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Judiciary Committee  
February 22, 2013

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[LB483 LB538 LB541 LB542]

The Committee on Judiciary met at 1:30 p.m. on Friday, February 22, 2013, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB483, LB538, LB541, and LB542. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Mark Christensen; Colby Coash; Amanda McGill; and Les Seiler. Senators absent: Al Davis.

SENATOR ASHFORD: (Recorder malfunction)...everyone. Welcome to the Judiciary Committee. For those...I see a few people here that I haven't seen before, so let me go over some of the ground rules that we have here. Each testifier, whether they're for or against a bill or are neutral, we'd ask to have you fill out the form which is in the front or behind the witness chair there. Or, actually, it's over on the table, isn't it? So you can fill out the form and have that ready when you come up to testify. We will have a light...we have a light system here that gives each testifier three minutes to talk about their issue. When the yellow light comes on, we'd ask you to sum up. That's sort of the light that says, kind of, sum up your testimony. And there very well may be questions and, if there are, those questions don't count against your time, so don't worry about that. Senator Ernie Chambers from Omaha is here; Senator Amanda McGill from Lincoln; and Oliver VanDervoort is the committee clerk. LaMont Rainey is our lawyer--always got to have one of those on the Judiciary Committee. And my name is Brad Ashford. I'm from Omaha. And Steve Lathrop is here from Omaha as well. So with that, we're going to start with LB483, which is Senator Bolz's bill. This is her first trip here, I think, isn't it? I believe so. Okay. [LB483]

SENATOR BOLZ: It is my first foray into the Judiciary Committee. [LB483]

SENATOR ASHFORD: Yeah, well, welcome. And would you please introduce LB483? [LB483]

SENATOR BOLZ: (Exhibits 1-5) Certainly. Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Kate Bolz, that's K-a-t-e B-o-l-z. I represent District 29, and it is my pleasure to introduce LB483 to you today. When the legislative session began this year, I had no plans of introducing a bill dealing with early childhood development and the Department of Corrections. However, when the folks from Christian Heritage approached me and brought me the ideas that are included in LB483, I became convinced that this bill is very worthy and cost-effective measure. LB483 is a bill that focuses on helping children and families. Children want to spend time with their family members. When a parent is incarcerated, many additional hardships are created for remaining family members. According to the Bureau of Justice Statistics, approximately one-half of state prisoners--64 percent of the mothers and 47 percent of the fathers--lived with at least one of their children either in the month before or just prior to imprisonment. More than half of parents in state prison provided primary

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financial support to their minor children before imprisonment. We also know that 90 percent of the children in foster care are growing up without their biological fathers playing a role in their lives. Children who have incarcerated parents are six times more likely than other children to be incarcerated at some point in their lives. With these statistics in mind, Christian Heritage, a nonprofit organization, applied for and received a federal two-year grant through the Second Chance Act to develop programs that encourage biological dads to become involved with their children's lives. Gregg Nicklas, CEO of Christian Heritage, is here today and will give testimony on the amazing results of his organization's programs on families and on individual recidivism rates. The Nebraska Department of Correctional Services has worked with Mr. Nicklas and Christian Heritage since February of 2009. Programs have been available to dads incarcerated at the Nebraska State Penitentiary, Lincoln Correctional Center, Omaha Correctional Center, and Tecumseh State Correctional Institution. My hope with LB483 is to expand this program to all of Nebraska's correctional facilities and allow more men, as well as young...as women, with young children to benefit. Currently, there are waiting lists for dads to participate in this program at both facilities where it is offered. I will reference for you that I have received more than 80 letters of support from dads currently enrolled in the program and from dads waiting to participate. It's a fairly impressive stack. My staff will be bringing individual letters from folks who originally are from your districts to your offices later this afternoon. The early years are critical for bonding. According to a 2012 study released by the University of Iowa, infants who have a close, intimate relationship with a parent are less likely to be troubled, aggressive, or experience other emotional and behavioral problems when they reach school age. The study confirmed that the first two years of life are a critical period for a child's social and emotional development. I brought this bill today to tell you about this program and to let you know that the federal funding ended in September of 2012. Christian Heritage strongly believes in this program and has continued to offer it by providing through private funds over the last five months. However, as a nonprofit organization, they continue to need help financially. Because of the positive effects this program has for families and the lowering of recidivism rates among those who participate, which saves Department of Corrections dollars, I am looking for a way to either cash fund this program or see if General Funds can be found to pay for it. When the bill was drafted, the Reentry Cash Fund seemed like the right place to look for funding. I realize now that that proposed method is not the right fit for this bill. I will continue to search for a funding source for this very worthy program and ask that the Judiciary Committee be willing to work with me and amend this portion of the bill as a source is found. I would like to offer letters of support from a number of organizations including the Hawks Foundation, First Five Nebraska, the Lancaster County Board of Commissioners, former regional prison Director Hershberger, Stan Parker, and the Children and Family Coalition of Nebraska. With that, Mr. Chairman, I thank the Judiciary Committee for their time. I'm happy to answer any questions in opening.

[LB483]

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SENATOR ASHFORD: Thank you, Senator Bolz. Do we have any questions of Senator Bolz? I am impressed by this program. I mean, we struggle mightily with the problem of recidivism and, I mean, it is impressive that such a low rate of recidivism...and that's not the only criteria, obviously, to determining success or failure, but certainly recidivism is one of those criteria. So I think they are doing a good job and, hopefully, we can find a way to fund this project. [LB483]

SENATOR BOLZ: That's right. [LB483]

SENATOR ASHFORD: Thank you. Okay. [LB483]

SENATOR BOLZ: Thank you. [LB483]

SENATOR ASHFORD: I don't see any questions. Do we have any...those who are for the bill, proponents of the bill, those who are for it? Okay, if we can grab the...come on up and we'll get your documents from the...the page will grab...gather your...do we have some other things there? [LB483]

A.J. SANTOS: Yep. [LB483]

SENATOR ASHFORD: So when you sit down, just state your name and where you're from, and we can get started. [LB483]

A.J. SANTOS: (Exhibits 6-8) Good afternoon. My name is A.J. Santos, A. J. S-a-n-t-o-s. I am in support of LB483. I am the supervisor of the Destination Dad program and a proud member of a wonderful team of people who have a real heart for children and families. I identify myself as an educator by trade. Teaching and coaching is a huge part of who I am and what I do. This program allows fathers to interact with their children as part of a broader educational and reentry program. Watching men make the transformation from father to a dad, as evidenced in the letters that Senator Bolz referred to, is something that I will cherish for the rest of my life. I gave the pages this breakdown of the program, how it was built over the past four years, so I'll kind of refer to that really quick. But in 2009, the number of participants who entered Destination Dad was 123. We've steadily grown each year to where this last year's totals were 264. And then you can kind of see, from 2010 to 2012, as new components have come on and been brought aboard, we've added more classes, more components, and definitely more dads. And I've kind of totaled those on the far right, so that kind of breaks down who is participating and in what classes. Two additional components that we'd like to...that have been approved and will be implemented in 2013 are our reentry family action plans and our parent-teacher conferences via Skype. We hope to have those up and running early spring to summer of this year. Currently, 65 Destination Dad classes occur monthly in the facilities. I would like to spend just a few moments detailing some additional components we look forward to expanding. Number one, tracking outcomes

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for children: Are they at home, not in foster care, in school, and out of trouble? Number two, we'd like to provide outreach to our families and released dads and children through social media. Number three, we would like to offer domestic violence classes for our dads. And, number four, we'd like to establish partnerships with like-minded organizations and businesses for reentry needs. Finally, I'd just like to state the four objectives of Destination Dad: to improve the lives of children by restoring their relationships with their incarcerated fathers; to help these vulnerable children remain at home, in school, and out of trouble; to help incarcerated dads understand the importance of their role as a father; and, finally, to equip and encourage these dads to be more involved in their children's lives. Thank you very much. [LB483]

SENATOR ASHFORD: Thank you. I don't see any questions, but thanks for your testimony. [LB483]

A.J. SANTOS: Thank you. [LB483]

SENATOR ASHFORD: The next proponent. [LB483]

PAMELA MOWRER: Hello. My name is Pamela Mowrer, P-a-m-e-l-a M-o-w-r-e-r. I am in favor of LB483. The last Wednesday of every month is a special day for my son, A.J. On that one day each month, he knows he is going to get special time, just he and his dad. He has had visits with his dad before, but these visits are different. These visits don't carry the stigma of prison. These visits are in a conference room where the children don't get to see the other inmates and guards and the occasional drug dog attached to a guard by a leash. These visits are supervised by Christian Heritage, and the kids can actually spend time playing with their dads. Toys and games are brought in for these special visits. My son and his daddy can build houses with LEGOs or play board games. If it wasn't for this program, it could be 10 or 11 years before they could play together, and most 16-year-old boys aren't into LEGOs and board games. This program is giving my son a happiness and security that my son deserves and desires that...or as a young boy. Before these visits started, A.J.'s greeting to his dad was a shy and slightly hesitant one. Now, with each visit, he runs a little faster into his dad's arms, screaming, Daddy, all the way there. He spends the days before counting down the days until his daddy visit. I love his excitement. Aaron (phonetic), his father, has made some bad decisions in life, but he is a fantastic father who loves his son wholeheartedly. Destination Dad gives my little boy the chance to experience this for himself. One of these visits a month may not sound like much, but it has been life-changing for my son, his father, and even for myself. I often find myself waiting for Aaron's (phonetic) call because he has taken many parenting classes and he always knows what advice to give me when dealing with the many challenges of parenthood. I am so thankful for this program, and I would like to give a minute for him to say what he likes about it. [LB483]

SENATOR ASHFORD: He can have as much time as he wants. (Laughter) The lights

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do not apply to him. (Laughter) [LB483]

PAMELA MOWRER: You want to tell them what you like about your visits? [LB483]

A.J. PETTES: Sure. [LB483]

PAMELA MOWRER: Go ahead, it's okay. [LB483]

SENATOR ASHFORD: Would it be easier for you to stand up and come over and talk to us or...? [LB483]

PAMELA MOWRER: Do you want to stand? [LB483]

A.J. PETTES: Um-hum. [LB483]

PAMELA MOWRER: Okay. [LB483]

SENATOR ASHFORD: What do you like to...what do you like...what about seeing your dad? What's the best part of that experience? [LB483]

A.J. PETTES: All the food. (Laughter) [LB483]

SENATOR ASHFORD: Yeah, the food? [LB483]

A.J. PETTES: Um-hum. [LB483]

SENATOR ASHFORD: Okay, so you have the chance to talk to him and tell him what you're doing in school and...right? [LB483]

A.J. PETTES: Yeah. [LB483]

SENATOR ASHFORD: Okay, and what else do you talk to him about? [LB483]

A.J. PETTES: Hmm, sometimes, on the phone, like, school, like what I learned from school. [LB483]

SENATOR ASHFORD: Right, right. And is...I'll bet he's very proud of you for learning so many things. [LB483]

A.J. PETTES: Um-hum. [LB483]

SENATOR ASHFORD: Is that right? [LB483]

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A.J. PETTES: Yeah. [LB483]

SENATOR ASHFORD: Good. [LB483]

PAMELA MOWRER: Tell him what you get to do on your daddy visits, your special visits, just you and your dad. [LB483]

A.J. PETTES: We get to build houses out of LEGOs. [LB483]

SENATOR ASHFORD: Okay, that's cool. [LB483]

PAMELA MOWRER: What else do you do? [LB483]

SENATOR ASHFORD: How old are you? You told me, probably, or your mom. How old are you? [LB483]

A.J. PETTES: I'm six. [LB483]

SENATOR ASHFORD: Six? So you're in first, second grade? [LB483]

A.J. PETTES: First grade. [LB483]

