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Judiciary Committee  
January 31, 2007

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[LB215 LB465 LB470 LB476 LB674]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, January 31, 2007, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB476, LB465, LB470, LB674, and LB215. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Vickie McDonald; Amanda McGill; Dwite Pedersen; Pete Pirsch; and DiAnna Schimek. Senators absent: None. []

SENATOR ASHFORD: If we could settle...get settled here a bit, good afternoon. Welcome to the Judiciary Committee hearing. I'd like to introduce myself. I am Brad Ashford, Chairman of the committee; Senator Pete Pirsch to my left; and Senator McGill to my right; Senator Chambers; Jeff Beaty is my legal clerk, and Jonathan Bradford is the...I'm sorry, you're legal counsel; Jonathan Bradford is legal clerk. How many...we have...on the agenda today we have five bills: LB476, dealing with the death penalty; LB465, dealing with jailhouse informants; LB470, dealing with the dissemination of records; LB674, dealing with identity theft; and then LB215, that is a bill also dealing with life imprisonment. How many of you are here to testify on LB476, Senator Chambers' bill on abolition of the death penalty? Okay. How about LB465, dealing with jailhouse informants? LB470, dealing with dissemination of records? LB674, dealing with identity theft? All right. And LB215, my bill? Oh, there is somebody here. (Laughter) I was...I'm...Senator Lathrop is also here, so welcome to him. The ground rules are pretty simple. We'd ask you to sign in, and many of you, I take it, have already signed in. And there...we have a light system here, which is designed not to cut anybody off but to keep the process moving along. And after Senator Chambers introduces LB476, each testifier, we would ask them to follow the lights and when the yellow light comes on that will be about a minute or so for you to finish up your testimony, and then the red light we would ask you to sum up whatever you're saying so that the next testifier will have an opportunity to testify. LB476, Senator Ernie Chambers from Omaha, from District 11. [LB476]

SENATOR CHAMBERS: Thank you. Mr. Chairman, members of the committee, I'm Ernie Chambers. I represent the 11th Legislative District in Omaha and down through the years I have brought bills for the purpose of abolishing the death penalty, which, by the way, is a very gloomy subject. And Senator Pirsch used the correct word, "somber," to describe this act of the state taking a human life and the fact that it is such a profound and significant issue for all of society that it deserves to be debated fully on the floor of the Legislature. Some of that was my comments, but he had also said he felt that the discussion ought to occur. Because people have come here, some from great distances, I'm going to keep my opening brief so that the bulk of the time can be given to receiving the testimony from people who have come. I'm available to you all the time. And if it's necessary for me to close to answer questions the committee may have of me, I will reserve that right. I must say a few words for the record so that it will be

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complete. This bill, LB476, would abolish the death penalty and substitute a sentence of life without possibility of parole and with a mandatory order of restitution. The rationale for this bill is presented in Section 1, which says, among other things, "The Legislature remains troubled by the lack of any meaningful procedure in the courts to ensure uniform application of the death penalty throughout the state despite the Legislature's express finding in 1978 of a radical lack of uniformity." And that continues to the present day. "The history of attempts to carry out the death penalty in Nebraska demonstrates an inordinate burden on the justice system and on the lives of the innocent families and associates of both the victims and the convicted parties. A maximum sentence of life imprisonment without possibility of parole and with order of restitution, subject only to the constitutional power of the Board of Pardons, and including a mandatory order of restitution, is preferable to the current capital punishment scheme. Such a maximum sentence reflects this state's desire to ensure the safety of its citizens, assist victims' families when possible, and yet preserve this state's values of human life, uniform fairness, and basic decency." I don't believe there has been or ever will be a fair, equitable, just means of inflicting a punishment which, in my mind, is inherently barbaric, unjustified, and beneath the dignity of any civilized society. Many people condemned the late Saddam Hussein as a very wicked person. Some apply to him the term "monster." Yet, when he was executed, the top spokesperson for the Pope had stated words to the effect that whereas Saddam Hussein undoubtedly had committed crimes, to commit a crime by way of response--namely, executing him--was unacceptable. And in these days, it is not necessary for the state, particularly Nebraska, to kill anybody. There are people who have been languishing on death row in Nebraska for decades and, yet, their very presence in the prison system indicates that a person convicted of first-degree murder can be taken from society's ranks, kept in prison without any additional significant harm to anybody. Most of the people who commit even first-degree murder are not going to face the death penalty. Plea bargains are usually allowed, and sometimes even before a charge. So with those comments, I have laid the groundwork for the presentation of other people's testimony. But if you have any question you'd like to ask of me before we take the testimony from others, I'm prepared to answer. [LB476]

SENATOR ASHFORD: Any questions of Senator Chambers? Thank you, Senator Chambers. [LB476]

SENATOR CHAMBERS: Thank you, Mr. President...Mr. Chairman. [LB476]

SENATOR ASHFORD: Thank you. I might add that Senator McDonald, I know, is going to be here shortly and Senator Schimek is introducing a bill and will be here as well, and I believe Senator Pedersen. So the other members of the committee will be here. Do we have the first witness, proponent witness, on this bill? Mr. Myers. (See also Exhibit 1) [LB476]

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LARRY MYERS: Do I need to state my name and address? [LB476]

SENATOR ASHFORD: I'm sorry, I did not go over that. [LB476]

LARRY MYERS: Okay. [LB476]

SENATOR ASHFORD: If you'd state your name and spell your last name for the record. I apologize. [LB476]

LARRY MYERS: It's on the sheet. Larry Myers, M-y-e-r-s, 10605 Shirley Street, Omaha, Nebraska, 68124. [LB476]

SENATOR ASHFORD: Go ahead. I'm sorry. [LB476]

LARRY MYERS: (Exhibit 2) Okay. Mr. Chairman, members of the Judiciary Committee, thank you for giving us this time. I've had several discussions with Chairman Ashford over the last few days, and we know your time is limited, so between myself and Coleen Nielsen and Dr. Mike Radelet from the University of Colorado, we want to address the core issues, what I call the core issues, of innocence, deterrence, cruelty in present means of execution, the exorbitant cost, procedural unfairness, and retribution and whether it should be a part of our justice system. I am going to, myself, I will address the procedural unfairness question and I will do it very briefly in the context of the Harold LaMont "Wili" Otey case that was 13 years ago in Nebraska. A lot of us don't remember. It's been ten years since there's been an execution in Nebraska and Mr. Otey was executed 13 years ago. I was part of a team that wrote an article. I was one of his attorneys. Many of the other attorneys are in the room, and that was an ongoing battle, especially from 1991 through 1994. As I look back on it, and Chairman Ashford has a copy of the book, The Death Penalty in America, with a chapter on the Otey case, the Otey case, in a way, personifies some of the unfairness in the procedures that are rampant across the United States. I'm not here to argue whether Otey was innocent or not, can draw your own conclusions, but there were problems, procedural problems, in that case that never should have happened and which probably contributed to the final result. First of all, one of the problems in America in death penalty cases is incompetent or inexperienced counsel. You've all read newspaper articles or magazine articles about cases where a person is confronting the death penalty and his counsel is drunk, or his counsel falls asleep at the table during the trial. Those are gross examples, but there's no question that experienced counsel makes a difference. In the Otey case, Harold Otey was appointed a public defender in Omaha, Nebraska, who had less than one year of experience. He was less than one year out of law school and he was up against Sam Cooper, one of the most experienced murder one prosecutors in the state. None of us would say that that was fair, and it certainly did affect the proceedings. The young public defender later became one of the greatest public defenders in the history of the state and he later made comments that he would have done things differently at the trial

