you, Chief McCormick. Senator Chambers.

**CHAMBERS:** [01:30:28] Chief, there is nothing in here about any danger to anybody. There's nothing about danger of a specific kind that would justify increasing the penalty. Don't take this as being flippant, but what difference does it make to you what the penalty is? Your job is to fight the fire. You'll do that even if there is no criminal penalty at all. So what difference does-- will this make you do your job better?

**JOHN McCORMICK:** [01:30:54] I am a law enforcement officer with a-- I'm a fire investigator with the city of Omaha, so when I went to-- I'm a state-certified law enforcement officer and I can-- you know, I do the whole process and, you know, I can put out the fire, I can investigate the fire, and I can make an arrest of a suspect, so--

**CHAMBERS:** [01:31:11] Well, let's say we make it a misdemeanor. What difference does it make to you what the penalty is? You're going to do your job anyway.

**JOHN McCORMICK:** [01:31:18] Well, I think it's a-- I think the classification of the crime will help deter the crime if people know that it's more important. You know, I feel that the-- it's just not a crime against property. I think, you know, I think it's more because firefighters are put in danger because they have to go actually fight the fire. Like if somebody-- destruction of property, if somebody took a sledgehammer to your car, they hit your car, they cause damage, there's a dollar amount involved in that. Well, if they come and burn your house, your house burns and I have to come put it out, so you're putting me in danger. So I feel it's-- it's an elevated crime. And it gives-- it would give the judge or the adjudication process more flexibility if there is any aggravating circumstances in that.

**CHAMBERS:** [01:32:08] But there's nothing in this, with all due respect, Chief, that talks about increased danger to anybody. It's based strictly on the dollar amount of damage, so this has been reduced to what happens with my car, based on your analogy. It's just the amount of damage and--

**JOHN McCORMICK:** [01:32:23] That would be for-- that would be for the Class-- the arson III. Is that what you're talking about?

**CHAMBERS:** [01:32:28] OK. Now we both are agreeing it's intentional. That's-- so we don't even

have to argue about that.

**JOHN McCORMICK:** [01:32:33] Right.

**CHAMBERS:** [01:32:33] The person intends to do what is done. But I don't believe people know what the penalty is for arson. I didn't know until I read it here. I'm not going to burn anything. But the thing that stops me from setting somebody's house on fire is because I'm not going to do it. But if I was going to do it, I wouldn't know what the penalty is. But let me-- do you have a copy of the bill? If not, I'm going to read what I'm talking about.

**JOHN McCORMICK:** [01:33:07] Yeah.

**CHAMBERS:** [01:33:08] Let me find it. But arson consists in intentionally damaging a building or property contained in the building. So if I destroy property in the building, maybe there's no danger that the building will be ignited. But a piece of property that I've destroyed, if I burn up a-- a wooden chair, then that's not as serious an offense as if I burn up a recliner, and there's no danger to anybody. It's a building. It doesn't say the building has to be one that's inhabited. It could be a garage. It could be a warehouse. And if I set a wooden chair afire, then that's different from if I set a recliner afire. Neither one endangers anybody. And it's not like theft where if you steal something, then you grade the value, you grade the offense by the value. In other words, I don't see any--

**JOHN McCORMICK:** [01:34:11] It does endanger somebody by having-- if somebody has to come put it out.

**CHAMBERS:** [01:34:14] So you've got to put out a recliner instead of a wooden chair.

**JOHN McCORMICK:** [01:34:18] That recliner could turn into a, you know, a three-alarm fire.

**CHAMBERS:** [01:34:20] We're not getting anywhere. I've made my point. I oppose this bill, just so you know it. And I don't think it's the business of people who fight fires to say what the penalty ought to be, and here's why I say that. I can't tell you how to fight fires. All-- the only thing I'd say is put water on it, you know, meaning that I don't know any of the best methods to fight a fire. But I do know something about setting penalties and having a rational basis for the gradation of crimes, not having a hit and miss. And whenever any group comes here and says, hey, we think there ought to be a harsher-- harsher penalty because it involves us, I won't support that. It doesn't have anything to do with challenging what you say the danger of firefighting is. But people fight to get those jobs and they fight to hold them and one of these times I will show you all how I got involved in that Goessling, or however you pronounce it, issue because things were not done by the firefighters as they should have done. And that man had a reputation for being a risk taker and these things were written. And when he went where he went inside that fire, there were things that other firefighter-- firefighters did that resulted in his being killed. I don't say they intended it. And they wanted to bring harsh penalties against a kid who had set a fire outside the building. And those were things that I got involved in, so I know what I'm talking about. And if that case hadn't been mentioned, I wouldn't say what I'm saying. But I got directly involved in that. But on this I see no connection. And maybe since Mr. Kleine is going to talk--he's-- he is a lawyer--maybe he can make a better case than you were able to make. I'm not faulting you for coming. Maybe I'd be wanting to say if you kill a senator, then you ought to get automatically the death penalty but they ought to drive a nail through your head first. But we cannot always say that because of the job that somebody has, their life is more valuable than another person's. And this-- these fires don't even endanger your life. They don't have to endanger anybody. And if you're going to sit there and tell me you have the experience you have, that you're an investigator and there's-- there's danger to a firefighter's life if he goes in a warehouse and a chair is on fire and he puts the chair out, his life is

in danger, everybody says, my life is on the line every day. I could say that with more justification than you because I get the threats. But I don't report them to the police. I don't report them to Mr. Kleine. If somebody's going to do something to me, they do it to me. So I can say, based on the threats I get, my life is on the line every time I come to this Legislature. But I don't say that. So that gets very threadbare and shopworn to me. I'd bet if somebody is going to fire you, you'd fight like an-- an enraged-- whatever the most ferocious animal you can think of, to keep that job  
[INAUDIBLE]