SENATOR ASHFORD: First grade, okay. Here in Lincoln? [LB483]

A.J. PETTES: Omaha. [LB483]

SENATOR ASHFORD: Oh, you're in Omaha, okay. [LB483]

A.J. PETTES: Um-hum. [LB483]

SENATOR ASHFORD: Well, we really appreciate you coming and telling us about seeing your dad and how cool it is, okay? [LB483]

A.J. PETTES: Um-hum. [LB483]

SENATOR ASHFORD: Keep working in school. [LB483]

A.J. PETTES: Okay. [LB483]

SENATOR ASHFORD: Okay, thank you very much. [LB483]

A.J. PETTES: You're welcome. [LB483]

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SENATOR ASHFORD: Okay. [LB483]

PAMELA MOWRER: All right. [LB483]

SENATOR ASHFORD: Okay, good job. Let's see, anybody else want to talk about this bill? Against? How about anybody more for it, for the bill? Anybody else? Come on up. [LB483]

RICHARD REINEKE: (Exhibit 9) Good afternoon. My name is Richard Reineke, R-i-c-h-a-r-d R-e-i-n-e-k-e. I am a Destination Dad graduate, small business owner, and proud father of three children. I would like to express my greatest appreciation for Christian Heritage and their Destination Dad program. You see, a little over two years ago, I was in prison. I didn't have any assigned programming, yet I was trying to do all that I could to prepare myself for the return to work, family, and friends, and Christian Heritage helped me with that. When I discovered there were classes like InsideOut Dads and Love and Logic, I signed up. I thought I knew a lot about parenting and relationships already, but I learned that there was a lot more to it. I learned, if you want a healthy relationship with your kids, you have to establish a healthy relationship with their moms. This isn't as easy as you might think, and it takes a lot of patience. But Christian Heritage teaches you how to begin, how to establish, and how to maintain these healthy relationships. My story didn't just start with the learning. It was actually after I was released I started to contact the mother of my now 12-year-old daughter, Zoe, who I hadn't seen in nine years. Even though I had made poor attempts in the past, with my knowledge I was able to establish a relationship with them over a couple of months. Now my daughter comes and visits. We spent much of last summer together. She hugs me and even says, I love you. We've come a long way in such a short amount of time. Also, I have strengthened my relationships with my other children and my family. Zoe is also connected with her half-sister and brother, Kara and Joshua. She continually lets me know how she and Kara look so much alike, and they spend the time getting to know each other, as sisters should. It is all coming together, and it is with the greatest respect that I give credit to Christian Heritage and their programs. We are sent to prison for rehabilitation, correct? And I can't see a better organization doing the job. I'm going to reference a quote from Batman which may seem a little out of place, but it has a resounding meaning: What happens when good men do nothing? Well, we all have a lot of good men and women in Christian Heritage doing all they can for our society, for our communities, and for our families to make the world a better place. Let's show them our support and gratitude in any and all the ways we can. I will continue to use what I've learned and assist others coming out of prison, set by the example of the staff of Christian Heritage. Thank you. [LB483]

SENATOR ASHFORD: Thank you very much. Thank you for your comments. [LB483]

RICHARD REINEKE: Thank you. [LB483]

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SENATOR ASHFORD: I don't have...see any questions, so you must have convinced us. Any other proponents, those for the bill? Okay. [LB483]

LESTER WAGNER: (Exhibit 10) Hello. My name is Lester Wagner, L-e-s-t-e-r W-a-g-n-e-r. I am in favor of LB483. I recently graduated from Kaplan University with a bachelor's degree in social work. I am currently employed at a restaurant in downtown Lincoln while working on my master's degree in management and leadership at the same time. I am also proud to say my family is off of ADC. At this time I want to tell you how the program has helped me and my family. It has helped me build a relationship with my dad and, also, a relationship with a daughter I had never met. It has helped me to stay focused on what is important for my family and helped me to set goals and to achieve those goals. The program has taught me more patience and helped me to better my life and become a better leader for my household. It has opened my eyes to the importance of making sacrifices for my family. It has taught me how to communicate better and build a strong relationship with my family. There is a need for parenting programs, therefore, I am asking for your support for these types of programs. Thank you. [LB483]

SENATOR ASHFORD: Very good. I don't see any questions. Thanks for coming over. Good luck. [LB483]

LESTER WAGNER: Thank you. [LB483]

SENATOR ASHFORD: Keep going. [LB483]

GREGG NICKLAS: (Exhibit 11) Good afternoon, Senators. My name is Gregg Nicklas, G-r-e-g-g N-i-c-k-l-a-s. I am in support of LB483 and appreciate Senator Bolz for putting the bill forward. It is my sincere belief, Senators, that this is one of the most important bills that will come before you this session because it enhances the work being done at correctional facilities in the state of Nebraska. And I'm honored to come before this committee because you have a reputation of being champions for reform. Today you have an opportunity to act on a bill that will promote the transformation of lives. You have heard testimonies and, as Senator Bolz indicated, we have over 80 letters from inmates who refer to the fact that their lives have been impacted and their families restored as a result of this program. We read in the newspapers and on-line about the need for additional prisons. We're offering an alternative at a fraction of the cost. Investing in this programming will address parenting, relationship, and also entry that includes family members in that transition, programming, as you've heard, that helps individuals reenter their communities, become gainfully employed, to go back to school, to get their families off welfare, and to stay out of prison. We have some really good news to share with you this afternoon. We're not proposing some grandiose scheme that we think might work. We're offering a program that we've been implementing in

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partnership with the Department of Corrections for four years. Over 800 incarcerated dads have participated in this program, representing nearly 2,000 children. Of those dads, 407 have been released and, according to the Department of Corrections, only 31 returned, an effective rate of 7.7 percent. We have 20 dads that are being released every month from prisons who have gone through the Destination Dad program and waiting lists at all the correctional facilities where it's offered. In your packet is a waiting list from Tecumseh that has 183 dads' names listed. Why is this program so effective? Because it's all about relationships and restoring families. I'd like to share a brief story with you. I attended one of the Destination Dad graduations at the Nebraska State Penitentiary. A dad came into the room and began to share with other people, I talked to my son on the phone last night, I talked to my son on the phone last night. I thought, big deal. After it was over, I went up to him and said, could you tell me why you're so excited about having talked to your son? He said, you have no idea, I came in here over four years ago when my wife was pregnant, I've never seen my son, I'd been trying to communicate with my wife but every time I'd call she wouldn't take my calls, when I wrote letters she wouldn't respond to me until I entered this class, until I entered this program, they taught me to think about life from her perspective and how to write to her, so when I started writing letters I would say, how are things going for you, and she began to respond and, after we wrote for a while, I had the opportunity to talk to her on the phone, and I could hear my son playing in the background but I had never talked to my son until last night, I talked to my son on the phone last night. That excites me so much to think that relationships are being transformed, that families are going to be reconciled. It's great for that incarcerated dad. [LB483]

SENATOR ASHFORD: I think your...great passion and a great story, but I'm going to have to ask you to just say one more sentence, in a passionate way. [LB483]

GREGG NICKLAS: Well, I would just say, in closing, you can enhance corrections by providing funding for a program that transforms lives. [LB483]

SENATOR ASHFORD: You're doing a great job, and I...the only reason I suggest that we end is because we have to go on. [LB483]

GREGG NICKLAS: That's all right. [LB483]

SENATOR ASHFORD: Yes, Mark. [LB483]

SENATOR CHRISTENSEN: Thank you, Chairman. [LB483]

SENATOR ASHFORD: Or, Senator Christensen. [LB483]

SENATOR CHRISTENSEN: Is there a criteria for this program for people to get in or just apply? [LB483]

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GREGG NICKLAS: They need to be a dad. [LB483]

SENATOR CHRISTENSEN: They need to be a dad. And then so it isn't set up...since it's limited to those that are going to be exiting first or anything that direction? [LB483]

GREGG NICKLAS: No. Dads that are...well, I should say, dads that are close to reentry may be given a higher priority in regards to entry and, of course, they have to have the ability to have contact with their children. If there's been some sort of offense against children, then that is certainly taken into consideration. But we do want to work with those dads who are going to be coming out soonest. [LB483]

SENATOR CHRISTENSEN: Okay. [LB483]

GREGG NICKLAS: Does that answer your question? [LB483]

SENATOR CHRISTENSEN: Yes, that answered the question. Thank you. [LB483]

SENATOR ASHFORD: Thank you, sir, and thanks...thank you for what you're doing. [LB483]

GREGG NICKLAS: You bet. Thank you. [LB483]

SENATOR LATHROP: Can I ask just one question? [LB483]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB483]

SENATOR LATHROP: If the recidivism rate for the people that go through this program is, what did you say, 7.7 percent,... [LB483]

GREGG NICKLAS: Yes, sir. [LB483]

SENATOR LATHROP: ...how does that compare with the overall recidivism rate for people that have been incarcerated, do you know? [LB483]

GREGG NICKLAS: Nationally or within the state of Nebraska? [LB483]

SENATOR LATHROP: Let's take the state of Nebraska. [LB483]

GREGG NICKLAS: 25.6 percent. [LB483]

SENATOR LATHROP: And here's another question, and maybe you know the answer to this, maybe you don't: Does the fact that they come to this program suggest that

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they're less likely to be involved in repeating offenses, or do you believe it's the program and the connection to the kids that they've developed and their families that's responsible for turning the recidivism rate? [LB483]

GREGG NICKLAS: That's a great question, Senator, and I don't know the answer. But I can tell you that in our budget for 2013, if we get the funding, we're going to be hiring a research firm to work with Dr. Hank Robinson, who is at the Department of Corrections, and we're going to be researching things like that. Do misconduct reports go down? Are these dads...we'll do a control group and then we'll do a group of dads who are in this program, and we'll have answers to those questions. [LB483]

SENATOR LATHROP: And are...is this a program that's being used in other states? In other words, are you copying or are you taking a model that's used in some other state, and are they experiencing... [LB483]

GREGG NICKLAS: In the information that A.J. handed out to you, that brochure that the dads get, the entry point is a program called InsideOut Dad. It's a research or an evidence-based program. It was created by the National Fatherhood Initiative. That's in institutions all over the United States. These other programs, where we have "Daddy Day Visits," where we do DVDs from dads where kids get to...dads read to their children books. We record them and then send the book and the DVD. And then we have "Peer Mentoring," where the guys get together every month and talk about their parenting issues. Those components are unique to this program. Another thing we want to do, in terms of creating research, over the course of the next couple of years would be to have this program become evidence-based and offer it to other states and municipalities. [LB483]

SENATOR LATHROP: Okay, good. Thanks for your testimony. [LB483]

GREGG NICKLAS: Thank you. Yes, sir. [LB483]

SENATOR ASHFORD: And that's a good point. I mean, it takes about a year...how long does it take for you to get that? [LB483]

GREGG NICKLAS: We think it will take two years, Senator. [LB483]

SENATOR ASHFORD: So you need to take two years, and then this can become sort of a model for the entire... [LB483]

GREGG NICKLAS: Yes, sir. [LB483]

SENATOR ASHFORD: And working through corrections departments across the country,... [LB483]

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GREGG NICKLAS: Right, and I just want to... [LB483]

SENATOR ASHFORD: ...you have that ability to do that through our Corrections Department. [LB483]

GREGG NICKLAS: Correct. And I just want to add, if I may, how great it's been to work with Director Houston, Larry Wayne, Layne Gissler, and others at the Department of Corrections. We truly have a partnership. [LB483]

SENATOR ASHFORD: I mean, this sounds absolutely transformational to me. I mean, I... [LB483]

GREGG NICKLAS: Yes, sir. I hope you get time to read some of the comments in those letters there. [LB483]