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had he had more experience. Secondly, there's the question in the Otey case of lack of proportionality review by the courts. Proportionality is simply...it's a state statute in Nebraska that in a murder one trial when it's life or death, both the trial court and the Supreme Court must do a proportionality review where they line up the facts and see which are more heinous and which are less heinous, and that you should not give someone death where someone was given life on every more heinous facts. That happened in the Otey case. The trial court failed to do a proportionality review. The Nebraska Supreme Court failed to follow the law, and if they did there was a high probability that Otey would have been given life because there were several Nebraska cases, including Erwin Charles Simants, where there were more heinous facts but where the defendant was given life in prison. So that was another example of procedural unfairness that happens all over the United States. Finally, in the Otey case one of the grossest and most clear violations was the due process violation in the Pardons Board hearing. The Pardons Board, as you remember, voted 2 to 1 for execution, with the Secretary of State dissenting. The problem was that the Attorney General was not impartial during the Pardons Board hearing and he politicized the hearings. He had a conflict of interest because he had preannounced what his decision was going to be, and then he had his own assistant Attorney General there to present evidence against Otey. That was unprecedented in the history of Nebraska. That was appealed to the federal courts, and this is very important. On the 2 to 1 decision, the Federal Court of Appeals held that Pardons Board hearings are a matter of grace and due process rights do not apply. So Otey was turned down, but five years later the federal courts changed their mind and the U.S. Supreme Court held, in Woodward v. Ohio, that due process rights do apply. Well, it was five years too late to help Mr. Otey on a clear violation of rights that could have given him a life sentence. In conclusion, again, I want to thank you and I simply want to say that capital cases, not only in Nebraska but across the country, are fraught with potential errors and are unpredictable. Some innocent defendants are executed; some of the worst offenders are given life sentences. Randomness and unfairness are nationwide and they led to Governor Ryan's mass grant of clemency in Illinois three years ago and currently there are ten moratoriums in ten states, ten across the United States, because lawmakers are concerned with the lack of fairness in the hearings. Thank you very much. [LB476]

SENATOR ASHFORD: Thank you, Mr. Myers. Any questions of Mr. Myers? Senator Pirsch. I just have one question and I think you alluded to it in your description of the case that came down five years after the...Otey was executed. [LB476]

LARRY MYERS: Uh-huh. [LB476]

SENATOR ASHFORD: And we've seen that, and maybe other witnesses will talk about this, but we've seen that happen since Furman v. Georgia, when the death penalty was reinstated. I believe that was 1970, help me, '72? [LB476]

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LARRY MYERS: Yes. [LB476]

SENATOR ASHFORD: Seventy-two. There have been a number of decisions which have, in effect, changed the rules as we go along, and the most recent one would be the Ring case in the decision which the U.S. Supreme Court made concerning juries determining sentencing. [LB476]

LARRY MYERS: Right. [LB476]

SENATOR ASHFORD: And I know, Mr. Myers, you've been involved in many of these cases and have studied it in depth. Since Furman, would that fact or that...the idea that the rules can change in midstream or immediately after an execution occurs, or even a couple years or three years, in the case of Otey, five years, is that alone a reason to look seriously at the death penalty as a penalty? The rules change. They can change in an eyelash. Would that...it's in '72 and we're talking about...excuse me for giving such a long question, but there have been many, many changes and fluctuations in the law since '72 and in the application. What does that indicate to you? Would that indicate some uneasiness, just some...what is happening with the court? Different court? What is it that creates this...these different rules being applied? [LB476]

LARRY MYERS: Well, Dr. Radelet... [LB476]

SENATOR ASHFORD: And maybe Dr. Radelet can talk about that. [LB476]

LARRY MYERS: Dr. Radelet is much more knowledgeable than I am and is one of the one or two top experts in the world and he would know these cases better than I do. But I'm simply saying since Furman, Shawn Renner and I were talking about this the other day, courts are made up of human beings and they make mistakes, like all the rest of us. [LB476]

SENATOR ASHFORD: Or they change. [LB476]

LARRY MYERS: Or they change their opinion. And it was a tragedy in the Otey case because Otey's attorneys argued that due process of law attached in Pardon Board hearings. The court didn't buy it. At that point Otey was executed, and five years later they changed the law and said they do. [LB476]

SENATOR ASHFORD: And proportionality occurred as a result of the Furman...no, it was after Furman,... [LB476]

LARRY MYERS: Yes. [LB476]

SENATOR ASHFORD: ...but prior to the Otey case. [LB476]

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LARRY MYERS: That's right. And for no explainable reason, neither court ever did proportionality review. [LB476]

SENATOR ASHFORD: Okay. Even though the Supreme Court had decided on proportionality prior to the Otey case. [LB476]

LARRY MYERS: Yes, and that it was valid, but they simply ignored it. [LB476]

SENATOR ASHFORD: Okay. [LB476]

LARRY MYERS: In other cases where there was proportionality review, a lot of people got life imprisonment and I predict that Otey would have also. [LB476]

SENATOR ASHFORD: Thank you, Mr. Myers. [LB476]

LARRY MYERS: Thank you very much. [LB476]

SENATOR ASHFORD: Next witness. And feel free to...we don't want any big gaps here. Mr. Radelet, if you'd state your name and spell your last name for the record, please. [LB476]

MICHAEL RADELET: Thank you, Senator. My name is Michael Radelet; it's R-a-d-e-l-e-t. I'm professor and chair of the Department of Sociology at the University of Colorado in Boulder, and I come here today to speak in support of Senator Chambers' bill. [LB476]

SENATOR ASHFORD: Proceed. [LB476]

MICHAEL RADELET: (Exhibits 3, 4, 5, 6, 7) Thank you. I have written six books and probably 60 or 70 different Law Review articles on different aspects of the death penalty. Most of my career was at the University of Florida, where I worked for 22 years with inmates on death row, going through last visits with perhaps 50 inmates, doing studies on racial bias for the Florida Supreme Court. I also did the study for Governor Ryan and his commission on capital cases in Illinois that uncovered massive racial bias in the imposition of the death penalty in Illinois. And I'm currently a consultant for the American Bar Association. We're doing research on race and death sentencing in a number of different states. I'm also a member board of director of a group called Families of Homicide Victims and Missing Persons, which is a Colorado-based organization of about 400 families of homicide victims where the murder has not been resolved. Senator, it's now been 30 years since the first execution, 30 years and two weeks since Gary Gilmore faced the firing squad in Utah. The first handout that I've given you gives you a little bit of data about what we've learned in those past 30 years.

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Since Gary Gilmore was executed, there have been an additional 1,059 inmates who have been executed in American jurisdictions, and nobody would have expected that the changes that we've seen just in the last year would have come in current death penalty debates. In 2006 we had the fewest number of executions. In the last decade public opinion has dropped precipitously so that the last Gallup Poll taken last year now...or taken...yes, last spring shows that more people now favor life without parole than favor the death penalty. It's very odd to be at a death penalty hearing when we can say please do what the public now demands--abolish the death penalty and replace it with life without parole. We have, as Mr. Myers mentioned, ten states now with different moratoria, some on lethal injection, some with wider concerns about the death penalty. In the packet I've given you some articles from The New York Times about the recent New Jersey commission that recommended, with only one dissenting vote, that New Jersey abolish the death penalty. I might say that that article from the Times, January 3, 2007, does not give Nebraska fair credit. On page 2, at the middle of the page, it says, if the Legislature did abolish the death penalty, it would be the first to do so since the U.S. Supreme Court halted all executions in 1972. That's false. The first person...the first state to do that was here in Nebraska where the Legislature passed a bill in 1979 to abolish the death penalty, though it was vetoed by the...by the Governor. What have we learned in the 30 years since Gilmore was executed? The first thing we've learned, that other witnesses will speak about, is that the death penalty is tremendously expensive, four or five, six times more than the cost of life without parole. We've learned about whether or not the death penalty has deterrent effects, and there's another handout in the packet, a article that I did where we surveyed the top 100 criminologists in the United States and asked them not what they thought about the death penalty but what their reading was of the literature that had examined the deterrent effect of the death penalty, and 90 percent of those criminologists said that the literature clearly shows, the data show, the death penalty is not, has never been and can never be a greater deterrent than life imprisonment without parole. The general public is also learning that so that when Gilmore was executed the number one justification for the death penalty was deterrence. Now almost every state that has the death penalty has life without parole as an alternative, and basically all those sophisticated statistical studies conclude that if people have not been...if people have not been deterred with a punishment of long imprisonment they won't be deterred by death. It's like if this table were a stove and you wanted to discourage kids from leaning on it, medium heat works just as well as high heat. After awhile, increases in the severity of a punishment no longer add to its deterrent effect. Also, 30 years ago when Gilmore was executed a prime justification for the death penalty was Old Testament and religious justifications--eye for an eye; tooth for a tooth. I put in the packet a compilation of views of religious leaders now and, in the words of Father Robert Drinan, who died last week, Jesuit priest, former member of Congress, he wrote, quote, the amazing convergence of opinion on the death penalty among America's religious organizations is probably stronger, deeper, and broader than the consensus on any other topic in the religious community in America, and that consensus shows a unanimous agreement, or near unanimous agreement, that the