**JOHN McCORMICK:** [01:37:36] Maybe a mountain lion.

**CHAMBERS:** [01:37:38] Oh! Hey, I-- look, I don't have-- I don't have anything else. Look, you all listen to this man.

**JOHN McCORMICK:** [01:37:43] All right.

**CHAMBERS:** [01:37:44] I have nothing else to say.

**JOHN McCORMICK:** [01:37:45] Noted.

**CHAMBERS:** [01:37:49] OK, brother.

**EBKE:** [01:37:50] Next proponent.

**MORFELD:** [01:37:50] [INAUDIBLE]

**CHAMBERS:** [01:37:52] He got me.

**EBKE:** [01:37:52] He got you.

**CHAMBERS:** [01:37:57] I think that was unfair.

**DON KLEINE:** [01:38:00] Good afternoon again, Senators. My name is Don Kleine, D-o-n K-l-e-i-n-e. I'm here as the Douglas County Attorney and as a representative of the Nebraska County Attorneys Association in favor of this bill. In my-- my career as a prosecutor, I've handled many arson trials and many arson cases, arson-for-profit cases, the Cascio's restaurant fire. There was a motel on North 30th Street that was set on fire, a couple houses in south Omaha that were intentionally set. And that's what we're talking about here, intentionally set fires, and the Legislature obviously feels that arson in and of itself is a-- is an extremely serious crime because there's no statute of limitations on the prosecution of an arson case, which is one of the few cases that we have on our statutes that we don't have a--

**CHAMBERS:** [01:38:46] May I interrupt? The insurance industry got that done so that there-- whenever they catch the person who deliberately set the fire, they can get them. The insurance industry got that provision and there are some others where there is no statute of limitations where there was a special interest group that wanted it.

**DON KLEINE:** [01:39:01] All right. But I'm just saying that that obviously got passed by the Legislature and in the consideration of that being a serious crime, and I've prosecuted. Like I said, the Cascio's fire was something that came to light-- the evidence came to light many, many years after that fire was set intentionally. In 2015, arson in the second degree was-- it did carry up to 20 years as far as a penalty. And then when-- in 2015 when some of the sentencing laws were changed, it came down to a Class IIIA and it changed to being a penalty of three years. So these are

intentional fires, as-- as-- as Senator McDonnell said. You know, there's so many people that are put at risk when you're talking about an arson case. It's the people who are fighting the fire. It's people who are citizens when-- when the equipment is being moved to another location. It's people are-- well, might be in another location that need help and they can't get it because people are fighting a fire in another location. It's the people who live in that neighborhood. One of the arson cases I had was a house that was set on fire and the house next to it caught on fire. So it puts so many people at risk and it's an intentional act and-- and it's so serious that I think that we need to have a stiffer penalty, at least to give the judge discretion on a stiffer penalty on these kinds of cases. As Senator McDonnell mentioned and, Senator Chambers, you've mentioned the Goessling case, and you're well aware of the facts in that case, it wasn't just-- you know, part of the arson, third degree, is setting fire to some property. In that case, a person set fire to a wooden fence. All right. So was it just the fence that burned? No. The wooden fence caught fire. It was intentionally set on fire. That wooden fence fire then went to the building, a Dollar Store on North 30th Street, and then we saw the consequences of what happened from that fire. But it started as simply, oh, I'm going to set this little wooden fence on fire, and it turned into a much greater catastrophe. So-- so that's I guess what I'm saying inherently. When you're talking about these kinds of cases, it puts people in danger. The fire is set intentionally. Maybe that person at the-- at the-- at the beginning wasn't intending to-- for the consequences to have that it had, but it certainly-- people need to be aware of that and that's why there needs to be a serious penalty for these kinds of cases. And I'll be happy to answer any questions.

**EBKE:** [01:41:34] Senator Baker.

**BAKER:** [01:41:35] Thank you. Mr. Kleine, would-- would you agree that these changes, they were enacted to be all about punishment and really nothing to do with a deterrent factor?

**DON KLEINE:** [01:41:47] Well, I think it is a deterrent factor. My question is, when do you-- when you make it a more serious penalty for a certain crime that occurs, people are aware of that.

**BAKER:** [01:41:56] Well, maybe people pay more attention to that than I do because every time something comes up about changing felony penalties, I have to get my cheat sheet to find out what that even means. You know, it seems unlikely to me that people that are setting fences on fire or buildings on fire know what the penalties are.

**DON KLEINE:** [01:42:15] Well, I think the judge needs to have discretion when they're sentencing that person based on their criminal history and what they've done here--

**BAKER:** [01:42:23] [INAUDIBLE]

**DON KLEINE:** [01:42:23] -- and the-- the risk they've put people on, to have this.

**BAKER:** [01:42:25] I don't disagree with that. But it's about punishment. It's not about deterring-- deterring arson.

**DON KLEINE:** [01:42:32] Well, I think that's part of it. I think the punishment is part of deterrence. But I think the punishment needs to be there, at least to protect the public from somebody who is doing some things like this.

**BAKER:** [01:42:40] [INAUDIBLE]

**DON KLEINE:** [01:42:40] You have people that-- that serially set fires. I mean-- I mean--

**BAKER:** [01:42:44] Yeah, I don't-- I'm not arguing over that.

**DON KLEINE:** [01:42:46] Sure. I-- I just want to make the point though. This isn't something that-- there are people that have problems with regards to fire, that set fires intentionally and continue to them on a serial basis, and I think that's important to recognize here.