SENATOR ASHFORD: No, no, I don't need to. No, I'm kidding. (Laughter) We actually do read some of this stuff. But anyway, this is really impressive, impressive. Thank you very much. [LB483]

GREGG NICKLAS: Thank you, sir. [LB483]

SENATOR CHAMBERS: I have a question. [LB483]

GREGG NICKLAS: Yes, sir. [LB483]

SENATOR CHAMBERS: Why are you trying to fund this with another dollar added to court costs? [LB483]

GREGG NICKLAS: Senator, in regards to where the funds come from, I would defer to Senator Bolz, in terms of those funds. We're just ask... [LB483]

SENATOR CHAMBERS: You just want the money, wherever it comes from. [LB483]

GREGG NICKLAS: Yes, sir. [LB483]

SENATOR CHAMBERS: Okay, okay. [LB483]

SENATOR ASHFORD: Yeah, and I think Senator Chambers raises a good point. I mean, we don't normally raise court fees for projects like this. [LB483]

GREGG NICKLAS: Yeah. [LB483]

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SENATOR ASHFORD: But it would seem, to me, that the department...the amount of money you're asking for is pretty small compared to the success of the programs. And I would hope the department can...and I've...we...as you know, we've had conversations with the department and, I know, with the Governor's Office and, hopefully, we can spring loose some money to keep this thing going. [LB483]

GREGG NICKLAS: That would be great. [LB483]

SENATOR ASHFORD: Yeah. [LB483]

GREGG NICKLAS: And I just again want to acknowledge all the private donors that have helped us get to this point. [LB483]

SENATOR ASHFORD: Right. [LB483]

GREGG NICKLAS: And we would appreciate the help of the state moving forward. [LB483]

SENATOR ASHFORD: Thank you. [LB483]

GREGG NICKLAS: Thank you. [LB483]

SENATOR ASHFORD: Any other proponents? Opponents? Neutral? Neutral, neutral. [LB483]

JANICE WALKER: (Exhibit 12) Senator Ashford, members of the committee, my name is Janice Walker, J-a-n-i-c-e W-a-l-k-e-r, and I'm here with the unenviable task of asking you to find another source of funding for this very worthwhile program other than what is in the introduced bill. You've... [LB483]

SENATOR ASHFORD: Well, thank you very much, Janice, for your comments. Does anybody have any...no, I'm just kidding (laughter). [LB483]

JANICE WALKER: You know, I've had to do this before. It's just not great. [LB483]

SENATOR ASHFORD: Right. No, I'm kidding. I'm kidding, of course. Does anybody have any questions of Janice? Senator Chambers, do you wish to... [LB483]

SENATOR CHAMBERS: Not a question. But ever since I've been in the Legislature, I've been opposed to the court system being used to raise money for other things. I have not even been in favor of the court having to raise court costs to fund the court system. The Attorney General is not required to go out and hustle money for the executive department, nor the Governor, who is head of that department. The Legislature can

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raise taxes, but we don't have to go around and pass the hat and say, give us some money to run the Legislature. Since the courts are absolutely essential to the proper functioning of a democratic society, my view is that General Fund money should fund the courts because everybody pays into the General Fund and everybody benefits from the court system, whether we actually walk into a courtroom and will be involved in a litigation or not. So that has been my longstanding position, it's my position now, and I'm just using you as the opportunity to make it clear to everybody that this has nothing to do with this program. I have not supported increases in court costs except, extremely reluctantly, when I was convinced that there was some connection to what the court itself does. [LB483]

JANICE WALKER: And I remember that from when you were here before, Senator Chambers, and I thank you very much for saying that. [LB483]

SENATOR CHAMBERS: Okay, okay. [LB483]

SENATOR ASHFORD: Okay, I think we get the idea. Thanks, Janice. [LB483]

JANICE WALKER: You're welcome. [LB483]

SENATOR ASHFORD: Katie. [LB483]

KATIE ZULKOSKI: Good afternoon, Senator Ashford and members of the committee. Katie Zulkoski, Z-u-l-k-o-s-k-i. And we have shared with Senator Bolz and want to share with the committee and reiterate our concern with the bill has nothing to do with the underlying program. Like Senator Chambers and like Janice, our concern is just with the funding mechanism of the program. And we appreciate Senator Bolz's comments that she's willing to look at other funding sources. [LB483]

SENATOR ASHFORD: We struggle every day with trying to find strategies that will ease the...first of all, to reduce the population of our corrections system and to reduce recidivism. We talk about it literally every week in here. So this is the first time in 15 years, I guess, where I've heard of a program that has this kind of success, so I don't know...we seem to...it seems like we have to grab...wouldn't you agree, we need to grab on to this somehow, yeah? [LB483]

KATIE ZULKOSKI: And the testimony today has been refreshing and encouraging. [LB483]

SENATOR ASHFORD: Yes, pretty...well, and compelling and refreshing and especially my little friend here. (Laughter) [LB483]

KATIE ZULKOSKI: Yeah, absolutely. [LB483]

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SENATOR ASHFORD: Okay, thanks, Katie. [LB483]

KATIE ZULKOSKI: Thank you. [LB483]

SENATOR ASHFORD: Any other neutral testifiers? Senator Bolz, do you wish to close? [LB483]

SENATOR BOLZ: I'll be brief. I know you have a long agenda today. I would just point out a few things from the testimony that you've heard already. One is that this is based on best practices. This is based on proven curriculums, on strategies that work for kids and for parents, and I think it is a true example of a way that we can end multigenerational family struggles with corrections, with poverty, and with other social ills. And so I encourage your support of the concept of LB483, and I look forward to working with all of you to see it happen. Thank you. [LB483]

SENATOR ASHFORD: (See also Exhibits 13 and 14). Thank you, Senator Bolz. That concludes the hearing on LB483. Senator Chambers has LB538. Senator Chambers. [LB483]

SENATOR CHAMBERS: (Exhibit 15) Mr. Chairman, members of the committee, I've always wanted to confront that Chambers fellow, but I see he's absent today, (laughter) so I'll go on anyway. The amendment that is being presented, I may have left one with the committee already, but I couldn't remember whether I had done it or not, because when I looked in my folder in my office I had one copy. I had intended to make sure that you got it. So if it was already delivered, the staff did their job and I had done mine. I am going to keep my presentations as brief and to the point as I can, but I'm willing to answer any questions that anybody would have to ask. And since my statement of intent is a distillation of my thinking, I want that to be a part of the record, so I will rely on it. This bill deals with the suspension and revocation of a law enforcement diploma or certificate. These matters fall under the jurisdiction of the Nebraska Law Enforcement and Criminal Justice Commission. Within the commission is the Police Standards Advisory Council, which is empowered by Section 81-1403(6) to do the following, among other things: "Revoke or suspend such certificates or diplomas...for reasons which shall include, but not be limited to, (a) incompetence, (b) neglect of duty, (c) physical, mental, or emotional incapacity..." The Office of the Attorney General, in a letter to me, dated November 26, 2012, explained that because, quote, there's no statutory definition of physical, mental, or emotional incapacity, as that phrase is used in Section 81-1403, unquote, dismissed by the commission...dismissal of a complaint that I had filed with the commission was not clearly unwarranted. Therefore, LB538 is offered to provide a definition which the Attorney General's Office said is missing. And the definition would say: Incapacity means incapable of or lacking the ability to perform or carry out the usual duties of a law enforcement officer in accordance with the standards

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established by the commission due to physical, mental, or emotional factors. This section is amended also by transferring the definition of felony from Section 81-1403; and there's a definition of felony rather than just using the word "felony" as a basis for revocation. If a similar offense had been committed in another state, then this language lets you know what the punishment for that offense would have had to be, to make it equivalent for the Nebraska requirement that in the case of the commission of a felony the revocation occurs. I guess that's why they did it. I didn't ask them. I'm telling you what seems logical to me as to why they would do it since we state what is a felony and what is not. Returning to Section 81-1403, new amendatory language is found on page 6 of LB538, which addresses, quote, temporary and, quote, permanent, unquote, disability. And in the case of temporary disability, suspension of a certificate or diploma occurs under LB538. If such disability is permanent, revocation is warranted. The provisions are retroactive. This I put in because in my dealings with the commission and the Police Standards Advisory Board, I was made aware that there were some officers who have been on this disability for years. And the reason I think something ought to be done in that situation will be explained in this paragraph. Because the law enforcement certificate or diploma is evidence that the holder is fully qualified to hold it and is capable of performing all the duties of a law enforcement officer, no person should hold such a document if he or she has an incapacity as defined by law. And this is the amendment that I had indicated would be offered and I'm reading it into the record. On page 6, line 9, after the period insert the following: A temporary physical, mental, or emotional incapacity shall not be deemed to exist if a law enforcement officer remains employed as a law enforcement officer, including employment as a law enforcement officer in a restricted or limited duty status. Believe it or not, a member of the Omaha police division talked to me in my office. For some reason, he was able to overcome that what I deemed to be natural antipathy that they have for me; so I retracted my horns. I didn't allow my tail to show and I didn't breathe any fire and smoke, and we discussed this notion of an officer being injured or ill but still on the department. And I pointed out that I have no interest in affecting the certificate or diploma of an individual in that set of circumstances, only those who have been separated for whatever reason and are no longer functioning as law enforcement officers. They cannot hold onto that certificate and be considered to be in good standing if they are not competent or qualified to do the work. There are certain rules and regulations that the commission has, but because, as the Attorney General's Office pointed out, there is no definition in statute of these various types of incapacity but they are a part of the law and they provide a basis for revocation, there should be a definition. And that is what this bill primarily does and it states the consequences under certain circumstances. So that's all that I have to present by way of an opening, but I'll answer any questions that you have. [LB538]

SENATOR ASHFORD: Does anyone have any questions of Senator Chambers in this matter? Seeing none...or yes, Senator Seiler. [LB538]

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SENATOR SEILER: Senator Chambers,... [LB538]

SENATOR CHAMBERS: Yes. [LB538]

SENATOR SEILER: ...where you talk about retroactive, where do you want it to be retroactive to? Is it in the bill? I'm sorry, I didn't check that. [LB538]

SENATOR CHAMBERS: No. Retroactive means back to when Adam was in the Garden of Eden (laughter) and forward. But here's why I said there could be rules and regulations. The commission...and I want this as a matter of record. The commission with the experience and knowledge that they have, could be allowed to establish what a cutoff point would be. I could have said three years, four years, five years, or whatever, and I could be asked the same question: Why draw the line there? So I expect that a bill as innocuous as this will be advanced, but I will have conversations with Director Behm and ask him, first of all: Would the retroactive provision create insurmountable administrative problems? [LB538]

SENATOR SEILER: Well, I was wondering if you were making it retroactive based on the medical report of when the temporary became permanent...or went into effect. [LB538]

SENATOR CHAMBERS: That's what the bill is based on, because that is the circumstance that led to the Attorney General referring to the lack of definition. And the issue resulted from my seeing where an officer had gotten a pension on the basis of having some kind of posttraumatic stress or something like that. So if that means that person is unable to perform as a law enforcement officer, that certificate should not be in existence, indicating that he or she is. Because after having obtained a pension here, that person could go someplace else and have a certificate that shows he or she is in good standing. If the commission were called and asked does this person have a certificate, the answer would have to be yes; but that's why that is. And I will have those conversations. [LB538]

SENATOR SEILER: Okay. [LB538]

SENATOR ASHFORD: Thanks, Senator Chambers. I don't see any other questions. [LB538]

SENATOR CHAMBERS: Since I have other bills, can I just leave this on the table and... [LB538]

SENATOR ASHFORD: Yes, you may. [LB538]

SENATOR CHAMBERS: Okay. [LB538]

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SENATOR ASHFORD: Do we have any other...do we have any testifiers for the bill?  
[LB538]

SENATOR CHAMBERS: I don't know. [LB538]