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death penalty as currently practiced in the United States violates the commandment thou shalt not kill. In the 30 years since Gilmore was executed, we've also learned a lot about racial bias. Number of studies been done, including here in Nebraska, that shows racial bias, regional bias in the application of the death penalty. We've learned a lot about innocence, and I've put into your hands a book that I authored that documents 400 cases where people who were convicted of homicide later turned out to be innocent. We've now had 123 inmates who were on death row since Furman, since 1972, who were released because it was concluded that they were innocent, some of them by DNA, almost all of them by absolutely pure luck. I see these Morse Code signals--red--summarize. The...I've also given you some information about botched executions. I've testified before this committee about the frailties involved in lethal injection and now the courts and legislators in different states, Jeb Bush in Florida, have halted the death penalty because of those inherent problems. I want to conclude just by making a point about retribution. How would we feel if somebody murdered one of our loved ones? One response to that is that life without parole actually can be worse. Right now, 12 percent of those executed in the United States dropped their appeals, asked to be executed because they'd rather be dead than serve life without parole. A hundred and twenty-three inmates have dropped their appeals. My conclusion is that I wish and I look forward to some day returning to Lincoln where we can talk about how can we reduce the homicide rate; what can we do to help families of homicide victims. When it comes to voting on the death penalty, it's probably the most important vote that many senators will overtake. It's the only one that involves killing living, breathing human beings. That doesn't mean that necessarily you have to oppose it, but what it does mean, that you have to study it. You have to know the issues. You can't hide behind a curtain of false arguments like deterrence and religion when the evidence simply is not there to support it. If you're a fence sitter, that means that those who have made the case for the death penalty have not really made their case, so I would count that as opposing it. Thank you very much. I'm happy not only to answer questions here, but you have my e-mail address so if anybody needs information about death penalty trivia over the next couple of months. [LB476]

SENATOR ASHFORD: Thanks. Thanks, Mr. Radelet. Any questions of Mr. Radelet? [LB476]

SENATOR LATHROP: I do, if I can. [LB476]

SENATOR ASHFORD: Yes, Senator Lathrop. [LB476]

SENATOR LATHROP: I'm interested in exploring with you the cost of having people on death row versus having them spend life in prison. You have in the handout that you provided to those of us on the committee a section on cost. Is that all based on Florida information, or can you tell me anything that would be helpful in understanding what Nebraska is spending on the death penalty? [LB476]

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MICHAEL RADELET: The information that I gave to the committee members is based on Florida. I did give Senator Ashford some national information of different studies that have been done, most recently in Indiana and New Jersey. The Nebraska studies, there's never been a comprehensive study, at least that I'm aware of, of the cost of the death penalty in Nebraska. I know that a few years ago there was a big concern up in Norfolk where they had the trials, death penalty trials, up there. It was basically bankrupting the public defender's office. They stopped taking new cases because it was so incredibly expensive to do these death cases. It's really not a controversial issue anymore; that is, opponents and proponents of the death penalty agree on this one that if we're going to have the death penalty it's going to cost a lot of money, and the studies indicate anywhere between four and six times more expensive for death. Those studies have been done by newspapers, they've been done by state supreme courts, they've been done by legislatures, and they've been done by a fair number of academics, and they all point to that same conclusion. [LB476]

SENATOR LATHROP: Let me ask you,... [LB476]

MICHAEL RADELET: Please. [LB476]

SENATOR LATHROP: ...just as a matter of foundation for the opinion you just gave or the information you just gave, what are the studies that we're talking about and what do they tell us about what it's costing the state to have the death penalty? [LB476]

MICHAEL RADELET: Again, different studies in different states that have looked at it, and most recent ones are in New Jersey and in Indiana. What they...what the studies usually do is compare not only the cost per execution but, when it comes to the death penalty, many are called but few are chosen, so it's the cost of the death penalty prosecution, even if that prosecution ends with a plea bargain in the middle of the trial. It could be somebody is sentenced to death. In the United States now about 60-62 percent of all death sentences imposed since 1972 have been thrown out by appellate courts. Then they go back and either have a new trial or a new guilt phase proceeding, so that cost is added in there. It includes the cost of people who may die by natural causes rather than being executed. So it's the cost not only of the one case where a person is executed, but the cost of pursuing the death penalty in the many other cases. It also turns out that when death is involved any attorney worth her salt is going to file motions by the bucketful, I mean anything you can protest--I don't like the color of the flag. Actually it was in a case in Georgia where they had the Confederate flag and that went on for two weeks, challenging the Georgia flag in the courtroom. It's going to be challenged, so it gets very expensive. They bring in expert witnesses, obviously, if there's hair, DNA. Those experts cost, I don't know, \$200, \$300, \$400 per year. Usually in death penalty cases there's two attorneys appointed plus an investigator, so those costs just add up. There's a case in Florida. The Orlando Sentinel carried an article

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earlier this month where a guy was sentenced to death from Daytona and the bill for the attorney was a million bucks. [LB476]

SENATOR LATHROP: Let me see if I can shorten this up just a little bit. [LB476]

MICHAEL RADELET: Sure. [LB476]

SENATOR LATHROP: ...so that my...that I understand my...your answer to my question. Under the estimated costs you have \$3.2 million as the estimated cost of each execution in the state of Florida, and you have the estimated cost of life imprisonment at \$600,000. [LB476]

MICHAEL RADELET: \$600,000. [LB476]

SENATOR LATHROP: Tell me as briefly as you can or as succinctly as you can what...how instructive is that about what we're spending in Nebraska. Is it going to be close? [LB476]

MICHAEL RADELET: I think... [LB476]

SENATOR LATHROP: Are we comparing apples to apples with the state of Nebraska or not? [LB476]

MICHAEL RADELET: The absolute dollar...that study done by The Miami Herald in 1989, so the numbers probably increase, but the ratio is what's important. That \$600,000 was calculated, average age of conviction is 28; 40-year life expectancy. Life without parole averages 40 years. So the \$3.2 million, it's probably higher than that now, but the ratio, that is it's four, five, six times more expensive to have the death penalty than to have life without parole, is what's the lesson for Nebraska. [LB476]

SENATOR LATHROP: And the expenses associated with the attorneys that work on the case, both prosecution and defense, and the expert witnesses that are hired along the way in the course of the trial and the appeals, is that the case? [LB476]

MICHAEL RADELET: Yes. I should emphasize especially appeals because if somebody is sentenced to life without parole there's very little to appeal usually, only the conviction, not the sentence. If a person is sentenced to death, they'll appeal the sentence and basically...basically lawyers cost more than prison guards. [LB476]

SENATOR LATHROP: Okay. That's all I have for this witness. [LB476]

SENATOR ASHFORD: Thank you, Senator Lathrop. Senator Schimek has joined us. Any questions, more questions of...? Senator Pirsch. [LB476]

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SENATOR PIRSCH: I'm sorry, I just had one clarification. You said in how many cases did you say there was DNA evidence came along later and completely...? [LB476]

MICHAEL RADELET: Right now there's total...I think it's 195 DNA cases, but that's for all felonies. There have been 123 people released from death rows since 1972, and about a dozen of those were because of DNA. It's interesting because people think DNA is the great savior, but only about 20 percent of homicides have DNA around. You know, if it's a drive-by shooting, there's no DNA to analyze. But what DNA has done is allow us to see that these people were convicted not on DNA, they were convicted on erroneous eyewitness identification or perjured testimony or a lying snitch, that kind of stuff, so the DNA has really been a window through which we can see all these other errors in the criminal justice system. [LB476]

SENATOR PIRSCH: Thank you. [LB476]

SENATOR ASHFORD: Two questions following up on the DNA issue, and then I'd like to ask the same question of you that I asked of Larry Myers regarding the fluctuations or changes in the law and how you see that, if you see that continuing. But initially on DNA evidence, since the Ryan situation in Illinois where the...that we've discussed, has there, in your opinion,...well, with the increased use of DNA, what impact does that have on the death penalty, in your view? [LB476]

MICHAEL RADELET: Well, DNA is, of course, a great tool to make sure that we convict the guilty and also exonerate the innocent, but it's not really the thing that will allow us to make these godlike decisions with godlike skills. Because, again, most homicides are...the basis of the conviction is eyewitness identification. It's not DNA, and eyewitnesses have been shown to be wrong. Usually they're right but, you know, maybe 90 percent of the time they're right, but that's a 10 percent error rate. [LB476]