**EBKE:** [01:43:00] Other questions? Senator Chambers.

**CHAMBERS:** [01:43:04] No, just to make something clear. I'm not discounting the danger that fire can cause. I'm not discounting the fact that firefighters do go into some very, very dangerous situations. And when I would see some of the stories on television that happened, if I could command a fire-- a firefighter, I'd say nobody's going to go into that building, the hazard is too great, the building is not worth it. The likelihood that you're not going to come out makes me give the-- the order that you don't go in there. There are firefighters who have disobeyed orders, by the way, and sometimes that's why it would be the story. And the guy would get in the place and then others would come in to try to rescue that fool, and sometimes they'd get out. Sometimes the one who caused it will get out and others won't, so the danger is there. But I'm being asked to create however many new categories, that many new crimes, which I'm not prepared to do. And I think if somebody is going to commit arson for hire, they don't care what the penalty is. They want to know how much are you going to pay me because I don't plan to get caught. And if I'm what they used to call a pyromaniac, the-- the penalty is not going to matter. I get a thrill out of setting the fire or watching the fire, and the penalty could be the death penalty and I'd set my fires anyway. I understand your argument but you are a prosecutor. And you have to understand that I am a policymaker and I don't want to have a proliferation of crimes today for special groups and then down the line everybody says, like Congress is saying now with their rewrite of the criminal law, this never should have been done. When it comes to the opioids, there should not have been these mandatory sentences, those that were there should not have been as harsh, and now the thrust of their bill, I don't know if it will be enacted into law, but it's a bipartisan effort, reduction in sentences, fewer people being locked up, and fewer crimes. So there is afoot in the land a recognition that harsh penalties don't deter crimes; they don't even deter professional criminals. They don't.

**DON KLEINE:** [01:45:31] But they deter the person who's locked up for that time period that [INAUDIBLE]

**CHAMBERS:** [01:45:35] Well, that's not a deterrent. That's a-- that's a punishment. Deterrence means it prevents you from doing it in the first place.

**DON KLEINE:** [01:45:41] Well, that prevents them from doing it when they're not-- not-- not out of-- they're in jail.

**CHAMBERS:** [01:45:45] You're getting quicker. I'm through.

**DON KLEINE:** [01:45:48] I do have one, one comment to make about--

**CHAMBERS:** [01:45:49] OK.

**DON KLEINE:** [01:45:49] -- your statement, if I could, Senator, and that, you know, you talk about the risk that firefighters take, and the firefighters that I know, the risks that they take are because of their concern about the lives of citizens, lives of their fellow firefighters. And even-- even the lives of pets--

**CHAMBERS:** [01:46:08] Um-hum.

**DON KLEINE:** [01:46:08] -- it could be in the--

**CHAMBERS:** [01:46:09] I know.

**DON KLEINE:** [01:46:09] -- in a residence or a house that they're trying to save. And their goal is to save lives and that's why they take the risks that they take.

**CHAMBERS:** [01:46:15] I don't question that. But in the context of this bill, I won't vote for the bill. And it's-- I don't think it's prioritized so it's not going anywhere. But I still-- I still think that discussion should have been had so that if it ever comes up in the future, reference can be made to the transcript if necessary. And if the chief happens not to be on the force anymore, then his words would still be here, his argument would be preserved, and my crushing-- well, I can't say I defeated him because he won that one. I'll leave it alone. OK.

**EBKE:** [01:46:50] OK. Other questions? Thanks, Mr. Kleine.

**DON KLEINE:** [01:46:52] Thank you.

**EBKE:** [01:46:54] Other proponents?

**JERRY STILMOCK:** [01:47:06] Thank you. Madam Chair, members of the committee, my name is Jerry Stilmock, J-e-r-r-y S-t-i-l-m-o-c-k, testifying on behalf of my clients, the Nebraska State Volunteer Firefighters Association and the Nebraska Fire Chiefs Association, in support of LB797. We support the measure. We thank Senator McDonnell for being the legislation-- bringing the legislation. And the only comment I'd have is I was curious myself as to what was happening at the state level. So I inquired with State Fire Marshal's Office and interesting--I thought interesting--in 2016 there were ten reported arson cases statewide to the Fire Marshal's Office. In 2017, there were 15. So perhaps with legislation of this nature there would be some type of deterrent, as was discussed, maybe some type of reduction. There's approximately 8,000 members of the volunteer fire-- Nebraska State Volunteer Firefighters that I represent and they place themselves in harm's way on a volunteer basis. And it was important to my clients that I appear today and testify in support of the measure. Thank you, Senators.

**EBKE:** [01:48:19] Thanks, Mr. Stilmock.

**JERRY STILMOCK:** [01:48:20] Yes, ma'am.

**EBKE:** [01:48:20] Any questions? Senator Chambers.

**CHAMBERS:** [01:48:23] We have to go through this so he can earn his money.

**EBKE:** [01:48:25] OK.

**SENATOR CHAMBERS:** [01:48:26] If one person says two plus two are five, is that an erroneous answer?

**JERRY STILMOCK:** [01:48:34] Sure, it is.

**CHAMBERS:** [01:48:35] Suppose 10,000 people say the same thing?

**JERRY STILMOCK:** [01:48:37] Still wrong.

**CHAMBERS:** [01:48:38] So the multiplicity of people who say a certain thing will not make any difference. And to me, I would say there could be a coincidental drop in the number of fires with a particular law having been passed. But in logic they say that just because something happened at the same-- simultaneously with or just before something, that doesn't mean that that act caused what followed. But that's all that I have. You're earning your money.