SENATOR ASHFORD: Oh, I'm just asking the general group out there. [LB538]

SENATOR CHAMBERS: Oh. [LB538]

SENATOR ASHFORD: (See also Exhibit 16) I recognize many of them. Anybody opposed to the bill? Anybody neutral? (Laugh) Oh, jeez. You know, I don't even know what to say. [LB538]

SENATOR LATHROP: Must be innocuous. [LB538]

SENATOR ASHFORD: I move to go into Exec Session. Anybody... [LB538]

SENATOR MCGILL: Either that or maybe that they were afraid to show up. [LB538]

SENATOR CHAMBERS: I don't know if I identified myself the last time for the record. I'm Ernie Chambers. I represent the 11th Legislative District. And I will ask the Chair, is the next bill up LB541 on the agenda? [LB541]

SENATOR ASHFORD: Yes. [LB541]

SENATOR CHAMBERS: Thank you. I brought all three of them, and I didn't want to get them out of order. And again I'm going to try to keep this as brief as I can, not meaning I won't answer questions. This bill amends the Uniform Arbitration Act, and that authorizes arbitration agreements between employers and employees; and this bill would exempt from its application, quote, a claim involving disciplinary action against a peace officer. Under Nebraska's arbitration laws, once a decision is reached, it's irrevocable and all the rest of that. And an agreement can be struck in a contract where once this is done there is no appeal, period. All of the proceedings are secret. All of the documents are secret. No information can the public obtain about anything. So if and when a police officer is disciplined by his or her own agency, the public which pays their salary and the public which counts on these officers to meet a higher standard than that of the ordinary citizen, the public has a right to know what is entailed when an officer has been suspended or fired. And in the case that led me to bring this bill, there was a firing. This rests upon the premise, this bill, that transparency in government mandates that disciplinary action involving those who are cloaked with the discretionary power to arrest and to kill, ought not be cloaked in secrecy and concealed from public view. This premise is popularly denominated as the public's right to know. Currently, under the

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Arbitration Act, collective bargaining agreements allow for arbitration whose proceedings are secret; the arbitrator's report of the same is exempt from a public records request; and the arbitrator's decision cannot be appealed. Hence, the Uniform Arbitration Act creates for peace officers who have been disciplined a system of secrecy, which may be analogized to a black hole in space whose gravitational pull is so strong that even light cannot escape its grip. In a letter dated June 26 of last year, 2012, the Assistant Omaha City Attorney informed me that my public records request for a copy of the auditor's report reinstating a fired police officer was denied because, quote, the arbitration decision involving the discipline of a current employee is to be considered personal information and the records of an employee that may be withheld pursuant to the Public Records Act. The Office of the Attorney General, which I consulted, subsequently affirmed this interpretation. In an open, democratic society, such a situation is not acceptable. The case involved a female officer shown on a hospital's security camera tape, kicking a man several times in the shoulder or head area while he was pinned to the ground under several officers. Another officer, fired then reinstated in January 2013 by the same arbitrator, was shown, quote, pulling on the man's head before delivering punches, kicks, and stomps. And that was what the World-Herald detected when they viewed that tape. Tasers also were deployed. Pursuant to the union contract, neither case was appealable. Doubt and suspicion assailed the community regarding collusion between the city which presented the case against the officers during the secret proceedings and the police union, because exoneration of the officers virtually immunized the city from liability. Public proceedings would have disclosed how the city handled the matter. Taxpayers have the right to total disclosure of how public employees, hired and paid by their tax dollars, are behaving and misbehaving. The right of the public to know transcends any desire for secrecy of alleged wrongdoing public employees. Public trust and confidence are neither fostered nor nurtured by such secrecy. LB541 is wholesome legislation and should be presented to the full Legislature whose duty of oversight could not be more obvious and pressing. A societal need will be served. And I have a comment to make about that incident. First of all, I started to bring the video and show it at the hearing. But rather than do that and prolong the hearing, during Exec Session I will allow the members to look at it and make a determination independent of what I will say. But I'm going to say this: For some reason, the city and the police union issued a joint statement after the female officer was reinstated. And everybody thought this is strange, because the leaked arbitrator's report--and people believe the union leaked it because it went in their favor, I don't know who leaked it--indicated that the city did not present sufficient evidence to establish their case. That's where the suspicion came in. We don't know what the city said. Even though the chief had fired the officer, the mere firing of the officer would not indicate that the city doesn't still have liability. The termination of the officer, in other words, wouldn't cut off liability that existed. So it would be in the interest of the city to do a poor job, give the arbitrator a basis to say, well, you didn't make the case; rescind the firing and reinstate the officer. But the peculiar thing is that the officer is going to have to be retrained, several other things, and reassigned. So if that kind of situation did not exist under the

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cloak of secrecy, I don't think this situation would have arisen. And this is what I'm saying all that for. I had looked at the video several times; the man would be stretched out with his head facing Senator Ashford and his feet facing me. The officer was standing up near his head, and she drew back and kicked him several times. He was dog-piled by several officers. Tasers were used against him. One officer admitted he struck him with a club. The other one had to admit that he was striking him around the head and he was stomping. In fact, this cop got his hand stomped on by one of the cops who was trying to stomp the man's head. Well, what the female officer said is that she kicked him in the leg area, which is not where she was located. She also said that she kicked him because he was trying to take a knife out of her pocket. I don't know if a knife is a part of the uniform; but if you look at the position of this man under these people and the female officer standing over him, kicking him, there is no way he could have tried to take a knife out of her pocket, because he was nowhere near where that could be done. And when these kind of things are involved, it's to the interest not only of the public but the police department itself--forgetting the union--to not have these things done in secret. And I recognize that at bargaining time this arbitration agreement would not have had to be entered into, but as people who live in Omaha know, the police department union wields tremendous influence and power, and I think they are accountable to nobody: not to the mayor, not to the chief, and certainly not to the public. [LB541]

SENATOR LATHROP: Can I ask some questions, if I may? [LB541]

SENATOR ASHFORD: Yes. [LB541]

SENATOR LATHROP: Senator Chambers, you've suggested there's two rationale for this. One is the inherent conflict the city has in prosecuting the disciplinary proceeding, which is to say in the case of this fellow, if someone is being injured or beat up by law enforcement, if they get that person disciplined and they do a good job, they might be establishing the liability case that person may bring against the city of Omaha. That doesn't change if the disciplinary proceeding is done in a different form. [LB541]

SENATOR CHAMBERS: I would want it done publicly. Officers can appeal the discipline, and those appeals are public. That's why the... [LB541]

SENATOR LATHROP: Where would you have this done, if not...if...right now they, through contract, do it before an arbitrator. And the city picks an arbitrator, the employee picks an arbitrator, and those people pick a third person who serves as the arbitrator. [LB541]

SENATOR CHAMBERS: Um-hum. [LB541]

SENATOR LATHROP: That's to establish somebody who's independent of the dispute,

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right? [LB541]

SENATOR CHAMBERS: Purportedly. [LB541]

SENATOR LATHROP: Well... [LB541]

SENATOR CHAMBERS: Yes. [LB541]

SENATOR LATHROP: It's about as fair as you can get. [LB541]

SENATOR CHAMBERS: That's my word. [LB541]

SENATOR LATHROP: Okay. Where would you have this done then, if not in front of an arbitrator? [LB541]

SENATOR CHAMBERS: Let the...the system exists now. The officer can appeal to the personnel board or take it to court. [LB541]

SENATOR LATHROP: Okay. [LB541]

SENATOR CHAMBERS: There would be a public forum and then everything that's done could be seen. Now the mere fact that every court case is open to the public doesn't mean necessarily that a fair verdict is rendered. But the public is there to observe and it might make people more circumspect in what they do. [LB541]

SENATOR LATHROP: Okay. My next question has to do with the fact that it's...this idea that when it's in front of the arbitrator, as opposed to the personnel board or a courtroom, that there is secrecy. And is your problem with this system that involves an arbitrator, is it the fact that it's an arbitrator or is it the fact that it's all in secret? [LB541]

SENATOR CHAMBERS: It's the secrecy. [LB541]

SENATOR LATHROP: If those proceedings were open but done before an arbitrator, would your concerns be met? [LB541]

SENATOR CHAMBERS: I've been asked... [LB541]

SENATOR LATHROP: In other words, if we didn't say you couldn't do it in front of an arbitrator but if you do it in front of an arbitrator it must be open to the public and the public has to be given a reasonable opportunity to appear and observe the proceedings? [LB541]

SENATOR CHAMBERS: And that it be appealable. [LB541]

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SENATOR LATHROP: And appealable from the arbitrator to... [LB541]

SENATOR CHAMBERS: Yes. [LB541]

SENATOR LATHROP: ...the district court? [LB541]

SENATOR CHAMBERS: Yes. [LB541]

SENATOR LATHROP: And in that case you'd be satisfied as long as it's a public proceeding. [LB541]

SENATOR CHAMBERS: Yes, and the decision of the arbitrator would be appealable. Right now, as you know, the only way an arbitrator's order can be set aside is for a basis that would set aside a contract. So if everybody does what they agreed to do, then that's the way it is, and it can be appealed nowhere. [LB541]

SENATOR LATHROP: Okay. [LB541]

SENATOR CHAMBERS: And what I think, and being completely frank with you, there's going to be no perfect, no ideal way to deal with the disciplining of police officers. But because we can't make it perfect, I think we can do away with some of the imperfection; and one of the worst aspects is the secrecy. [LB541]

SENATOR LATHROP: Okay. I think I get what you're driving at. Thank you. [LB541]

SENATOR CHAMBERS: Okay. [LB541]

SENATOR ASHFORD: Yes, Senator Coash. [LB541]

SENATOR COASH: Thank you, Senator Ashford. Senator Chambers, you describe statements from...in the example you gave, you described some statements from officers about what their interpretation or what they said. [LB541]

SENATOR CHAMBERS: Um-hum. [LB541]

SENATOR COASH: How did you know that, if these statements were given in a... [LB541]

SENATOR CHAMBERS: Part of the report was leaked,... [LB541]

SENATOR COASH: Okay. [LB541]

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SENATOR CHAMBERS: ...and then the World-Herald gave...lifted statements that they chose to print. And I'm not saying they were hiding anybody, but there's no way they could print the entire arbitrator's report in their newspaper. And they're going to print the things that they think are significant and that people will read. So when the... [LB541]

SENATOR COASH: So your access to that information wasn't because of the system working as it should...or as it is under the current law. [LB541]

SENATOR CHAMBERS: Most of the information that anybody got was from what the World-Herald printed; and prior to that, what the city and the police union were willing to let the public see. [LB541]

SENATOR COASH: Okay. How would your bill affect the current union agreement between the law... [LB541]

SENATOR CHAMBERS: How would this affect it? [LB541]

SENATOR COASH: How would it affect? I mean, would it...I mean, if there's a contract that says this is how we'll deal with employee discipline, if this bill becomes law, does it become... [LB541]

SENATOR CHAMBERS: It cannot abrogate an existing contract. [LB541]

SENATOR COASH: Okay. So it will just become part of the next contract? [LB541]

SENATOR CHAMBERS: Yes. [LB541]

SENATOR COASH: Okay. [LB541]

SENATOR CHAMBERS: From...we can't do anything and the U.S. Constitution even tells us that we cannot abrogate existing contracts when they're legal and everything is in order. [LB541]

SENATOR COASH: So this does nothing for anything that would happen prior to the enactment of a new contract. [LB541]

SENATOR CHAMBERS: Right. I'm not interested in affecting that with this bill. [LB541]

SENATOR COASH: Okay. Thank you, Senator Chambers. [LB541]

SENATOR ASHFORD: Anybody else have any questions? I don't see any, Senator Chambers. Okay. Do we have proponents for this bill, those in favor? Sort of 0 for 2. How about opponents? [LB541]