SENATOR ASHFORD: So in order to get a conviction in any case, criminal case, DNA alone is not sufficient. There must be other... [LB476]

MICHAEL RADELET: Well, if there was DNA evidence, I think that alone would be sufficient. But the problem is, is that most people who were sent to death row there isn't DNA, there can't be DNA. Either it's not there or it's not properly preserved. There could be mishandling, could be a lab error. The Houston...there have been a couple police departments, Oklahoma City, Houston now with terrible problems in their crime labs. So even if there's DNA present, they sometimes mix it all up and you can't really make an identification. So DNA is really great when it works. It really allows us to have faith that the people who we convicted really did it. But in homicide cases, and death penalty requires a homicide, DNA are best or most often used with sex crimes because there's biological substance that can be tested. [LB476]

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SENATOR ASHFORD: On the issue of the changes in the law since Furman v. Georgia, what...in your view, how do you see that continuing to develop there? Where do you see...and I'm not asking you to... [LB476]

MICHAEL RADELET: Yeah. [LB476]

SENATOR ASHFORD: ...be prophetic here, but just how does that enter into the debate, in your opinion, and how does it enter into the debate as you go around the country talking about it? What impact does that have on the debate in other states when you get these changes or modifications in existing law? [LB476]

MICHAEL RADELET: Sure. Well, just to give some examples of the evolving status of the law, and really evolving standards of decency, it was just a couple of years ago where the Supreme Court said you can no longer kill juveniles, people who were 17, 16, and 15. The first kid I met on death row was 15, was like in 7th grade. But now the Supreme Court finally in...I think it was 2002 said you can no longer do that. Another example is the mentally retarded. All sorts of cases where people have been executed despite the fact that they had IQs of below 60 and then finally, again just in the last two or three years, the Supreme Court has said we can no longer execute the mentally retarded. In my former home state of Florida, we had a thing that said even if a jury voted for death, for...I'm sorry, for life, the judge could override and impose death, and that happened in 167 cases where juries voted life and the judge, really a hanging judge, if you will, came back and voted for death. And finally, the Ring decision, which you've already referred to, in 2002 said the jury vote now must be binding. Now where it's going to go in the future is kind of interesting. [LB476]

SENATOR ASHFORD: Well, I guess what I'm...where I'm getting at... [LB476]

MICHAEL RADELET: Yeah. [LB476]

SENATOR ASHFORD: ...is it's one thing if someone is alive and the law changes. One can deal with it. If someone is not alive and the law changes, one can't deal with it. [LB476]

MICHAEL RADELET: Yes. For example in Florida... [LB476]

SENATOR ASHFORD: And I hate to sound so simplistic, but... [LB476]

MICHAEL RADELET: No, it's not simplistic. In Florida there were four people with jury "recs." of life who were executed. I took the ashes of one and sprinkled them off a cliff in Dakar, Senegal. It's not a theoretical abstract possibility you're talking about. We're talking about a person who was executed under a law that the Supreme Court later

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invalidated. You know, again, we're dealing with really... [LB476]

SENATOR ASHFORD: And since Furman, there have been a number of these changes--juveniles, jury determination, compare...or proportionality, who makes the proportionality judgment, so forth and so on. [LB476]

MICHAEL RADELET: And right on the horizon now are issues about executing the mentally ill. [LB476]

SENATOR ASHFORD: What would be...my last question and then I really will cease here, but the idea of a moratorium, what would a moratorium do, in your view, if that were something that the Legislature deemed appropriate? What would a moratorium do to the process? How would that...there was a proposal to do something like that in Nebraska a few years ago. [LB476]

MICHAEL RADELET: Yes. The moratorium would enable...it can't be a moratorium in and of itself. It has to be a moratorium accompanied by some specific purpose. So, for example, in Illinois the moratorium was to research issues about fairness in the application, both with racial bias and with innocence. In New Jersey it was much more broad. The New Jersey commission...the New Jersey commission is quite interesting because basically a number of the commission members said, well, we still support the death penalty, but it's not worth all the fuss, it's not worth all the money; whatever small benefits of the death penalty there may be, we could do a much better job using those resources to help families of homicide victims in different ways. So they did a comprehensive study basically on the cost-benefit of the death penalty. [LB476]

SENATOR ASHFORD: And there was a moratorium in the process, and they have now...they have not abolished it. [LB476]

MICHAEL RADELET: They...the moratorium continues. The commission came back with a recommendation in early January that it be abolished. Governor Corzine has said that he is very much in favor of abolishing it, so it's very likely that in the next month or two that, if Nebraska is not the first state to abolish the death penalty, then New Jersey will be. [LB476]

SENATOR ASHFORD: Well, then there is precedent then to establish a moratorium for a period of time to allow experts on both sides or all sides of the issue to take a look at this and to report to the Legislature. That's a broad moratorium, but you're suggesting that such a...such a...there is a precedent for something like that. [LB476]

MICHAEL RADELET: There's a precedent and that is one of the purposes that a moratorium could be used for, to study what goals are the death penalty are supposed to accomplish and are there more cost-effective ways that we could achieve those goals

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rather than fussing about the death penalty. [LB476]

SENATOR ASHFORD: And it was New Jersey then, I've read a little bit about this, that came back with the savings would go in to help the families and isn't that where that... [LB476]

MICHAEL RADELET: Yes, that's correct. In New Jersey two members of the commission were families of homicide victims. [LB476]

SENATOR ASHFORD: Okay. [LB476]

MICHAEL RADELET: In Colorado we've got an abolition bill that's going to be heard next week and it's basically to establish cold case squads to investigate unsolved homicides. You know, 40 percent of homicides aren't even solved, so for 40 percent of homicide victims the punishment is totally irrelevant. [LB476]

SENATOR ASHFORD: So there's no closure in those cases and the cases remain open. [LB476]

MICHAEL RADELET: Absolutely not. [LB476]

SENATOR ASHFORD: I appreciate it, and I've gone on too long, so I thank you for your...any other questions? [LB476]

SENATOR PIRSCH: Just a brief one. How many states currently have some form of death penalty in place? [LB476]

MICHAEL RADELET: Well, it depends on how one counts--37 or 38. New York Court of Appeals abolished it or threw out the statute a couple years ago. The Legislature was supposed to fix it and then they decided not to fix it, so they're a questionable thing. But...so we would count 37. [LB476]

SENATOR PIRSCH: Okay. And how many has...has in any state the Legislature abolished it or repealed since that point in time? [LB476]

MICHAEL RADELET: Well, Nebraska, vetoed by the Governor. The only other state to do that was New Hampshire in 1999. Their state legislature, it was like 200 members of their state legislature, they voted to abolish the death penalty, but that was vetoed by Governor Jeanne Shaheen, the governor. So there have been states that have done it, there's precedent for that, but they haven't had all the ducks lined up so the governors vetoed it. [LB476]

SENATOR PIRSCH: Thank you. [LB476]

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MICHAEL RADELET: Sure. [LB476]

SENATOR ASHFORD: Thanks. Thank you. [LB476]

MICHAEL RADELET: Thank you. [LB476]

SENATOR ASHFORD: Next proponent. [LB476]

COLEEN NIELSEN: (Exhibit 8) Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Coleen Nielsen, that's C-o-l-e-e-n N-i-e-l-s-e-n, and I'm the registered lobbyist for the Nebraska Association of Criminal Defense Attorneys. I'm testifying in support of LB476. My testimony is aimed at discussing the costs of the death penalty. General death penalty cases cost more than other cases. They require more investigation and pretrial preparation, more pretrial motions, more experts, more time in screening jurors, and often jurors are more likely to be sequestered in a death penalty case, and they involve two trials, one for guilt and the other for sentencing. In addition, death penalty trials tend to last longer, and more appeals follow death penalty cases. It is difficult to put a precise figure on the death penalty. Few states have actually done a study on the cost, but here are a few figures that I've found through the Death Penalty Information Center in Washington, D.C. The California death penalty system costs taxpayers \$114 million per year beyond the costs of keeping convicts locked up for life. Taxpayers have paid more than \$250 million for each of the state's executions. That was from the L.A. Times in March, on March 6, 2005. In Kansas the costs of capital cases are 70 percent more expensive than comparable noncapital cases, including the costs of incarcerations. That was from the Kansas Performance Audit Report of December 2003. In Indiana the total costs of the death penalty exceed the complete costs of life without parole sentences by about 38 percent, assuming that 20 percent of death sentences are overturned and reduced to life. That was the Indiana Criminal Law Study Commission in January 10 of 2002. The most comprehensive study in the country found that the death penalty costs in North Carolina are \$2.16 million per execution over the costs of sentencing murderers to life imprisonment. The majority of those costs occur at the trial level. That was Duke University, May of 1993. Enforcing the death penalty cost Florida \$51 million a year above what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida has carried out since 1976, that amounts to a cost of \$24 million for each execution. That was Palm Beach Post, January 4, 2000. In Texas, a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years. That was Dallas Morning News, March 8, 1992. In Nebraska, costs have been rapidly rising. In reviewing the annual reports of the Nebraska Commission on Public Advocacy, they show that in 1996 the average cost of defending a capital murder case was \$80,000. In 2006 that number now exceeds \$200,000. The reports show that the attorneys' fees and costs in the