**EBKE:** [01:49:11] OK. Any other questions?

**JERRY STILMOCK:** [01:49:12] Thank you, Senators.

**EBKE:** [01:49:12] Thanks for being here.

**JERRY STILMOCK:** [01:49:13] Yes, ma'am.

**EBKE:** [01:49:14] Other proponents? Opponents?

**SPIKE EICKHOLT:** [01:49:28] Thank you, Madam Chair and members of the committee. My name is Spike Eickholt, S-p-i-k-e E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association, opposed the LB797. I think Mr. Kleine explained before the history of this statute, perhaps the penalties and when they were adjusted. When the Legislature adjusted the property and various crime-- criminal offenses in LB605 in 2015, the penalty classifications for this statutes-- for these two statutes was left the same. So before LB605, the Class III penalty was 1-20 years. The state is a Class III felony which is now zero to four years. But that was a deliberate choice that the Legislature made and I would just again remind the committee that there should be some fidelity to LB605 and that CSG plan that was made. But if the Legislature is going to consider-- or if the committee is going to consider this, I would just point out that what this bill would do would essentially make that any arson causing a damage of \$500 or more is a felony. I'm not trying to minimize the seriousness of arson and fires and the risks that are posed to various people, but \$500 is a very relatively low threshold that would, I would argue, make every arson a felony offense. If the situation-- if the purpose of increasing the penalties is to have a deterrent effect on arson for hire or arson profits, that kind of thing, I would just remind the committee that there are whole other crimes that apply. There is insurance fraud. There's theft by deception. There's forgery offenses if somebody filled out a written form and somehow falsified or misrepresented the true cause of the fire for some sort of profit reason. If a person does so under oath, there's perjury and other crimes that can be charged as well, in addition to an arson offense, under current law. If something happens to a firefighter responding to an arson investigation, there are other crimes that already exist. As the committee knows, under 28-929, 28-930, and 28-931 there's a whole series of stepped felony offenses if a person does something to cause injury to a firefighter. They are designated and given that special victim status in the sense that it is a felony offense if somebody causes injury to those people. If someone was to die in-- if a firefighter was to die in responding to an arson, that is first-degree murder under 28-303, under the felony murder theory of prosecution. That's a Class I felony. That's punishable by death. So there's already punishments that exist on the books. We'd urge the committee not to increase the penalties in this-- on these two statutes.

**EBKE:** [01:52:04] Thanks, Mr. Eickholt. Questions? I see none. Thanks. Are there any other opponents? Are there any speaking in a neutral capacity? I see none. Senator McDonnell. Senator McDonnell waives. We have one letter in opposition from the ACLU of Nebraska, Spike Eickholt. OK. That concludes the hearing on LB797. We will move to LB1010. And if you're planning on testifying on LB1010, move on forward, I think, in any capacity.

**PANSING BROOKS:** [01:53:01] How many do we have on this one?

**EBKE:** [01:53:01] It doesn't look like very many: one, two maybe. OK.

**HANSEN:** [01:53:07] All right.

**EBKE:** [01:53:08] Senator Hansen.

**HANSEN:** [01:53:09] Good afternoon, Chair Ebke and fellow members of the Judiciary Committee. For the record, my name is Matt Hansen, M-a-t-t H-a-n-s-e-n, and I am the state senator representing District 26 in northeast Lincoln. I'm here today to introduce LB1010 which would allow some defendants who have been found mentally incompetent to stand trial to be brought back for competence at an outpatient treatment provider rather than taking up a much-needed bed at an inpatient facility. This bill would provide-- would at first apply only to Lancaster County with the possibility of being expanded to other counties upon evaluation of the program's success. The intent of this bill is to help free up beds at the Lincoln Regional Center which currently provides 250 beds to serve, among others, those in our court system with mental health issues. Last fall the Lincoln Journal Star reported that dozens of people in the last year had spent weeks or months in a county jail waiting for a bed at the Regional Center after a judge ruled they were incompetent to stand trial. At the time those at the Regional Center who had been in the jail had waited an average of 68 days and half had been in jail for more than 80 days. The county jail is simply not the right place for those suffering from mental health issues to wait, especially for weeks and months at a time. Not only is it a huge cost and burden to the counties who have little resource to house those with mental illness, but the jail setting could also exacerbate their symptoms, putting themselves, other inmates, and jail staff in danger. The bill presents a possible solution to those long wait times that some people would be made eligible to use outpatient programs to restore competency, freeing up beds for those suffering more severe mental health issues and shortening their wait at the county jail. Currently everyone must go to an inpatient Regional Center program even if they are otherwise eligible for bail and pose no risk to public safety. The outpatient option would be available to those charged with an offense for which bail was not prohibited-- sorry, would not be available for those charged with offense for which bail is prohibited or if the judge determines that public safety would be at risk. This bill also creates steps for court approval of the treatment alternative and to have-- and for a change in provider if the court finds a change of placement is appropriate. I just want to say I appreciate all the work I've done with Lancaster County and I'd be more than happy to work with all stakeholders on this issue. With that, I'd take any questions.

**EBKE:** [01:55:19] Thank you, Senator Hansen. Questions? Senator Chambers.

**CHAMBERS:** [01:55:23] Is mental competency a matter of geography?

**HANSEN:** [01:55:31] Uh, no.

**CHAMBERS:** [01:55:31] Is it-- is it a matter of population in a given city?

**HANSEN:** [01:55:34] No.

**CHAMBERS:** [01:55:36] Then I think this would probably be unconstitutional. At least, it's unworkable. When they classify cities, they have population range. If one person more than that number moves into the city, then all of this goes out the window because it becomes a different classification of city, isn't that-- wouldn't that be true?