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BILL MUELLER: (Exhibit 18) Mr. Chairman, members of the committee, my name is Bill Mueller, M-u-e-l-l-e-r. I appear here today on behalf of the State Troopers Association of Nebraska in opposition to LB541 as drafted. I've been in the room when Senator Chambers has opened on his bill, and my understanding is that he has two concerns, one of which is the appealability of arbitration awards dealing with law enforcement. I represent the State Troopers on legislative matters. They have a lawyer who represents them on issues like the issue that would arise in an arbitration between the state and the troopers. Mr. Young could not be here today. I don't know if he's dodging Senator Chambers or not; he tells me that he's out of state. But I have spoken to him about this matter and I'm going to relay to you what he told me about the process. As far as the...well, first of all, the State Troopers Association negotiates with the state, and in their collective bargaining agreement they do have a provision that requires that employment disputes be arbitrated with the state. What I am told, from Mr. Young, is that within this bargaining agreement language they actually have provided both for a broader appeal and, in Mr. Young's opinion, a public process would be involved. I've had the page hand out for you the Department of Administrative Services Web site that actually has opinions in arbitration matters posted on it. I'm advised that if there was an arbitration with a state trooper in the state that Mr. Young does not know why that would be a private matter, he believes that it would be discoverable if there were a public records request made, and the opinion of the arbitrator would be posted on the department's Web site. I want to be clear, that has been negotiated between STAN and the state of Nebraska. If they didn't negotiate that, then what Senator Chambers describes may certainly be the case. And again I represent STAN. We don't represent any other law enforcement entities. But we do not believe that this bill as drafted...well, we believe that the bill as drafted is too broad. If there were a requirement that these arbitrations be public and be subject to disclosure, we would not object to that. I'd be... [LB541]

SENATOR ASHFORD: But why are you against... [LB541]

BILL MUELLER: Well, because the bill as introduced, is... [LB541]

SENATOR ASHFORD: I mean, why are we against the bill exactly? [LB541]

BILL MUELLER: Well, because as introduced... [LB541]

SENATOR ASHFORD: This sounds sort of like neutral testimony. [LB541]

BILL MUELLER: As introduced, you could not arbitrate a claim involving disciplinary action against a peace officer. We want to continue arbitrating these disputes. Page 2, lines 21 and 22... [LB541]

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SENATOR ASHFORD: So it's a technical opposition. You're for arbitration. [LB541]

BILL MUELLER: And that's what I...oh, we are for arbitration and we are for public disclosure of that. Yes. And ours, according to Mr. Young, are publicly disclosed. [LB541]

SENATOR ASHFORD: Who's Mr. Young again? I get mixed up. [LB541]

BILL MUELLER: Mr. Young is the lawyer for the State Troopers Association. [LB541]

SENATOR LATHROP: Bill, is the... [LB541]

BILL MUELLER: Yes. [LB541]

SENATOR LATHROP: There's a difference between having a proceeding that is public and making public the conclusions of the arbitrator. [LB541]

BILL MUELLER: Yes. [LB541]

SENATOR LATHROP: Are you suggesting that the State Troopers are okay with a public proceeding? [LB541]

BILL MUELLER: I asked that... [LB541]

SENATOR LATHROP: Or that they...or are you telling us that they are glad to provide the decision of the arbitrator, which if I'm hearing Senator Chambers right, isn't what he's after. [LB541]

BILL MUELLER: I asked Mr. Young that very question and his... [LB541]

SENATOR ASHFORD: This Mr. Young is a pretty integral guy here, whoever... [LB541]

BILL MUELLER: Well, I'm sorry. I don't want the committee... [LB541]

SENATOR ASHFORD: I mean, whoever he is, we've got to... [LB541]

BILL MUELLER: I don't want the committee to understand that I'm giving you my legal opinion and my experience in how this works, because I don't have experience in how this works. [LB541]

SENATOR LATHROP: He's the labor law lawyer over in Con Keating's office. [LB541]

BILL MUELLER: He's the labor law lawyer who's involved in these matters. [LB541]

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SENATOR ASHFORD: What's his first...is this...not Duncan Young? [LB541]

BILL MUELLER: Gary Young. Gary Young. I asked him the very question that you posed to me, Senator Lathrop. And he tells me that in his opinion the Public Records Act would prohibit attorney-client confidential information of the accused or the public agency to be disclosed. He doesn't believe that the act would apply to evidence offered in the arbitration between the state and the law enforcement bargaining council. [LB541]

SENATOR LATHROP: But again, that's disclosure of something that was offered and not...here's the difference and what I hear is Senator Chambers' point and why I asked the questions I asked, which is we can have a personnel board hearing where they sit around a table like this and the folks get to come in and watch it, or it can be done in arbitration, which I assume is two lawyers in some setting that looks like a courtroom and one arbitrator. The question is whether the public gets to come in and listen to the evidence that's coming in, and not whether they can make a freedom of information request for the evidence... [LB541]

BILL MUELLER: Yes. [LB541]

SENATOR LATHROP: ...that was submitted. [LB541]

BILL MUELLER: I understand. [LB541]

SENATOR LATHROP: Do you see the difference? [LB541]

BILL MUELLER: I do. And... [LB541]

SENATOR LATHROP: Okay. Where are they at on being in the room with the... [LB541]

BILL MUELLER: And when I asked Mr. Young that question, his comment was, in his experience the public had not attended one of these arbitrations but he did not know why they would be excluded. He did not believe that it is a private proceeding. [LB541]

SENATOR LATHROP: Okay. Thank you. [LB541]

BILL MUELLER: Thank you. [LB541]

SENATOR ASHFORD: Senator Chambers. [LB541]

SENATOR CHAMBERS: In order, Mr. Mueller, that I can understand to the extent that you understand this Mr. Young, who is the elephant in the room although he literally is absent, he doesn't...he...let's let him be speaking for the State Troopers Association.

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[LB541]

BILL MUELLER: Yes. [LB541]

SENATOR CHAMBERS: They do not care if the proceeding itself is open to the public. [LB541]

BILL MUELLER: That is my understanding, yes. [LB541]

SENATOR CHAMBERS: So they don't object to that. [LB541]

BILL MUELLER: That is my understanding. [LB541]

SENATOR CHAMBERS: All right. And you as a lawyer know that court proceedings are open if nobody ever attends (inaudible). [LB541]

BILL MUELLER: Correct, absolutely. [LB541]

SENATOR CHAMBERS: And the fact that some cases are not of interest has never been an argument for closing the... [LB541]

BILL MUELLER: I agree. [LB541]

SENATOR CHAMBERS: Okay. So I want to be clear on that. [LB541]

BILL MUELLER: Yes. [LB541]

SENATOR CHAMBERS: Now how about when the arbitrator's decision comes down, is that appealable? How do they feel about that? [LB541]

BILL MUELLER: According to Mr. Young, they have negotiated in the collective bargaining agreement that an arbitration would be appealable to the district court for a clear factual error or error of law, and he said that arbitration of patrol matters are appealable in the same way that a trial verdict or a personnel hearing result would be appealable, which is broader than the current law under the Uniform Arbitration Act that we've adopted here. So again, they have negotiated apparently what they can appeal. [LB541]

SENATOR CHAMBERS: So if a provision like that were in the law, the State Patrol wouldn't have any objection. [LB541]

BILL MUELLER: That's my understanding. Yes, they would not have any objection. [LB541]

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SENATOR CHAMBERS: So when you say they are objecting to the bill as written... [LB541]

BILL MUELLER: Yes. [LB541]

SENATOR CHAMBERS: ...the part they're objecting to is the statement that no disciplinary action involving a peace officer can be subject to arbitration. [LB541]

BILL MUELLER: Correct. [LB541]

SENATOR CHAMBERS: You're aware that I think compensation matters are not covered by the Arbitration Act, are they? I don't think they are. [LB541]

BILL MUELLER: I don't know. [LB541]

SENATOR CHAMBERS: That's a very large exemption, in my opinion. But at any rate, at least I know the extent and limitations on the objection of the Patrol. [LB541]

BILL MUELLER: Yes. [LB541]

SENATOR CHAMBERS: And I asked you for a clarification not really to argue. [LB541]

BILL MUELLER: No. [LB541]

SENATOR CHAMBERS: But I do want to ask this question now because it's kind of apart from this. You said Mr. Young is out of the state. [LB541]

BILL MUELLER: Yes. [LB541]

SENATOR CHAMBERS: You don't know when he left? [LB541]

BILL MUELLER: (Laugh) I don't know when he left, no. [LB541]

SENATOR CHAMBERS: Did you talk to him in person when he told you he was leaving? [LB541]

BILL MUELLER: Yes. It was last week when he told me this. [LB541]

SENATOR CHAMBERS: And he said he was going to...he didn't know for sure whether he would be leaving but he knew he wouldn't be in town today? [LB541]

BILL MUELLER: He was certain that he would not be in town this afternoon. [LB541]

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SENATOR CHAMBERS: Okay. Thank you. I don't blame him, personally. [LB541]

BILL MUELLER: Nor do I. [LB541]

SENATOR ASHFORD: Yeah. [LB541]

BILL MUELLER: We were going to offer a letter, and I thought that it would be better if we actually came and testified and took questions. [LB541]

SENATOR ASHFORD: Well, it's cleared everything up for me anyway. (Laugh) [LB541]

SENATOR LATHROP: It's hearsay either way, Bill. [LB541]

BILL MUELLER: It is hearsay. It is absolutely hearsay. [LB541]

SENATOR ASHFORD: Upon hearsay. Very good. Thanks, Bill. [LB541]

BILL MUELLER: Thank you. [LB541]

SENATOR ASHFORD: (See also Exhibit 17) Kind of two of those...three of those little balloons in that deal. Okay, any other opponents? Neutral? Senator Chambers? [LB541]

SENATOR CHAMBERS: And since I can talk to the committee and there's not much, I'm going to waive closing on that one. [LB541]

SENATOR ASHFORD: Now you have the next bill. [LB541]