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sentencing phase equal or exceed these same fees and costs during the guilt/innocence phase. So we're "timesing" that by \$200,000--\$400,000. One recent example is a case in which the defendant was charged with capital murder and pled guilty to all of the charges, yet during the sentencing phase the commission expended approximately \$350,000 in attorney time, investigator time, and in costs which included a number of expert witnesses. [LB476]

SENATOR ASHFORD: Coleen, could you sum up for us, please? [LB476]

COLEEN NIELSEN: Sure. Basically, in fact of the last ten years expert witness costs have increased threefold and expert witness costs are generally found in sentencing phase, not in the guilt/innocent phase. It would also follow that these costs are increasing...if they're increasing on the defense side they're also increasing on the prosecution side as well. That would conclude my testimony. [LB476]

SENATOR ASHFORD: Thanks, Coleen. Any questions? Thank you very much. Next proponent. How many proponents do we have? Opponents? [LB476]

ERIC ASPENGREN: Opponents? [LB476]

SENATOR ASHFORD: Or proponents. No, you're...we're still on the proponents. Sorry, I was getting a count, excuse me. [LB476]

ERIC ASPENGREN: (Exhibit 9) My name is Eric Aspengren and my last name is spelled A-s-p-e-n-g-r-e-n. Mr. Chair and senators, I'd like to thank you for letting me testify here in favor of LB476 this afternoon. I'm the executive director of Nebraskans Against the Death Penalty. Nebraskans Against the Death Penalty was founded in 1981. We've been advocating for the abolition of the death penalty statewide every since. We have membership in every county and every legislative district in the state. What prompted the founding of Nebraskans Against the Death Penalty? Some of the senators on this committee of course remember the events of the time. This body, the Judiciary Committee of the Nebraska Legislature, voted to repeal the death penalty. The Legislature as a whole voted to repeal the death penalty, and the Governor at the time, Charles Thone, chose to veto that bill. We've been here at every session of the Unicameral since that time, representing citizens of Nebraska who oppose the death penalty. Nebraskans Against the Death Penalty has grown in size steadily since 1981 and has...as has the movement nationwide, and as our organization has grown, support for the death penalty has steadily decreased nationwide. According to a recent Gallup Poll, which you heard before, when given the choice between the death penalty and life without parole, more Americans choose life without parole. Nationwide polls and polls in other states show that support for the death penalty has declined. With that support for the alternative offered in this bill, life without parole has grown dramatically. In 1994 the Gallup Poll showed support for life without parole at 32 percent. The most recent Gallup

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Poll shows that support nationwide for life without parole is at 48 percent. The number of death sentences is down. The number of executions is down. Nine states that currently have the death penalty on their books have put their executions on hold in the last year alone. And recently a special commission created by the New Jersey legislature recommended that that body...to that body that they do away with executions in that state altogether. Why is opinion changing about the death penalty in the United States? People are realizing that it doesn't live up to its promises and that it is a failure. The death penalty is not applied fairly. The death penalty does not deter crime. It does not protect innocent lives, and it does not bring closure for all of the victims' family members. At the same time, it creates more victims. It creates more victims in the families of those who are condemned. It creates victims in the innocent who are not shielded from the mistakes made in enforcing the death penalty. A hundred and twenty-three people have been released from death row nationwide in the past 20 years, and recent information has shown that likely at least four innocent people have been executed. These are just a few of the problems we see in the death penalty. There are other questions concerning the methods used, and ultimately there are moral questions concerning the death penalty. The American people are beginning to see this information. They now doubt the value and the efficacy of the death penalty. They are changing their minds about the death penalty. You have heard and you will hear more testimony this afternoon that will go into more detail about various problems with the death penalty and how the death penalty is a failure. It's important to recognize these failures and realize that the death penalty will also continue to fail us. The history of the death penalty in the United States is defined by its failures. It has always been this way, and if we continue to use it, it will continue to fail us. [LB476]

SENATOR ASHFORD: Thank you very much. Any questions? Thank you for your testimony. [LB476]

AMY MILLER: (Exhibit 10) Good afternoon, Senator Ashford and members of the committee. My name is Amy Miller. My last name is spelled M-i-l-l-e-r, and I'm legal director for ACLU Nebraska, the state affiliate of the American Civil Liberties Union. Because we are a civil liberties organization charged solely with protecting those rights under the constitution, I'm going to limit my comments to our concerns, which fall under the Eighth Amendment, which prohibits cruel and unusual punishment, and the Fourteenth Amendment equal protection clause, which guarantees equal treatment under the law. We know that the flaws in Nebraska's system mean that the death penalty is not being applied fairly or humanely. I will focus entirely in my oral comments on the Fourteenth Amendment equal protection clause problems. This Nebraska Legislature has already in fact got the data in front of it from the Baldus study that was commissioned by the Legislature several years ago. In paragraph...excuse me, in footnote 2 you'll see the full citation to that study. Professor David Baldus' study, released in 2001 with 2001 with cooperation of the Nebraska Crime Commission, found evidence that the death penalty is invoked for reasons other than the offender's

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culpability and for reasons other than the severity of the crime. Among its findings are the prosecutorial judicial discretion leads to disparate treatment of offenders when the victim of a high economic status. Put in a less fancy way, if you're rich and you're killed, your victim is...your murderer is more likely to go to death row; if you are poor, your murderer is likely to spend life in prison. In addition, there are geographic disparities. Prosecutors in major urban areas in Nebraska are 2.4 times more likely to seek the death penalty than prosecutors in rural areas. Again, if you are murdered in an urban area, you are more likely to have your murderer go on death row. If you are murdered in a rural area, your murdered is more likely to spend time behind bars for the rest of their life. In addition, the death penalty was found in Nebraska not to be consistently applied to cases with similar levels of defendant culpability. There simply are many cases where someone who has committed a crime of equal guilt and severity of the crime simply have been sentenced to life without parole rather than to execution. And finally, and in our view one of the most particularly problematic, is that race is a factor in Nebraska's death penalty system. Racial minorities are statistically more likely to face a death penalty phase following conviction and are less likely to have a plea bargain offered than white offenders. The racial disparities are even more clear-cut now than they were when the Baldus study was issued in 2001. Right now Nebraska has ten men on death row. Five of those men are not white. Half of our death row is made up of racial minorities and yet, across the entire state, according to the U.S. Census Bureau, the number of minorities in our state are 9 percent of our state population. Even if you take that up to 10 percent, that means that it's 5 times overrepresentation on death row for people of color. [LB476]

SENATOR ASHFORD: Could I just ask you a quick question on that? And I read the Baldus study and one of the comments that was made, I believe, unless I misread it, and there's a lot of statistics in there, the number of minorities that are prosecuted, though, is substantially higher than the number of minorities, correct? [LB476]

AMY MILLER: Yes. [LB476]

SENATOR ASHFORD: I mean so that does, to some extent... [LB476]

AMY MILLER: There is overrepresentation of minorities across the board, and we believe that that's, again, part of prosecutorial discretion, judicial bias, and then again racial prejudice in law enforcement. [LB476]

SENATOR ASHFORD: That's hard to...you have to look at the subject...look into the mind of the prosecutor. [LB476]

AMY MILLER: Yes. [LB476]

SENATOR ASHFORD: Okay, I...please proceed. I just wanted to... [LB476]