**HANSEN:** [01:56:01] Yes, the-- if the population increased, it would be [INAUDIBLE]

**CHAMBERS:** [01:56:09] And it's based on population.

**HANSEN:** [01:56:09] Um-hum.

**CHAMBERS:** [01:56:09] I see all kinds of problems with this that I'm not going to go into, but who did you say asked you to bring this?

**HANSEN:** [01:56:16] We worked with Lancaster County.

**CHAMBERS:** [01:56:18] With who?

**HANSEN:** [01:56:18] The county, Lancaster County.

**CHAMBERS:** [01:56:20] Lancaster County?

**HANSEN:** [01:56:22] Um-hum.

**CHAMBERS:** [01:56:22] Is that where Joe Kelly was county attorney? He was. Case rests.

**EBKE:** [01:56:27] [LAUGH] Any other-- Senator Pansing Brooks.

**PANSING BROOKS:** [01:56:33] Thank you. I'm looking at the fiscal note. I was wondering if maybe can you explain that because it talks about \$407,333 but then it talks about the Fiscal Office saying that there appears to be a cost savings, so I'm sort of confused by that fiscal note.

**HANSEN:** [01:56:51] Sure. I think that was an interesting-- as well. So the goal-- the goal of this bill is currently in Lancaster County-- well, in all counties, but when somebody is waiting for competency, per our state statute, they have to go to an-- oh, let me find the exact term. They have to go to a state hospital for the mentally ill and functionally, under statute, that is the Lincoln Regional Center. And the Lincoln Regional Center does not have beds for them. They have to just wait where they are in the county jail. So the issue then becomes is if you get more people out of the county jail and getting mental health treatment, does that actually increase costs? And that's where you get the determination of HHS is obligated to pay for those individuals anyway. The only reason they're not paying for them now is because they are enforcing a wait list on them. And so by asking them to speed up, are you actually-- they're not going to be providing any services they weren't already obligated to. And if they're able to provide those services at a rate lower than the Regional Center for people who need lower levels of custody, in theory, it should be a cost savings.

**PANSING BROOKS:** [01:58:00] OK. And just-- can you speak to the fact that why you've made this separation of city of the first class. I presume you have some reasoning for it, so--

**HANSEN:** [01:58:12] Sure. So this is kind of something that has come up. One of my-- my priority bill last year dealt with a small issue of competency and some other larger issues in our kind of county jail, but it was largely focused on our county jail population. And when we saw the county competency, this was kind of a recurring problem that people who are waiting for the Regional Center are staying in the county jail for weeks and months at a time. I was primarily working with Lancaster County because they were my county and the people I know and they were interested in doing this. We actually went back and forth on whether or not we were going to have this be statewide. And then the thought was that if we went-- there was some kind of concern from stakeholders that if we went statewide immediately, they would not be able to rally the support they wanted for the bill so they were set, kind of going to go to limit it to Lancaster County and see if

other counties wanted to come in. And part of the rationale from that was-- seems Lancaster County, although-- although kind of mental healthcare is not a factor of geography, it does seem that Lancaster County has disproportionately amount of people deemed incompetent for whatever reason. Lancaster County just by the numbers has a greater number than, say, Douglas County, despite the population probably indicating otherwise. So that was something that was kind of a very localized problem in Lancaster County, one reason we wanted to address it there.

**PANSING BROOKS:** [01:59:41] Had-- had there been any discussion about doing like an interim study to look at that or-- but meanwhile you couldn't get funding if you really did want to try like-- I'm just interested.

**HANSEN:** [01:59:55] So-- so this has kind of been an interesting issue and we've kind of gone multiple, multiple rounds with different stakeholders and kind of [INAUDIBLE] things. Ultimately we had a meeting a few weeks ago in my office and I-- and I let them know-- Senator Chambers hasn't asked, but I let them know this wasn't going to be my priority and I didn't have a vehicle for this year, but the hearing could be maybe more an opportunity to raise the issues going forward. Kind of that hearing I realized that we've-- we've-- this is sometimes what happens. We get too many lawyers in the room. We created pages upon pages upon pages of, you know, different rules, requirements, regulations, this, that, and the other thing. And I think maybe in the current state the statute-- this statute rather than-- we say like shall order the defendant to a state hospital for the mentally ill or, you know, an outpatient facility, period, you know, and just give the discretion wherever that needs to be to kind of free up that. Kind of one of the things that kind of keeps coming up is that these are, you know, these are people who are, you know, just kind of-- just kind of lost in the system, like they shouldn't be in the county jail by any standard, they haven't been convicted, they haven't even necessarily been through the trial process because they're-- been deemed incompetent, so they're just waiting to get better so they can go to trial, so what can we do to make that happen?

**PANSING BROOKS:** [02:01:08] Well, I-- I appreciate you bringing this. In Education Committee we're fumbling around with this whole thing. All we're doing is institutionalizing our most severely-- our people in most-- in highest need. And we closed all of the-- most of the mental health institutions and then all of a sudden all we have to do with them is place them in jails and in schools, so, and then wonder why it isn't working perfectly. So thank you for bringing this and for the idea and it's really important discussion.