SENATOR CHAMBERS: (Exhibit 19) If I were a British gentleman, I'd say egad. No, I see two gentlemen sitting side by side, and I didn't see manacles holding them there. And maybe when they testify you'll understand why I was somewhat surprised. But here is something that I would like to have handed out. And as I make note on this, the face of it, there is no need unless you want to, to look at the different handing down...oh, these are annotations that are attached to the system of aggravating and mitigating circumstances. They list the cases that the courts have handled. And the ones in the volume that I have--statute books--only go to 2005. But as that says, just look at the volume of the litigation. And this will be brief also. The offending statutory language that will be repealed by this bill is found in Section 29-2523(1)(d), and in the profession it's known simply at (1)(d). And people who handle death penalty litigation know precisely what (1)(d) is referring to. And this is the language that comprises (1)(d): The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence. And if any of you can make sense out of

that, that is as precise as the law requires statements in the law to be when they'll have a bearing on the outcome of a case. Then you will have severed the Gordian Knot. Check it on Google. But at any rate, the U.S. Supreme Court has ruled that a mandatory death sentence is unconstitutional for its failure to give consideration to the individualized characteristics of defendants. So in an attempt to distinguish a death penalty case from a, quote, ordinary, unquote, murder, a scheme of aggravating circumstances was devised, at least one of which must be present to warrant a death sentence. This that I'm trying to repeal is one such aggravator. And when the U.S. Supreme Court struck down all death penalty statutes in the '70s, it's because they were arbitrary. There was no provision of guidance to the jury, and it was acknowledged that every murder is bad. But when it comes to taking a life, then there has to be something to distinguish that type of murder from the run-of-the-mill murder. So to continue. This provision is the most litigated, judicially interpreted, tweaked, and defined, confusing, unworkable, disagreed upon aggravator in the litter. No one knows precisely what it means. No one can say precisely what it means, because it is not susceptible of precise meaning. The best efforts of bench and bar to bring order out of the statutory chaos have proved to be futile. Almost every attempt by the courts has only further muddied the legal waters. In criminal law, especially, where a life hangs in the balance literally, vagueness, indefiniteness, uncertainty are unacceptable and offend against both the U.S. and the Nebraska Constitutions. Overturning death sentences has resulted. The only consensus prosecutors, defense counsel, and courts appear to have reached is that the offending aggravator is unworkable, unusable, and therefore incapable of constitutional application. And here's what I mean by that. If one court says we find this aggravator to apply here, then in a substantially similar situation a court says, no, it doesn't apply there. The problem is not only the language but the application. You have a set of circumstances. If there's nothing else that you can find to justify bringing a death penalty case, this is the catchall. And by being able to charge somebody with an offense and say you're seeking the death penalty, sometimes you can force a plea. If you do away with this...well, let me continue. The only reasonable practical course regarding this provision is: go it should, go it must; and when LB542 is enacted into law: go it shall. Confirming is the fact that Douglas County Attorney Don Kleine, in a recent death penalty case, relying on research of office staff, decided against relying on the aggravator due to its problematic baggage picked up by way of varying judicial rulings that added to and subtracted from the, quote, meaning, unquote, and quote, application, unquote, of the provision, leaving doubt and uncertainty in the wake of these varying judicial decisions. In point of inescapable legal fact, one deed has morphed into little more than extremely troubling statutory surplusage whose primary contribution to death penalty litigation continues to be the spawning of more, unpredictable in its outcome, litigation. No longer should it encumber the statutes. And by surplusage, I mean there are words that are there that have no meaning. And when the county attorney cannot even make use of it to rely on, that tells you something. He's for the death penalty. If he brings a case seeking the death penalty, he wants the state to kill somebody. And he had offered it. But then his staff did some research. And when they saw that the

decisions were here, there, and everywhere, Don Kleine decided that that would not be relied on. He said he had other factors he could use anyway. I'm not one who wants to make it easier to apply the death penalty, because I want nobody executed by this state, but I also don't think there ought to be things in the law that serve no purpose other than to spawn litigation and confusion. If I would follow to the nth degree my view on the death penalty, I would fight tooth and nail to keep this provision, because it spawns litigation. Once (1)(d) is relied on, then in addition to the automatic appeal that exists in a death penalty case in Nebraska, you have a specific matter on this also; and there are different bases by which you can offer appeals in that complex panoply of proceedings associated with death penalty cases. And the Nebraska Supreme Court, the U.S. Supreme Court, courts throughout the country, whether trial courts, appellate courts, or the Supreme Court have indicated--and I don't know whether they've followed through on it--that death penalty cases are so serious in that they would take the life of a person, that more time is given to these cases. They often clog the judicial docket. But they must be given that time, that consideration, and the one who is under sentence of death must be allowed and is allowed to come back again and again and again. And some prosecutors say that is a waste of time. But there are too many cases on record where one of those again and again and agains paid off; and a court said, wait a minute, something is wrong here and either this whole case should be thrown out and a new trial, or the death penalty was not properly imposed. So the death penalty is thrown out but the finding of guilt remains. So the sentence has changed from death to life, or whatever in the state that next highest punishment is. And when you have a system like that, those even who are in favor of the death penalty should not want a provision like the one I'm talking about. And if you think I'm not telling the truth, I'm going to let you know that I'm telling the truth in the way that's unimpeachable if you were a child as I was a child. I crossed my heart, licked my finger, and hoped to die if I'm lying; and brothers and sisters, I'm yet breathing so I'm not lying. But if you have any questions, I will answer them. [LB542]

SENATOR LATHROP: Very good. Senator Seiler. [LB542]

SENATOR SEILER: I...just one. Under the uniform criminal instructions act, in the book that the judges follow as far as giving instructions, did you take a look at that? Do they define these terms? [LB542]

SENATOR CHAMBERS: I didn't look at that but I've read about how the courts have tried to do it. Some will try to describe the agony, the mental anguish, the suffering that a person goes through in the presence of impending death. And I think Arizona may have tried something like that, and it sounded good to other states so they did it; then that was struck down because it was too vague and indefinite. And the kind of things that they said would create the existence of that particular aggravator would be present in every murder that was about to occur when the person knew it, the mental suffering and so forth. So it didn't work. [LB542]

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SENATOR SEILER: I just wondered if we had a standard instruction on that. [LB542]

SENATOR CHAMBERS: Right. And what they're always trying to do, supposedly, is separate out the case that justifies murder, I meant death penalty, from the routine where you cannot impose the death penalty. [LB542]

SENATOR SEILER: No, I understand. Thank you. That's all I have. [LB542]

SENATOR LATHROP: I see no other questions. We will take the first proponent, in that case. [LB542]

ALAN PETERSON: Good afternoon, Vice Chairman Lathrop and members of the Judiciary Committee. I'm Alan Peterson, A-l-a-n P-e-t-e-r-s-o-n. I represent the American Civil Liberties Union-Nebraska. This is a good bill because even though it doesn't repeal the death penalty, which I too would like to see, it removes the biggest remaining piece of arbitrariness that still remains in Nebraska statute. Senator Chambers summarized well the history, and I'll try not to repeat too much: 1972, in a case called Furman v. Georgia, by 5 to 4, the U.S. Supreme Court kicked out all the death penalty statutes in the country, on the ground that the way capital punishment was applied here was too arbitrary. It was like lightning strikes some person but not everybody else. And it said we can't have that. The problem with the arbitrariness, and that's what garnered all 5 of the votes--2 of the justices said all death penalty is bad--but they all agreed it was so arbitrary, the reason that's a problem is because if a prosecutor, a judge, a jury can impose death based on vague language, then it gives it too much discretion. And in some areas, maybe Nebraska, certainly parts of the south, certainly Georgia, Texas, that arbitrariness resulted back then in '72 in clear indications that race and poverty, socioeconomic status, geography, arbitrary factors like that were determining who died and who didn't. They said, you can't have that under our constitution, under the Eighth Amendment and under due process. Okay. So the repair job that the states did in the '70s, including Nebraska, was to create these aggravators. But they threw in what Senator Chambers rightly called the catchall. There's two parts of it. "Heinous, atrocious, or cruel"...and the courts have said, well, that probably means torture; it mainly means torture. So they tried to define that a little bit in order to make it pass. And then the second part of the sentence that would be thrown out by this bill says "or manifests exceptional depravity." The courts have thrown that out too, including the Nebraska courts, the federal courts, the Eighth Circuit. Nebraska then tried to define that again after having tried two or three times before to add some new definitions to it, to sort of narrow it. But the problem is, as many of the judges on the Eighth Circuit pointed out, the Nebraska courts never said they were discarding all the old definitions. And so you still have an expandable rubber bag arbitrary aggravator in Nebraska law. You don't need it. It causes litigation that is not necessary. I've spent 20 years of my life defending--because I was appointed a death row person--largely on the basis of that

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ridiculous broad and vague aggravator. Let's just get rid of it. [LB542]

SENATOR CHAMBERS: May I ask a question? [LB542]

SENATOR ASHFORD: Yes. [LB542]

SENATOR CHAMBERS: Because the red light is on. [LB542]

SENATOR ASHFORD: Yeah. Oh, it just flashed on. [LB542]

SENATOR CHAMBERS: Oh. [LB542]

SENATOR ASHFORD: No, actually it flashed on before. [LB542]

SENATOR CHAMBERS: Mr. Peterson, I've said what I would do if I was just going to follow through on my attitude against the death penalty. Would you agree that if this remained, it would be a spawner of additional litigation? Despite all the attempts that courts have done to try to narrow, to try to apply it, it still is something which if there and applied or used by a prosecutor would by itself help spawn additional litigation? [LB542]

ALAN PETERSON: A defendant's attorney has to raise that vagueness and overbreadth problem; so, yes. I'm split between saying, this is such a bad piece of law maybe you ought to leave it in there so it can be litigated rather than killing them. [LB542]

SENATOR ASHFORD: Well, that was the question I was going to ask. I mean, it makes it... [LB542]

ALAN PETERSON: But on the other hand, some people might die because of this, and we don't need to take that further chance. [LB542]

SENATOR ASHFORD: Senator McGill. [LB542]

SENATOR MCGILL: Do you know which of our, the men currently on death row, has this as one of the aggravators in their cases, if any? [LB542]

ALAN PETERSON: I would say...you know, Mr. Soucie is here. He may know more. I would suspect at least probably close to half of them have got it thrown in, because it used to be such a catchall. And it's narrowed a little bit but it's still pretty much of a catchall. And isn't that a terrible phrase when you're talking about catchall so you can kill all? [LB542]

SENATOR ASHFORD: And the impact of that would be that if half of them had this in the aggravator, then they would be resentenced under this. [LB542]

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ALAN PETERSON: I would not say that. Once they've had their final appeal and that's all over with, it would depend on whether you could get retroactivity. [LB542]

SENATOR ASHFORD: Right. [LB542]

ALAN PETERSON: It might be an argument to the Pardons Board, more likely. [LB542]

SENATOR ASHFORD: And not to the court. Okay. [LB542]

ALAN PETERSON: Yeah. I tend to doubt that it would be automatically retroactive. [LB542]

SENATOR ASHFORD: Okay. Thank you, Alan. Yes, Senator Seiler has a question. [LB542]

SENATOR SEILER: Alan, I'll ask the same question on our instructions. Have any of the courts tried to define those terms: heinous or the whole list there in paragraph (d)? [LB542]

ALAN PETERSON: The Nebraska Supreme Court has formulated the language for the HAC part--heinous, atrocious, cruel... [LB542]

SENATOR SEILER: Right. [LB542]

ALAN PETERSON: ...and I don't know their exact language. But yes, it essentially requires that some form of torture be proved in order to get that part. [LB542]

SENATOR SEILER: And that's in the standard instruction? [LB542]

ALAN PETERSON: You know, I don't...because I don't try enough criminal cases. [LB542]

SENATOR SEILER: I haven't either for a while. [LB542]

ALAN PETERSON: Usually only when I get appointed, which I have been a few times, but. [LB542]

SENATOR SEILER: Okay. Thank you. [LB542]

ALAN PETERSON: Yeah. Jerry may know the answer to that. It would be better to ask him. [LB542]

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SENATOR SEILER: Okay. [LB542]

SENATOR ASHFORD: Thanks, Alan. [LB542]

ALAN PETERSON: Thank you very much, committee. [LB542]

JERRY SOUCIE: Mr. Chairman and members of the committee, my name is Jerry Soucie, S-o-u-c-i-e. I'm an attorney in private practice. I'm appearing here today on behalf of the Nebraska Criminal Defense Attorneys Association in support of this bill. To give you a little background, I think I've represented at least two-thirds of the people on death row, at one time. I represented Harold Otey, which was the...on a postconviction of habeas corpus and back and forth, where this was a major issue. Mr. Otey was the first person to be executed in Nebraska since, I think, Charlie Starkweather. The point that Senator Seiler was trying to make regarding instructions is what has been confounding courts for as long as I've been doing this. And Mr. Otey goes back, my representation, in the '80s. And there is not an accepted standard jury instruction, because there can't be. What happens with this particular aggravating circumstance is it becomes very fact-specific. It starts with the county attorney in exercising his or her prosecutorial discretion whether to even allege this aggravating circumstance. And what may be particularly atrocious, heinous, and cruel to Mr. Kelly, or Doug Warner in Scotts Bluff, may not reach that threshold with another county attorney. There's no sort of statewide review in terms of who decides what that particular aggravator will be even though the county attorney appears to be acting on behalf of the name of the state. There is no statewide review. One of the things that happens is an instruction talks about manifest exceptional depravity, and that...the definitions that have been fashioned by courts have changed over time. There were standards that were originally defined in the Palmer decision. It's always called...it's generally called the four-factor Palmer test. But it didn't meet the criteria when they wanted to get the death penalty against Carey Dean Moore. So in Carey Moore, after he had the sentencing hearing, the panel came up with the five-factor Carey Moore standard, and that was used to justify his death sentence. After Moore's case passed through the system, they then went back to the old Palmer test. And then they had some further amendments that were made, I guess it would have been a year and a half ago, I believe, in the Torres case, where they went back to some other instructions. And I can provide you...I've briefed this 15 different times and I can give you the whole historical perspective of how things have changed. But I just think we need to take it off the board. So one of the things that happens is when you have a...okay, I guess I see my time is up. [LB542]