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AMY MILLER: Yes. No, there is no doubt that the ACLU believes that the system is rampant with racial bias, but it is most pressing when you see it then manifest itself at the issue of who we're going to kill and who we're going to allow to live. Again, cost has been discussed already earlier today. I'm not going to repeat those figures, but on the bottom of page 2 of my testimony I have given you the information that the Legislature commissioned in 1995. To our knowledge, the Legislature has never actually had a separate study of the actual costs in Nebraska, but when you did a study in 1995 and entrusted that to your Legislative Research Division, the study looked at North Carolina and Kansas as the two closest states in terms of the number of people on death row and a similar sort of justice system, and the study found that, quote, the availability of the death penalty as a sentencing option adds significant financial costs to a state's criminal justice system. It is significant that, although the cost were broken down in slightly different ways in North Carolina and Kansas, these two studies both found an annual, an annual additional expense for death penalty cases of over \$4 million. So with an additional \$4 million per year estimated for all of those costs, ranging from the execution itself to the criminal appeals to the criminal defense to the criminal prosecution, Nebraska simply can't afford to continue to put people to death. As a final comment, I would also like to point out that when we constructed our electric chair in 1920 the world was such a different place, and I think Senator Ashford's comments about the fact that we are seeing a...see change in the American way or thinking about the death penalty. When we constructed the death penalty in Nebraska and created the electric chair, that we're still using now, in 1920, child labor was still legal, it was illegal to try to form a union to organize for better working conditions, and women couldn't vote. The fact that Senator Schimek, myself, and Senator McGill would not have been able to provide any representation in the legal system alone I think indicates that this is such an outdated concept that it simply ought to be abolished at this point. [LB476]

SENATOR ASHFORD: Thank you for your comments. [LB476]

AMY MILLER: Thank you. [LB476]

SENATOR ASHFORD: Any questions? Thank you. Next witness, please. [LB476]

DEL ROPER: [LB476]

DEL ROPER: Senator Ashford, members of the committee, thank you for this opportunity. My name is Del Roper, that's D-e-l R-o-p-e-r. I'm a retired United Methodist pastor residing in Grand Island. Though I am a pastor, I come today to represent Nebraskans Against the Death...or, I'm sorry, Nebraskans For Peace. I used to serve on the board of Nebraskans Against the Death Penalty too. [LB476]

SENATOR ASHFORD: Well, they're both fine. (Laughter) [LB476]

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DEL ROPER: Okay. I wish to offer testimony favoring the abolition of the death penalty. Abolition of the death penalty has long been advocated by Nebraskans for Peace. We are an organization that's very much opposed to violence in all of its forms, whether it be bullying in our schools, domestic violence in the home, violence in the media, solving conflicts by war, torturing enemy prisoners, or killing convicted murders in the name of the state. We are convinced that violence in any form only begets more violence, breeding far more problems than it solves. As the British author George Bernard Shaw once observed, it is the deed that teaches, not the name we give it. Murder and capital punishment are not opposites that cancel one another out, but similars that breed their kind. Further, Nebraskans for Peace has long been concerned that the death penalty falls unfairly and unequally upon the poor and the minorities of our society. Intensive, careful research, as you've heard testified here today, over the past 40 years has produced no conclusive evidence that the death penalty acts as a deterrent to murder in our society. I'm cutting this down considerably. We are also convinced that the nation's leaders should give attention to the improvement of the total criminal justice system and to the elimination of the social conditions which breed crime and cause disorder, rather than fostering a false confidence in the effectiveness of a death penalty. And incidentally, I've read several places where, since the moratorium, where it's been instigated again, that it was with the thought that it would somehow provide security for our citizens. There's no evidence of that. We also declare...we declare opposition to the retention and the use of capital punishment in any form or carried out by any means. We urge the abolition of capital punishment and I, as a pastor and citizen, appeal to your sense of leadership as elected representatives to end this senseless, ineffective form of retribution. [LB476]

SENATOR ASHFORD: Thank you, Pastor. [LB476]

DEL ROPER: Thank you very much. [LB476]

SENATOR ASHFORD: Any questions of this Pastor? Thank you, sir, very much. Good afternoon. [LB476]

LEOLA BULLOCK: Good afternoon. [LB476]

SENATOR ASHFORD: May I just also say if there are those in the room who would like to...do not wish to testify but would like to have their names noted for the record that they appeared, we can...they can certainly do that as well. So it's not absolutely necessary that you testify in order to be in the...I'm not dissuading anybody, but...so please go ahead. [LB476]

LEOLA BULLOCK: (Exhibit 11) I am Leola J. Bullock, and I speak today on behalf of the NAACP, the Lincoln branch, which has a long tradition of opposition to the death

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penalty in all its guises. For the record, the NAACP stands firmly against any and all methods of capital punishment. The NAACP strongly supports action to abolish capital punishment, and we are proud to stand with our sister and brother organizations and individuals against the death penalty. Much has been said and much has been written about capital punishment since its reinstatement in the United States in 1976. There is not much that is new that can be said. Therefore, I will briefly, but importantly, reiterate three points that the NAACP has said before on this matter. The death penalty is inherently illogical, immoral, and unjust, and no tinkering can make it otherwise. To kill in order to show that killing is wrong defies common sense. It turns logic upside down and inside out. Not surprisingly, those states that have the highest execution rates, and most are in the South, also have the highest murder rates. State-sanctioned murder, by whatever method, does not deter murder. Killing merely begets more killing. That is the simple, irrefutable logic of killing. The death penalty is immoral. Nearly all religious denominations oppose and condemn capital punishment. States should not and ought not to play God. Among western democracies, the United States is the only country that still engages in capital punishment. The death penalty is unjust. Since 1976, when the death penalty was reinstated some 1,059 persons have been executed in the United States, while over 123 death row inmates have been set free following proof of their innocence. In other words, for every eight persons who have been executed, one has been set free, unjustly convicted and condemned. Does anyone really believe that we have not already executed innocent people? The application of the death penalty has been shown time and again to be fundamentally flawed. It is bound by racism, whether the participants in the machinery of death are white or black; by "placism," where one lives in Nebraska or across the river in Iowa; and by classism, whether one is rich or poor. Capital punishment is an inherently flawed and barbaric practice. The NAACP remains steadfastly committed to common sense, morality, and justice. The NAACP, therefore, calls upon this Legislature to abolish capital punishment. Thank you. [LB476]

SENATOR ASHFORD: Thank you. You've done this before because you knew exactly when your time...(laughter) without...do we have any...do we have any questions? [LB476]

LEOLA BULLOCK: Many years. [LB476]

SENATOR ASHFORD: Thank you for your comments. [LB476]

LEOLA BULLOCK: Thank you. [LB476]

SENATOR ASHFORD: Any other proponents? Go ahead. [LB476]

ANNE SEVERES: (Exhibit 22) Good afternoon, Mr. Chairman, members of the committee, my esteemed colleagues. My name is Anne Severes, S-e-v-e-r-e-s, and I am the director of social ministry for the Archdiocese of Omaha and Catholic Charities.

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I'm here today to express my support for the abolition of the death penalty in Nebraska. With this in mind, I offer the following for the consideration by the committee on behalf of the Catholic Church. Any opposition to capital punishment does not preclude consideration in justice and charity for the victims of violent crime and their families, nor may we neglect the larger issue of social renewal so that justice may be established in legal, economic, and social terms, thereby addressing some of the real causes of crime. The penal system in our state requires study and reform because of problems with overcrowded institutions, inhumane living conditions, and complaints of violations of the human rights of the prisoners. All of these areas need to be addressed with honesty, vigor, and in light of the biblical teachings about forgiveness and nonviolence. The issue of capital punishment can never be considered in isolation. It is part of a much larger social fabric. As we consider these issues, what needs to be foremost in the minds of all who claim the name Christian, Catholic, or a person of good will committed to the common good, is the teachings and example of Jesus, who set aside revenge and punishment for its own sake. We may not forget the divine image in which all people have been fashioned by a God who loves the just and the unjust, the righteous as well as the sinner. Retaining the death penalty in Nebraska diminishes each of us and denies our opportunity to fully restore justice to both the victim and the offender. Thank you. [LB476]

SENATOR ASHFORD: Thank you. Next proponent. [LB476]