**HANSEN:** [02:01:38] I-- thank you. I appreciate it. And I will say kind of like the other thing that's kind of floating out there is, and I think Senator Schumacher addressed it on the floor today, you know, is just-- the other solution to this is just to say get more beds at the Regional Center or another-- undo the closing of the Regional Center just to provide more services.

**PANSING BROOKS:** [02:01:53] Yes.

**HANSEN:** [02:01:53] That's the other option.

**PANSING BROOKS:** [02:01:55] Yeah, thank you.

**EBKE:** [02:01:57] Senator Chambers.

**CHAMBERS:** [02:01:58] She didn't even look up. Senator, did you see this letter that Mr. Dix wrote in support of your bill?

**HANSEN:** [02:02:07] I have not.

**CHAMBERS:** [02:02:08] Oh. It is here and it'll let you know why he doesn't want to appear before a committee where I'm a member. He's-- he's supporting your bill and he says: We respectfully ask you and the Judiciary Committee members to advance LB1010 to General File. I think he meant respectfully. But anyway, that's why he doesn't want to come before the committee and pay for his sins in person.

**HANSEN:** [02:02:34] Sure.

**CHAMBERS:** [02:02:36] And by the way, I'm not condemning you for bringing the bill. But from a legal standpoint I don't see how you can make determination of competency a matter of population or geography. But anyway, I'm not going to debate that.

**HANSEN:** [02:02:52] Sure.

**CHAMBERS:** [02:02:52] I just wanted that on the record. That's all I have, Madam Chair.

**EBKE:** [02:02:58] Thank you, Senator Chambers. Any other questions? Senator Halloran.

**HALLORAN:** [02:03:00] Thank you, Chair Ebke. It's probably more of a comment than a question, but it--

**EBKE:** [02:03:05] That's OK.

**HALLORAN:** [02:03:05] I appreciate your bringing the bill, but we do that a lot. But I concur with Senator Pansing Brooks, concur with Senator Chambers. It's not-- it's-- it's not an issue relative to the size of a primary city. It's a statewide issue, mental incompetency, and we-- this is a can we've been kicking down the road, too, as much as we have been kicking down the road on overpopulation in prisons and-- but they're-- they're related issues. There's a significant population in our prison system that shouldn't be there because of mental incompetency and-- and-- but we have no place to go, as you point out. So it's a problem with no place to go, pretty much. And if you'd work with me or Senator Pansing Brooks, I'd like-- I'd work with the two of you in proposing something next year. Will it cost money? Yeah, it will. But until we put something up-front to the Legislature to deal with proposing reestablishing regional mental hospitals, more beds for that purpose, it would relieve some of the prison population and deal with an issue that needs to be dealt with separately from jails and incarceration. So with that, I would just offer my help in doing that with you two if it's something you'd like to do.

**HANSEN:** [02:04:37] I appreciate it. I'd be happy to work with you and Senator Pansing Brooks on that. And she's giving us the thumbs up, for the record.

**EBKE:** [02:04:46] OK. OK.

**HANSEN:** [02:04:47] Thank you.

**EBKE:** [02:04:47] First proponent. We just have the two testifiers on this bill? Anybody that's sitting over there? No? Just hanging out? OK.

**KERRY EAGAN:** [02:05:00] Good afternoon, Senator Ebke and members of the Judiciary Committee. My name is Kerry Eagan. That's spelled K-e-r-r-y E-a-g-a-n. I'm the chief administrative officer in Lancaster County. I work for the county board and I'm here to testify on behalf of the county board in support of LB1010. I think as a preliminary matter I do need to thank

Senator Hansen for introducing LB1010 to help address the serious problem of persons found incompetent to stand trial sitting in jail due to the shortage of mental health treatment resources. I would also like to thank HHS Behavioral Health Division Director Sheri Dawson and Linda Wittmuss at HHS for working with Lancaster County to help craft a solution to this problem. As you're aware, under existing law the only treatment option available to a defendant who has been found incompetent to stand trial is commitment, and I'm quoting, to a state hospital for the mentally ill or some other appropriate state-owned or state-operated facility. Due to long waiting lists, almost all of these defendants are required to wait in jail pending an opening at the Regional Center. Also, during 2017, the average wait for a transfer from the county jail in Lancaster to the Regional Center was 61 days. And in the last quarter of 2000-- 2017 that spiked up to almost 69 days. LB1010 amends Section 29-1823 to authorize outpatient treatment for incompetency to stand trial for defendants who can be treated in the community without jeopardizing the public safety. Due to the fiscal impact of creating additional resources, LB1010 is intended as a pilot program applicable only to Lancaster County. And I guess I could address Senator Chambers' concern. That's traditional language that I've seen in the statutes, that "a city of the primary class," to identify basically Lancaster County. I would be totally open to using some other, just say-- just say Lancaster County, don't base it on population, but that was the idea was to create a pilot program that could show the-- the-- that the program works. Allowing treatment in the community for appropriate defendants would help free up beds at the Regional Center for other patients, as well as get mentally ill inmates out of jail sooner and into treatment. Of course, at this point we realize that LB1010 is still a work in progress. However, it is our hope that a pilot program, carefully drafted with a limited amount of time, perhaps, would demonstrate that in the long run community treatment will prove to be more effective and less expensive than treatment at the Regional Center. And I would be happy to answer any questions at this point.

**EBKE:** [02:07:50] Thank you, Mr. Egan. Any questions? I don't see any.

**KERRY EAGAN:** [02:07:56] [INAUDIBLE] If I could maybe address the issue of the fiscal impact, these are resources that don't exist of treatment in the community right now so they would have to be created. We think in the long run that treatment in the community is more effective and it's less expensive and we're not going to solve the problem by building more regional centers. There's a huge waiting list that this could just be one avenue available for the appropriate type of person that this could be used.