SENATOR ASHFORD: What is it that you were thinking? [LB542]

JERRY SOUCIE: Well, one of the things that happens is one of the standards is that if the victim needlessly suffered. And it forces you, now that you have jury sentencing after LB1, to ask the most absurd questions that drives the victim's family right through

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the wall. There was a case that the commission had in which the victim was kidnapped, raped, and then the defendant shot her in the head to kill her. And the question had to be asked of the pathologist: Well, did she suffer before...you know, we shot? I mean, it was an instantaneous shot to the head. And the victim's family...and the court just sucked the air right out of the courtroom. But you have to ask that stupid question to try and show that, yes, she was murdered but she was murdered quickly, and to make the argument that that's more humane than having stabbed her and let her bleed to death over six hours. It just puts you in an absurd position. [LB542]

SENATOR ASHFORD: Thank you, Jerry. [LB542]

JERRY SOUCIE: Thank you. [LB542]

SENATOR ASHFORD: I don't see any other questions. Don. [LB542]

DON WESELY: Senator Ashford, members of the Judiciary Committee, for the record my name is Don Wesely, W-e-s-e-l-y. I'm here representing Nebraskans Against the Death Penalty. And we are here in favor of LB542 and thank Senator Chambers for introducing the bill. While NADP supports the repeal of the death penalty because of its numerous policy failures and procedural flaws, we feel that this bill would at least remove one flaw in the process that adds to the already unfair application of the death penalty and is harmful to the families of the murder victims--and we just heard one example of that. As Alan Peterson has pointed out, this aggravator has been used to promote an unfair application of the death penalty. But I won't belabor that point. The use of this aggravator to secure plea bargains could also lead to false confessions by innocents under interrogation. We know that the death penalty was threatened in the Beatrice Six case, which led to false confessions after hours of interrogation. For many reasons, NADP has serious concerns about the impact of the death penalty on victims' families. This bill seeks to correct just one of them. The very existence of this aggravator tells some families that your loved one's murder was heinous while telling others your loved one's murder was just ordinary. To the mothers of murder victims, the murders are equally painful. This aggravating circumstance is arbitrary, but then so is the application of the death penalty, which is one of the reasons we support its complete repeal. We urge the committee to seriously consider the bill and advance it to full debate of the floor. Thank you. [LB542]

SENATOR ASHFORD: I don't see any questions. Thanks, Don. [LB542]

DON WESELY: Thank you. [LB542]

SENATOR ASHFORD: Any other proponents of the bill? Any opponents? Proponents, all done? Okay. Joe. [LB542]

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JOE KELLY: (Exhibit 20) My name is Joe Kelly, K-e-l-l-y. My business address is 555 South 10th, Lincoln, Nebraska. I'm the Lancaster County Attorney. I'm here in opposition to this particular bill. I would probably add to the other comments with two things and then take whatever questions you have. The first...I'm handing out what are the first two pages of standard jury instruction 10.4, presently utilized by the Nebraska courts. It is correct, the case law--Carey Dean Moore and others--and the United States Supreme Court previously struck down the language: cruel, unusual, etcetera, as being too far without limitations and needing some sort of a limiting instruction in order to become constitutional. That is exactly what the courts have done in this jurisdiction and many others. The statute for the aggravator, (1)(d), remains to this day unconstitutional. That is not to say that the method that we use to prove or disprove that particular statutory aggravator is unconstitutional; rather it is constitutional. It's made its way through the courts for over 20 years. The dust is settled. And that brings...and so I offered you the instructions just so you can see, if you are not aware, of how the attorneys take the standard language and then tailor it into an instruction, as Mr. Soucie said. Depending on the particular type of case, you'll delete some of that language depending on what your facts are. The second thing I wanted to point out was simply go back into the issue of those already on death row. I really can't imagine if you passed this bill that we wouldn't have another 15 or 20 years of litigation on those individuals who are in the state penitentiary, who had as one of the aggravators determined against them this particular (1)(d). [LB542]

SENATOR ASHFORD: Any questions of Joe? [LB542]

SENATOR LATHROP: Maybe just...can you comment on the extent to which this is precipitating litigation? And that would mostly be in the post appeal process, right, or the post conviction? [LB542]

JOE KELLY: Direct appeal and everything after that, yes. [LB542]

SENATOR LATHROP: It has to be contributing to it if the...if the aggravator itself is unconstitutional. And what the jury instructions admonish the court to do is to limit...further limit. Because I was reading this before you dropped this up. Even as I look at the comments that follow the proposed pattern instruction, it says, boy, you've really got to do some limiting here. And that puts the court in a position of trying to kind of write something on the fly--not completely on the fly--thoughtfully, but on the fly, to try to limit it so in its application it will be constitutional. And that just seems like it provides a great deal of opportunity for the Jerry Soucies of the world to appeal these things indefinitely. [LB542]

JOE KELLY: Well, I wouldn't argue that you aren't going to have more appeals on that particular issue. But really, in a capital case, you're going to have an appeal on every single aggravator that was found, I think; and they'll probably challenge the

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constitutional validity of each and every one of them. But back to the tailoring. The fact that you strike a word or add a word here or there in those instructions is nothing unusual at all for the criminal realm or I think for the civil realm. I mean, you have standard instructions that are always tailored to particular cases. [LB542]

SENATOR LATHROP: In your experience, have you needed this aggravator? If you look at the other aggravators that would be left, are they sufficient for the county attorneys to get the death penalty where they want it? [LB542]

JOE KELLY: Not always. Barney and Bjorklund is a Lincoln case. I think Carey Dean Moore that Mr. Peterson was involved in, fall in the same category of the depravity, and that's when you're looking at the state of the defendant's mind at the time of the crime. And in each of those cases, you're talking about singling out, picking out, victims. And it could also be a situation where you're trying the methodology of killing ahead of time, to see that it works. Those are two examples of that depravity. [LB542]

SENATOR LATHROP: But even in Moore, he had multiple victims, didn't he? [LB542]

JOE KELLY: Yes. You're correct. [LB542]

SENATOR LATHROP: And was there...did he rob the cab drivers before he killed them? [LB542]

JOE KELLY: Yeah. Right. [LB542]

SENATOR LATHROP: So you had concealing the identity of a perpetrator of a crime. I just wonder if... [LB542]

JOE KELLY: Roger Bjorkland... [LB542]

SENATOR LATHROP: I mean, I'm listening to this dialogue, and it sounds like the defense bar is going, uh, I'm here; you know, we're kind of getting rid of something we could litigate for 25 years. And then you come and say leave it in there. And it almost seems like you ought to support it just to get rid of the appeals and the time it takes to get through all the postconviction appeals. [LB542]

JOE KELLY: If I thought I'd get rid of the...I mean, I don't think it would do that. I think it would subtract perhaps one issue, but...yeah. [LB542]

SENATOR LATHROP: All right. Thanks. [LB542]

SENATOR ASHFORD: Yes, Senator Seiler. [LB542]

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SENATOR SEILER: On paragraph 5 and 6, "The murder was senseless; or the victim was helpless," has that ever been a criteria by itself? [LB542]

JOE KELLY: That's very shaky ground. It comes from the Palmer case, I believe. But in no circumstances would I, as a prosecutor, ask a judge to give either of those. Those words are very similar to atrocious and cruel and heinous. [LB542]

SENATOR SEILER: I mean, in any type of murder the senselessness... [LB542]

JOE KELLY: You can't define heinous with another adjective. [LB542]

SENATOR SEILER: Yeah. It seems like in any murder the senselessness or the victim was helpless; if he wasn't helpless you wouldn't have a dead person. He would overcome the other person. [LB542]

JOE KELLY: Yeah, you certainly wouldn't have a first-degree murder. Yeah, so. [LB542]

SENATOR SEILER: Right. Thank you. [LB542]

SENATOR ASHFORD: Can I just follow up on...because this is...obviously, thanks to Senator Chambers, we've had this debate so many times since...every time we have it, or this discussion, it gets more and more interesting, and you see something else in it. I mean, when I've been...in my struggle through this issue over the years, I've always had the thought that what the public...where the public gets confused is when you use this sort of broad language as a mitigator...as an aggravator. Because it...you know, it's a relatively subjective...it is a subjective, almost a feeling like sort of a determination that...as opposed to...and Senator Lathrop was asking the same question. A rather specific analysis of those crimes that...or the nature of the crimes that we as a Legislature have determined to be, first of all, you know, bad enough to deserve the death penalty, but also at least objective enough so that we're, you know, not getting into this arbitrariness thing that I think bothers anybody, a lot of people, even if they support the death penalty. And that...I mean, to be honest, that's what's bothering me...one of the things that bothers me about the death penalty and has for years is that very point. And if you can...Carey Dean Moore would be a good example. I mean, a jury could convict Carey Dean Moore of, you know, a 1A felony and he could be sentenced to death under existing statutes without (1)(d). See, I mean, doesn't it seem...? [LB542]

JOE KELLY: I understand what you're saying. Since Furman, none of the federal courts have said Kansas, Nebraska, and Iowa and all of the states have to have the same aggravators. [LB542]

SENATOR ASHFORD: Right. [LB542]

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JOE KELLY: Secondly, none of the courts have ever said everything has to be totally objective. In other words... [LB542]

SENATOR ASHFORD: Right. [LB542]

JOE KELLY: ...an officer on duty. Something that we could only argue factually. [LB542]

SENATOR ASHFORD: Well, right. And these aren't totally objective. They are... [LB542]

JOE KELLY: And what I would say is what (1)(d) is and always has been is a way to say that this was a terrible murder that takes it from totally subjective and makes it objective--much more so objective--meaning to say... [LB542]

SENATOR ASHFORD: Or much less objective. [LB542]

JOE KELLY: When you talk to the victim of any murder they will say, you mean you won't...you don't believe that was atrocious and terrible and...you know? And so you work from the total subjectivity of a family through the spectrum and try and get back to the court where you have a working formula that has some objectivity to it. [LB542]

SENATOR SEILER: I think you misspoke when you said a victim. You were talking to a victim of a murder. [LB542]

JOE KELLY: Yeah. Family. [LB542]

SENATOR SEILER: I don't think that's possible. [LB542]

JOE KELLY: Nope. [LB542]

SENATOR ASHFORD: Now the victim, that would be tough. But thanks, Senator Seiler, for that clarification. But I...yeah, it is...though it is in all the years, I don't know how many times, you know, 10, 20, 15, 20 times we've had these discussions, and to me it always comes back to that sort of thing. And, you know, Senator Lathrop has mentioned on numerous occasions on the floor, even during the years when Senator Chambers wasn't here, this issue of inconsistent kinds of results when you have, you know, terribly difficult cases, obviously, that one person gets the death penalty and the other person doesn't, and that...and the reasons for it probably. But I mean it really...this kind of...that provision sort of causes that to happen. [LB542]

JOE KELLY: There always...but there is, on every sentence...and I'll say it...and... [LB542]