RICHARD HARGESHEIMER: (Exhibit 12) Good afternoon, Mr. Chairman, members of the committee. My name is Richard Hargesheimer; that's spelled H-a-r-g-(-e-t-c.-). That's how my daughter spelled it until she was in the 4th grade. Made sense. It's H-a-r-g-e-s-h-e-i-m-e-r. I appear today before you representing Amnesty International and what I will do, I've got my written testimony so, in the interest of expediency, I'll just direct you to a couple of points that I think we might like to cover. Amnesty International supports Senator Chambers' bill. Amnesty International is unequivocally opposed to capital punishment. There are many reasons why. Killing, however it's dressed up, is wrong. I know that the phrase "killing people to show killing people is wrong" is sort of worn, but I first heard it about 20 years ago when Senator Jerome Warner told me when a 4th grade student, female student, wrote to him about the death penalty using that phrase, that turned him around from a death penalty supporter to an abolitionist. We know that arbitrariness riddles the system. Mr. Myers talking about proportionality, and Washington, this is not a...this is just not an isolated case. In the state of Washington a couple of years ago a man who murdered 1 woman was given the death penalty and executed; another who murdered 48 women was given life. And that's not isolated. On the second page of my testimony I talk about that were capital punishment a system, a system of capital punishment in the United States, were at a private business it would have collapsed long ago. It's product would have been recalled. Despite an investment of billions of dollars, it is an enterprise that has shown no measurable benefit to society and, in fact, in New Jersey recently, as folks have cited New Jersey, the New Jersey

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study, New Jersey estimates that it's spent \$1 billion on capital punishment since 1962...or since 1982, beg your pardon, since 1982, and not a single person has been executed for \$1 billion dollars. On page 3 I cite and quote a retired New Jersey Supreme Court Justice who has become an abolitionist but who was a supporter of capital punishment, and if you get a chance, he addresses the issue of what happens when you start narrowing the grounds on which you can apply capital punishment to convicted killers. And it shows that litigation increases and that the only alternative really is to abolish it. It opens windows for all kinds of litigations. Let's see, and then on the third page, too, Mr. Chairman, I also cite a letter from the Iowa Supreme Court to the Iowa house judiciary committee in 1995. They were asked by the legislative fiscal analyst to produce some testimony. They applied it. They said, well, we don't usually do this but in this case we would, and they basically say that in those states that have the death penalty the courts are overwhelmed by it. The system collapses. And while they didn't say they supported it or didn't support abolition in Iowa--Iowa actually didn't have the death penalty there, they were trying to reinstate it--the judges said, quite clearly, this is not a very good idea. Any questions? [LB476]

SENATOR ASHFORD: Thank you. Any questions? Thank you, Richard. [LB476]

RICHARD HARGESHEIMER: Thank you. [LB476]

SENATOR ASHFORD: Senator Schmit. [LB476]

LORAN SCHMIT: (Exhibit 23) Good afternoon, Senator Ashford, Chairman, Senator Chambers, and the members of the Judiciary Committee. My name is Loran Schmit. I'm from Bellwood, Nebraska. I'm here today to speak in support of LB476, introduced by Senator Chambers. For many years I was a member of the Legislature and I was an outspoken supporter of the death penalty of the crime for first-degree murder. I was convinced that anyone who took a life should be prepared to sacrifice their life. During the time I spent in the Legislature I discovered information that was very disturbing to me. That information came to be known as a disparity in sentencing. Most of us never appear in a court of law. We never experience standing before a judge, wondering what will happen to us because of some unlawful act that we have committed. I must concede that I was surprised to learn that it was normal for penalties to vary wildly regardless of the offense, whether it is for a traffic ticket or for capital murder. The first reason that caused me to change my mind was that we had evidence that innocent persons had been unjustly executed. It is almost a nonevent today when we learn that a person who has been on death row for years has been found to be innocent and is released from custody. Many times the persons responsible for the incarceration of that person have long since passed by and the person who was unjustly convicted is so happy to regain their freedom that they are never compensated for the loss of their own life. Another reason I changed my mind is that since the Starkweather execution in '59, there have been thousands of murders committed in Nebraska and we have, I

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believe...we've had, I believe, four executions. That's a ratio of about 1,000 to 1, and I challenge anyone to tell me to identify how those 4 murderers were so much heinous in their executions of crime than were the other 1,000. It's a pretty fine line to draw, and I was unable to do that. The last reason I changed my mind and became a death penalty opponent was that my friend, Senator Chambers, spent several hours over the years to convince me that the death penalty was wrong. He was always willing to offer advice when asked, and from time to time when not asked, and he did convince me and I've never regretted that decision. I want to explain a national experience that occurred in my own area. In 1974, a 16-year-old lad was convicted of first-degree murder. He has relatives in Bellwood. There were two persons involved, the second, a 17-year-old man from Omaha. I want to point out that the young man from Bellwood had no money and was provided with a court-appointed attorney. His accomplice's family had money and hired their own attorney. Joe was convicted and sentenced to life imprisonment without possibility of parole. His accomplice testified against Joe, served six months at Kearney, and was turned loose. Many persons, including myself, have tried to secure a commutation to a definite period of time for Joe's sentence without success. As of now, Joe has been incarcerated for 33 years, while his accomplice served six months. Such disparity in sentencing is not unusual even in capital cases. Joe at least has his life, and perhaps someday will have a chance for commutation of his sentence. Once the death penalty has been carried out there is no recourse, regardless of any new evidence. The disparity in sentencing today, where 1 person is sentenced to death and 1,000 persons to a lesser penalty, is totally unfair and I do not believe it can be justified. I ask the committee to send LB476 to General File to allow the entire Legislature to debate the issue. And thank you. [LB476]

SENATOR ASHFORD: Senator Schmit. Any questions of Senator Schmit? Senator Schmit, I have a couple...one comment and that is that you always gave me...or you gave me a lot of advice when I was in the Legislature with you, but I normally asked for you first, so I never... (Laughter) [LB476]

LORAN SCHMIT: Glad to help again. [LB476]

SENATOR ASHFORD: But I have a question. It's really a hypothetical, if I might, and goodness knows you've had a long stand...long years of service here and were involved in many, many debates on incredibly critical issues to our state. And if you were to argue for the abolition of the death penalty today, and I appreciate the comments you're making about the case, but what would you say about the issue of retribution and victims and people who are impacted, not the convicted felon though now, but the person who has...the family of the person who was the victim? Because I know when we were serving together and Senator Pirsch's mother did a great job, in my view, and you remember, and Senator Schimek and all of us that were here remember about the yeoman's work that she did in the area of victim's rights. How would you...and you debated a lot of things so you're an expert. Tell me how you would talk about that issue.

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[LB476]

LORAN SCHMIT: Well, Mr. Chairman, I believe the Nebraska Legislature has for years and years had a preponderance of members who really felt very sincerely that victims should be taken care of; we should do everything we can to take care of those victims of crimes. We have done a lot, but not nearly enough to provide the resources that will prevent some of those crimes from occurring. You know, I had to defend my position one time back in Bellwood, Nebraska, to a group of people and they were very...it was about, I suppose, 99 to 1 against me, and I said, you know, in Nebraska, in Bellwood, Nebraska, we all know each other; we all have families, we have brothers and sisters, uncles, aunts, cousins, and second cousins, third and fourth; I said you do not understand concept...the situation where individuals have not been blessed with a family, with resources, with the ability to get into a good line of work and support yourself and your family. There are many people who are not fortunate like we are, and the Legislature has, as I said, done somethings to help, not enough perhaps, but you're headed in the right direction. And I think we definitely--and I passed a bill that provided for reparations and I sincerely believed in it--but we have to remember that there's...arguing in support of abolishment of the death penalty in no way condones the crime of murder. It does not in any way forget the victim of the crime. Society should take care of that victim, and we have an obligation to do so. And if you believe, as I do, that life begins at conception and ends at natural death, then you have an obligation to take the position, as I do, in opposition to the death penalty. And I just feel it's not my job. I have an obligation, as we all do, to minimize the opportunity for this kind of crime, and once it has occurred, I'm tough before the action, I try to be compassionate afterward in understanding the situation. The young man I referred to actually participated in a murder. He did not intend to murder, he tells me, but the man died. The point that I make is he is serving life, and his accomplice is...has gone free 33 years ago. That type of disparity in sentencing I believe contributes to contempt for the law. And I don't like to be arrested for speeding when I see Senator Brad Ashford go around me and get around with it, (laughter) must less... [LB476]

SENATOR ASHFORD: Well, usually it was Senator Chizek, but... [LB476]

LORAN SCHMIT: Yeah. (Laugh) [LB476]

SENATOR ASHFORD: ...I don't have...I don't have that burden any longer. (Laughter) [LB476]

LORAN SCHMIT: You understand my contrast. [LB476]

SENATOR ASHFORD: Yeah, right. [LB476]