**EBKE:** [02:08:24] Thank you, Mr.--

**KERRY EAGAN:** [02:08:24] So that's where the fiscal impact comes from is because it's creation of new resources that, like I say, in the long run probably will be more cost effective for--

**PANSING BROOKS:** [02:08:30] So in the long run.

**KERRY EAGAN:** [02:08:32] Yes.

**PANSING BROOKS:** [02:08:32] Who could help us get some of the differential on cost? I mean could-- I suppose the county with a pilot could then show cost savings, correct?

**KERRY EAGAN:** [02:08:41] That-- that was the intent. It was to show that it's effective, that it can be done safely, and that it would result in cost savings. We were concerned about the fiscal impact in Lancaster County alone, let alone the entire state, and that's why it was proposed this way. Certainly we think if it's good enough for Lancaster County, it's good enough for every county; in fact, we think it should be available in all 93 counties. But we were worried about the fiscal impact.

**PANSING BROOKS:** [02:09:09] So have-- are you familiar with the pilot, anything else that we've done similar to this, that is in one county versus others?

**KERRY EAGAN:** [02:09:21] Not off the top of my head.

**PANSING BROOKS:** [02:09:21] OK, I just didn't--

**KERRY EAGAN:** [02:09:21] No, we were trying to think outside the box on this.

**PANSING BROOKS:** [02:09:23] Yeah. I was just trying to see if there was something like that that would help assuage some kinds of concerns. So thank you for coming today, Mr. Eagan.

**KERRY EAGAN:** [02:09:35] You're welcome.

**EBKE:** [02:09:37] OK. I see no other questions. Thanks for being here.

**KERRY EAGAN:** [02:09:40] Thank you.

**EBKE:** [02:09:54] Next proponent.

**JOE NIGRO:** [02:09:54] Good afternoon, Senator Ebke, members of the committee. I'm Joe Nigro, J-o-e N-i-g-r-o. I'm the Lancaster County Public Defender. I appear on behalf of the Nebraska State Bar Association and the Nebraska Criminal Defense Attorneys Association in support of LB1010. Currently when any party has concerns that a defendant may be incompetent to stand trial, they can ask the court to order a competency evaluation. The court then has a psychiatrist or clinical psychologist evaluate the defendant. After the evaluation has been completed, the court decides whether the defendant is competent to stand trial. Until the defendant is competent, the proceedings are placed on hold. In addition to determining competency, the court must also determine, if the defendant is incompet-- if the defendant is incompetent, whether they are likely to become competent within the foreseeable future. If the defendant is found to be incompetent and is unlikely to become competent within the foreseeable future, then the prosecutor must dismiss but can seek a civil commitment. If the defendant is found to be incompetent and likely to become competent in the foreseeable future, then the defendant must go to Lincoln Regional Center until they've been restored to competency. For most of my career, defendants found incompetent were immediately taken to LRC but the combination of the reduction of inpatient beds and inadequate community services for people with mental health issues has led to people waiting two, three months at times for a bed at the Regional Center. Some of these people are waiting in jail. That's been part of the concern here in Lancaster County is-- is that backlog. And-- and we have people actually out on bond, usually on minor misdemeanors, who are incompetent to stand trial. They're showing up for court, waiting for a bed, and this bill would allow these people to be restored to competency on an outpatient basis. I don't know that it's likely to be widely used because I don't-- if somebody is in custody, I don't see a court releasing them to be restored to out-- to competency on an outpatient basis. But I think for those people who are out on bond, that those-- those folks the court might wind up ordering it on an outpatient basis. When somebody goes to LRC to be restored to competency, they will usually be there for months. And if someone's OK being out on bond, why not let them be restored to competency on an outpatient basis and minimize the disruption to their lives? This bill proposes trying this essentially as a pilot program for Lancaster County. And I don't know if it's a good comparison, Senator Pansing Brooks, but a couple of years ago the Legislature fund-- specially funded a veterans court in Douglas County. So that's an instance of something being tried in one particular place. And it is a modest proposal. I'm-- I think there were concerns about the cost and that's why it's limited to Lancaster County. I personally think it makes more sense to-- to-- to do this statewide because mental health--

it looks like I'm out of time. I don't know if anybody would like me to finish my remarks.

**PANSING BROOKS:** [02:13:02] Please, continue with this last part.

**EBKE:** [02:13:02] Yeah, go ahead and finish with the last--

**JOE NIGRO:** [02:13:02] Thank you.

**EBKE:** [02:13:06] Yeah.

**JOE NIGRO:** [02:13:06] You know that as-- the concern Senator Chambers raises is valid. But if-- if juveniles only have the right to legal counsel in three counties, then why can't we treat mental health in Lancaster County, at least on a pilot basis, and see how it works? I don't quite understand the HHS fiscal note for all of the staff they're going-- because the bill says the county is responsible for the cost, I assume what the court-- what a court's going to do is select a provider in the community and we have-- and-- and we're fortunate in this county because we do have providers. We do have-- they're going to want a psychiatrist or clinical psychologist to oversee. So if somebody like Lutheran Family Services or Blue Valley gets assigned the responsibility of restoring this person to competency, I don't see the cost for the-- for HHS. And in fact, I know there's been interest at HHS in this bill because there's such a demand for Regional Center beds. We have people now coming out of the crisis center who can't even get a bed at the Regional Center. They're going to Mary Lanning because there aren't enough beds for the people on competency and they have highest priority, I mean, so I don't understand that fiscal note. It doesn't really make sense. And I believe this legislation will help reduce that waiting list and it's going to further the administration of justice. And so I urge you to advance LB1010 and-- and, Senator Halloran, I was heartened by the comments you just made about trying to work on these issues and it's something I'm quite passionate about. I'm chairing the statewide committee to establish mental health courts. We don't have enough services and it's causing a huge problem in the criminal justice system, so I'd be anxious to work with you or anybody else on trying to find ways to increase mental health services, both inpatient and outpatient, because that's the reason why we have this issue here. I'd be happy to take any questions.