SENATOR ASHFORD: But this is the ultimate. [LB542]

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JOE KELLY: It is indeed. But every single time a judge renders a sentence, they most often say...and this is..."I'm giving you the following sentence because of the severity of the crime," and they have a litany straight out of the statute. [LB542]

SENATOR ASHFORD: Right. [LB542]

JOE KELLY: And the severity of the crime can mean absolutely different things to different judges everyday. [LB542]

SENATOR ASHFORD: Senator Chambers. [LB542]

SENATOR CHAMBERS: Mr. Kelly, you said you are here representing the... [LB542]

JOE KELLY: County Attorneys Association. [LB542]

SENATOR CHAMBERS: ...County Attorneys Association. [LB542]

JOE KELLY: Yes. [LB542]

SENATOR CHAMBERS: Is Don Kleine a member of that association? [LB542]

JOE KELLY: Yes. [LB542]

SENATOR CHAMBERS: Not all county attorneys agree with the position you're taking today, do they, that this provision ought to be left in the law? [LB542]

JOE KELLY: Yes. [LB542]

SENATOR CHAMBERS: They all agree that it should be? [LB542]

JOE KELLY: Yes. The ones who were at the meeting. [LB542]

SENATOR CHAMBERS: Why do you think Don Kleine would not rely on it? And his reasoning was the differing judicial decisions and in some cases the language has been struck down as being constitutionally overbroad? As a county attorney, you know and you stated that as written that aggravator is constitutionally overbroad. Didn't you acknowledge that? [LB542]

JOE KELLY: Yes. [LB542]

SENATOR CHAMBERS: So you want the court to read into the law what is not in the law, don't you? Or read out of the law what's in the law, don't you? You don't want the

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law taken just as it is, because it would be struck down as unconstitutional, wouldn't it? [LB542]

JOE KELLY: Right. Right. [LB542]

SENATOR CHAMBERS: So you want to take an unconstitutional piece of legislation and, by massaging it, turn it into something that it's not based on the way the Legislature wrote it. You're amending what the Legislature wrote, aren't you? [LB542]

JOE KELLY: No. [LB542]

SENATOR CHAMBERS: You're changing it. Well, if you can't take it the way it is and win, you guys are willing to change it in order to win, huh? And winning, for you, means to kill somebody, doesn't it? [LB542]

JOE KELLY: The courts change the meaning...the courts add to statutes all the time in order to give a constitutional effect to a piece of legislation, if that's what they think the legislation... [LB542]

SENATOR CHAMBERS: No, the court is not supposed to add to it. It says if there's an interpretation that will render it constitutional and an interpretation that renders it unconstitutional, it will take the rendering that will make it constitutional. The Nebraska Supreme Court has repeatedly said in construing statutes and interpreting and applying them, this court will not read into any statute something that's not there. And I'll find the cases for you if you haven't read that. And the court will not read out of any statute what is there. Have you read opinions like that by the court? [LB542]

JOE KELLY: Indeed. And the... [LB542]

SENATOR CHAMBERS: Okay. But they disregard it, don't they? [LB542]

JOE KELLY: No more than they do... [LB542]

SENATOR CHAMBERS: Not, no more than they do. They disregard it. Either they do or they don't. They disregard it, don't they? [LB542]

JOE KELLY: Sure. The... [LB542]

SENATOR CHAMBERS: And they have to disregard it with reference to this aggravator, don't they? [LB542]

JOE KELLY: But what the statute... [LB542]

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SENATOR CHAMBERS: Not but. They have to disregard it with reference to this aggravator, don't they? They have to disregard what is written that you said yourself... [LB542]

JOE KELLY: They aren't disregarding it. [LB542]

SENATOR CHAMBERS: ...it's constitutionally overbroad, didn't you? [LB542]

JOE KELLY: Yes. [LB542]

SENATOR CHAMBERS: You don't make sense to me, so I'm probably not able to operate on your level, so I'll just leave you alone. [LB542]

SENATOR ASHFORD: But I think to the point though, I think this really can be...I mean, this is so serious and this isn't...I mean...Joe, I mean this, to me, is so serious when we start talking about the death penalty. And the Legislature has written what it wrote. The courts have determined that it's too vague. Then they have now...they have given it a definition which is less vague, even though the Legislature hasn't said that that is what we meant. And so...and the death penalty is given in cases where there is torture--torturous acts--or torture is exhibited. And that's enough to meet that standard. Isn't...I mean, to me, I don't know how that's not getting into the realm of our role, which is to say when we're talking about the death penalty, we're not talking about jaywalking. I mean we're talking about the death penalty. And that's what has gotten me to the point of saying I have to vote to repeal this thing because it's too arbitrary. It's just too arbitrary. There's way too much inconsistency in its application. And there are other arguments about cost, but the cost arises out of the arbitrary...the potential of, you know, of inconsistent application. I mean, if we were at...years ago, when we had these bills and when I was there, you know, I know Senator Chambers didn't like it but I remember trying to do amendments on police officers only, or whatever it was, and because at least it put some sort of a specific thing in the statute. Anyway, that's just my... [LB542]

SENATOR CHAMBERS: I'd like to ask...and I'm not going to argue. I argued with you on the arguing I'm going to do. Now I'm going to ask you a couple of questions to elicit some information, and you're the only one who has the answer. Have you discussed with Don Kleine why he decided against relying on this aggravator when initially he did rely on it? [LB542]

JOE KELLY: No. I don't know what case you're talking about, but no. [LB542]

SENATOR CHAMBERS: Okay. Well, it was the one where the man was killed, his wife was hanged they said, and the little boy was killed. [LB542]

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JOE KELLY: Brazilian. [LB542]

SENATOR CHAMBERS: Szczepanik...or I can't...I don't remember how to pronounce it. But it was... [LB542]

SENATOR ASHFORD: Oh, that was the case. [LB542]

SENATOR CHAMBERS: It was very recent. [LB542]

JOE KELLY: Yeah. [LB542]

SENATOR CHAMBERS: Very recent. [LB542]

JOE KELLY: Right. [LB542]

SENATOR CHAMBERS: And there was an article in the World-Herald, a long article, and Don Kleine explained that he had attached this aggravator. Then when his staff did some research, they came back to him and said this is not going to work, and they began to mention all of the types of things that the devious mind of judges, hanging and flogging judges, hanging and flogging lawyers got together and said this is how we can save the right to kill people even when it's outside what the Legislature said. Don Kleine was going along with that until his staff researchers told him it's not going to work. So Don Kleine then withdrew it. He said the judge can look at if he wants to but I'm not going to rely on it. Is he as much a county attorney as you are? [LB542]

JOE KELLY: Yeah. [LB542]

SENATOR CHAMBERS: Okay. Now here's a question that I'm going to ask and I'm not going to argue. Why didn't the Supreme Court, if this language is overbroad...? Let me back up. Are you aware of any cases where the Supreme Court struck down a statute for being overbroad? [LB542]

JOE KELLY: I mean... [LB542]

SENATOR CHAMBERS: You're not aware of them having struck down statutes for being overbroad? [LB542]

JOE KELLY: They do. I just don't have one on the top of my head right now. [LB542]

SENATOR CHAMBERS: No, I didn't mean give the name of it. But you're aware that they use that as a... [LB542]

JOE KELLY: Sure. [LB542]

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SENATOR CHAMBERS: ...basis to strike down statutes. [LB542]

JOE KELLY: Sure. [LB542]

SENATOR CHAMBERS: Have you read or heard it discussed among some of your colleagues that when it comes to the criminal law there cannot be vagueness, arbitrariness, or capriciousness? It has to say what it means; and if there's doubt, the doubt is resolved in favor of the defendant. Are you aware of that? [LB542]

JOE KELLY: Yes. [LB542]

SENATOR CHAMBERS: Okay. So what the court seems to be seeking is certitude or an absence of vagueness when we're dealing with the criminal law. But then the court took a statute which deals with what the U.S. Supreme Court said is the most serious matter that can come before the court, and that's to take a life; and it forsook all of the standards it had applied in the past. And rather than doing what the U.S. Supreme Court said should be done, extra precaution needs to be taken where a life is at stake, that's the very area where the Nebraska Supreme Court said we're going to disregard everything else we've said. We're going to disregard the standards we require for definiteness, no vagueness, and so forth; and we are going to rewrite the statute and we're going to say that whereas the statute says a, b, c, and d, we're going to say e, f, g, and h. And then a court looks at it, a higher court, and says well, e, f, g, and h, they don't stand up. So they said, then we will explain e, f, g, and h, but adding i, j, and k. And then we have to explain that, for example, the defendant apparently relished. They had a lot of problems because some defense lawyers asked, what does "apparently" mean? Then the courts had to go into some involved reasoning on that before they got to the main theme. Relished. What does relished mean? And then the courts had to try to define that. And every word they used to define one word had itself to be defined. Now whether this remains or not, is not going to give me heartburn, because as long as it remains the litigation is going to be there. You have made available, and there is additional information on these jury instructions, which make it clear how difficult it is for the court to apply this. So if a prosecutor relies on it, that prosecutor is guaranteeing additional litigation. So the prosecutor might say, but if I don't apply it I cannot even bring a capital charge. Then you should have, and just let the murder be a murder and let there be the processing of the matter on that basis and then the appropriate sentence. But this, and then I'll be through with bothering you. One of the judges said in addition to it being as arbitrary as a lightning strike, there is nothing to distinguish the cases where somebody is sentenced to die from the cases where somebody is not sentenced to die. If you didn't know the outcome, you could lay the cases side by side and you would not be able to know which one received a death sentence and which one did not, if somebody told you. They were not all resolved the same way. But if nobody told you that, then you would say the way all these should come out, because they're

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substantially the same. If they all should warrant death, then all of them would get death. If they all should warrant nondeath, they would not get death. But then when you tell them, well, these said die and these said don't, and then they object if a person says that it makes no sense. There's nothing to distinguish one from the other. Either they all ought to be one way or all ought to be the other way. When the county attorneys took this position, did they take a vote on it? Did they vote in deciding this position? [LB542]

JOE KELLY: The group of 20 or so who went over the legislation. [LB542]

SENATOR CHAMBERS: How many county attorneys are there? Ninety-three, because there are 93 counties, right? [LB542]

JOE KELLY: There's 160 or so, maybe. [LB542]

SENATOR CHAMBERS: I didn't hear you. [LB542]

JOE KELLY: One hundred and sixty maybe. [LB542]

SENATOR CHAMBERS: But county attorneys. Not counting the deputies. [LB542]

JOE KELLY: Oh, county. Ninety-three. Yeah. [LB542]

SENATOR CHAMBERS: Uh-huh. Just the county attorneys. Ninety-three. [LB542]

JOE KELLY: Probably a few less because a few serve... [LB542]

SENATOR CHAMBERS: And 20 appeared probably at this meeting? [LB542]

JOE KELLY: Right. [LB542]

SENATOR CHAMBERS: And when they take a position, do they vote or do they just develop what they consider to be a consensus? [LB542]

JOE KELLY: The latter. [LB542]

SENATOR CHAMBERS: So we don't really know that if a vote were taken, all of them would....a majority would have voted this way. [LB542]

JOE KELLY: No. [LB542]

SENATOR CHAMBERS: Okay. That's as arbitrary as what we're talking about here, isn't it? That's all I have, but thank you. [LB542]

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SENATOR ASHFORD: Thanks, Joe. I think we're fini, as they say. Anybody else want to chat about this? Any opponents? Any neutral testifiers? Senator Chambers, do you...? [LB542]

SENATOR CHAMBERS: I'm going to close with this statement: That that is, is. That that is not, is not. That that is not, is not that that it is. And that that it is, is not that that is not. [LB542]

SENATOR ASHFORD: Very well said. Okay. [LB542]