**EBKE:** [02:14:58] Questions for Mr. Nigro? Senator Pansing Brooks.

**PANSING BROOKS:** [02:14:58] Thank you. Well, thank you for coming and thank you also for mentioning the veterans court. I did think about the right to counsel. Of course, the fact that I don't believe that it's constitutional to only do it in three counties, our three largest counties, that-- that doesn't justify the other. But the veterans court and that specific program that does help veterans up in Douglas County is a perfect example and we can do things that are initial pilots to promote and plan to do it across the state, so to make sure that we do it thoughtfully. But again, I'm grateful for Senator Halloran's offer to work through this and Senator-- also Senator Matt--

**HANSEN:** [02:15:50] Hansen.

**PANSING BROOKS:** [02:15:50] -- Hansen is-- I-- my-- I just lost it totally-- Senator Hansen's great vision on this as well. So thank you for coming forward.

**JOE NIGRO:** [02:16:02] You're welcome.

**PANSING BROOKS:** [02:16:02] And, OK, are there any other-- any other questions for Mr. Nigro? OK. Any additional proponents? And I'm sorry, Senator-- my darling friend, Senator Hansen, who's my--

**KELLEE KUCERA-MORENO:** [02:16:17] Hi. Kellee Kucera-Moreno, K-e-l-l-e-e K-u-c-e-r-a M-o-r-e-n-o. Thank you for bringing this to light. Our people do not need to be incarcerated. I think it's unethical to keep locking people up for being human. Half the people shouldn't be in there. If people have chemical dependency issues or mental health issues, they need help. They have an illness. To put them in a jail one day too many; so that a bed opens up at the Regional Center is one too many for me. I was incarcerated two days and I still have PTSD. So, you know, and I know that it affects people. If you have mental health issues and you're locked up in a cell and you haven't been proven competent or incompetent, I don't think it's ethical. Everything is going to be a pilot program. You know, the people are coming out, half the people that are coming out we're going to have to come up with pilot programs. My husband's working on the inside. I'm working on the outside and creatively we're looking at-- each person has to take a look at what do they want to do to become a better person, what are they willing to do. A lot of people are not going to be willing to quit drinking or quit doing something, but are they willing to quit beating their wife, are they willing to not be a harm to society? But you can't change people. That's one thing that's the problems that you guys have a big-- you know, you have a lot of hand trying to keep people safe in the community but you can't change people. People have to want to change. So thank you again and I look forward to helping the system change.

**PANSING BROOKS:** [02:17:57] Thank you for coming, Ms. Kucera-Moreno. Any questions? And we appreciate your advocacy and your passion for your husband and your desire to make sure that we understand his issues and the issues of many others within the prison system. Thank you.

**KELLEE KUCERA-MORENO:** [02:18:14] Thank you.

**PANSING BROOKS:** [02:18:16] Any other proponents? No.

**EBKE:** [02:18:23] OK. Do we have any opponents? Do we have anybody testifying in a neutral capacity? Senator Hansen, as you make your way up here, we have two-- two letters, one in support from Larry Dix of NACO and one in opposition from Sheri Dawson of the Department of Health and Human Services. Senator Hansen.

**HANSEN:** [02:18:44] Thank you, Chair Ebke and fellow members of the committee. I'm more than happy to continue working with the committee, obviously now, through the interim, and into next year on making sure we're appropriately providing mental health for-- for people who need it and they're not kind of unduly languishing in the-- in the criminal justice system. I do want to thank Lancaster County for working with me. I had-- I had-- was working-- working on this track already and I had an opportunity to go visit our Lancaster County Jail over-- over the fall. And seeing their-- their hospital unit where people with mental health end up and seeing some of the situations, what they call a safety cell, what they call a suicide smock, and seeing some of the situations there made me realize that that is obviously very not the-- the appropriate place and not getting the appropriate care. I'm-- so I'm very glad I was able to see that firsthand and do want to continue working on the issue. And then I'll also just close. This is my last bill introduction of my first term. So I want to thank you all for being here with this experience. I want to thank my staff, Courtney and Sarah, for supporting me. And with that, I will close.

**EBKE:** [02:19:55] Senator Pansing Brooks.

**PANSING BROOKS:** [02:19:55] Thank you so much for bringing this, Senator Hansen. As you've heard from the testimony, it's critically important. We have to figure out what to do about all of this. And Senator Halloran is willing to work on it. I know that in Education Senator Walz and Senator Linehan consider it a key priority. The schools say it's their number-one priority of their greatest

problem they have to deal with. Senator Ebke has-- has made statements regarding that. So clearly there are key people that really do want to work on this. So thank you for bringing it and it's just the-- the two committees that have the greatest number of bills are highly focused on this, so thank you.

**HANSEN:** [02:20:42] Thank you.

**EBKE:** [02:20:43] Any questions for Senator Hansen? OK. Thank you. This closes the hearing on LB1010 and it closes our hearings for the day. Thank you for being here. Thank you for [INAUDIBLE]