LORAN SCHMIT: And so I hope that I've made myself clear. [LB476]

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SENATOR ASHFORD: Well, I agree, and I think that, you know, Senator Pirsch had the right idea in that victim's reparations and your bill, as well, and I remember both those. So thank you for your comments. [LB476]

LORAN SCHMIT: Well, thank you. Good to see you. [LB476]

SENATOR ASHFORD: Let's see, you're...you got...sorry, Jim. He's much quicker. [LB476]

TERRY WERNER: (Exhibit 24) Sorry, Jim. Well, it's an honor to follow Senator Schmit up here. Chairman Ashford and members of the Judiciary Committee, my name is Terry Werner, W-e-r-n-e-r. I'm the executive director and paid lobbyist for the Nebraska Chapter of the National Association of Social Workers. Social workers share the concerns of other citizens about the rise in violent crime. They are very aware of the victims of criminal homicide, and indeed many social workers have personally experienced the anguish caused to their families when a loved one has been murdered. It is the premise of this policy statement, however, that punitive action by the state can never compensate for such losses, and that the death penalty is neither sufficient nor an acceptable solution to the problems caused by violent crime. The following broad professional values and their corresponding ethical principles and specific standards, as delineated in the National Association of Social Workers, NASW, code of ethics, ungird social workers' responsibility to oppose the death penalty. NASW's broad ethical principle that social workers respect the inherent dignity and worth of each person prohibits support of the death penalty. Capital punishment is an officially sanctioned violent act of killing as a way to deal with lethally violent behavior. Although homicide is unquestionably an act that diminishes the value and worth placed on human beings, the legitimization of killing through capital punishment also diminishes their value and worth. Both forms of killing are, thus, contradictory to this social work principle. The broad NASW ethical principle of social justice states that social workers challenge social injustice and pursue social change on behalf of vulnerable and oppressed individuals and groups of people. Related to this principle, the code of ethics prohibits social workers from practicing, condoning, facilitating, or collaborating with any form of discrimination. Furthermore, the code of ethics holds social workers responsible for engaging in social and political action to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class as part of their responsibilities to the broader society. These values, principles and standards provide the grounding for social workers to oppose capital punishment in that the death penalty has always been and continues to be differentially applied to people who are poor, disadvantaged, of limited mental and intellectual capacity, and from ethnic or racial groups. In the United States, where executions have increased rapidly over the past several years, studies have shown a marked racial bias in the defendants selected for execution. NASW, on this basis, stated and grounded in professional values and

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ethnic principles and standards as delineated in the code of ethics, maintains that the integrity of human life and the promotion of human well-being are among the highest values to which a society aspires. The practice of capital punishment, which involves a deliberate act of execution by the state, is therefore at variance with the fundamental values of social work profession. The death penalty is a violation of human rights that belong to every human being, even those convicted of serious crimes. In the United States its application is arbitrary, unfair, and prone to racial bias, and targets people who are most vulnerable. Thus, it is the position of NASW that the U.S. government and all state authorities which have laws that provide for capital punishment should abolish the death penalty for all crimes. Thank you for your consideration, and I urge you to please advance this to the floor of the Legislature. [LB476]

SENATOR ASHFORD: Thank you. Jim... [LB476]

TERRY WERNER: Any questions? [LB476]

SENATOR ASHFORD: Any questions? I'm sorry. Excuse me for...Jim. How are we doing? How many more testifiers, proponents, do we have? Good. [LB476]

JIM CUNNINGHAM: (Exhibit 13) Senator Ashford, members of the committee, good afternoon. My name is Jim Cunningham, C-u-n-n-i-n-g-h-a-m. I'm the executive director of the Nebraska Catholic Conference and I'm testifying on behalf of the conference in support of LB476. You've heard from a representative of the social ministry commission of the archdiocese. The Nebraska Catholic Conference represents the mutual interest and concerns of all three of the dioceses--the Catholic Archdiocese of Omaha, and the diocese of Lincoln and Grand Island--under the direction of the diocesan bishops. The teaching of the Catholic Church, as now promulgated in the modern catechism, does not condemn the death penalty in principle. Public authority has a legitimate purpose in punishing criminals and the right and duty to defend society from unjust aggressors. This does not exclude recourse to the death penalty. Nevertheless, Catholic teaching also applies an extremely important condition to the use of the death penalty; namely, if nonlethal means are enough to defend the innocent and preserve public order and safety then public order (sic) must limit itself to such means, as they are more in keeping with the common good and more in conformity with the inherent dignity of each human being. In practical application, this teaching regarding the death penalty has become clearer in recent years. A new understanding has evolved. Much of this is due to the energetic teaching efforts of the late Pope John Paul II. In his great and important encyclical, "The Gospel of Life," the Pope articulated a standard for application of this teaching. We look upon it as a public policy test for the death penalty and encourage you to do the say. The test is this: Is the death penalty absolutely necessary; that is, are there no other means left by which to defend society from the unjust aggressor? In analyzing this question from a worldwide perspective, Pope John Paul II himself responded that the cases of absolute necessity are extremely rare, if not practically

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nonexistent. If these cases are extremely rare on a worldwide scale, then surely they could be presumed to be nonexistent in a nation so highly developed as the United States. The Nebraska Catholic Conference urges you as policymakers to consider LB476 within this framework. We think the correct response to the test of whether the death penalty is absolutely necessary is unambiguously no, of course not. The death penalty fails the test. We urge that it be repealed through LB476. I'd like to go off my testimony for just a moment, Senator Ashford, to make a couple of points. It is my recollection, I'm sure that Senator Chambers or Senator Schimek or maybe you even, Senator Ashford, could correct me if I'm wrong, but I heard mention about the death penalty moratorium. It's my recollection that Nebraska was the first death penalty state, the Legislature, of which to pass a death penalty moratorium. It was vetoed, although the funding was provided for the study that took place. I think that's important to note because it shows that doubt about the death penalty in Nebraska has been around for some time and it's time to move forward by debating this before the full Legislature. And finally one other point that came to mind when I heard Senator Schmit testify. Other members of the Legislature who have debated this on the floor I think made a good point and that is, is that the death penalty really is a barrier to doing a more effective job of restorative justice, of looking out for the rights of victims and of reforming the criminal justice system. It demands attention. It saps energy. It saps resources. It seems to me that those comments reflected the notion, and I think it's a very good one, that we could do a better job on a lot of fronts in the context of criminal justice if we would get rid of the death penalty and move forward. Thank you. [LB476]

SENATOR ASHFORD: Any questions of Jim? Those are good comments, Jim. I agree with you that the issue of victims has not been enhanced. There is no...and I think that's a compelling point and one that's been made a couple of times certainly by Senator Schmit, and I think it's a compelling point. Thank you. [LB476]

JIM CUNNINGHAM: And I certainly want to endorse the comments that Anne Severes made about the importance of responding to the victims of violent crime. [LB476]

SENATOR ASHFORD: Thank you. [LB476]

JIM CUNNINGHAM: Thank you. [LB476]

SENATOR ASHFORD: Thanks, Jim. [LB476]

JAMES RODGERS: My name is James Rodgers, R-o-d-g-e-r-s. There has been several comments about the Ring decision back in 2002. I'm interested in terms of how the states reacted to that. There were about nine states singled-out as not having a judge being involved in sentencing and so on. And Arizona changed their laws, brought it into pretty much complete compliance with the laws of most of the other death penalty states, and they did it and the bill was signed prior to the Ring decision being released.

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And then Nebraska come along in the fall and passed something. Senator Chambers, I have a couple of suggestions for you, then I'll sit back down. Put the jury as the entity to hear not only the aggravating circumstances but the mitigating circumstances as well, not for them to come to a jury consensus but so that as individual jurors they can consider those in further decisions. Most death penalty states do that. And secondly, put the jury as the one to make the decision as to what sentence is to be given to the defendant. Most death penalty states are doing this. Life really is a death penalty. It's death by natural cause, rather an execution. A third recommendation, Ernie, is just strip the bill and substitute a constitutional amendment which abolishes the death penalty and substitutes life without the possibility of parole. The time is coming when this is going to happen and a 2008 general election would be a great time to do that. You could save us from going through the petition process if you can get it through as a constitutional amendment. That's all. [LB476]

SENATOR ASHFORD: Thank you, sir. Any questions? Next witness. [LB476]

STEVE LARRICK: Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Steve Larrick, L-a-r-r-i-c-k, 920 South Eighth, here in Lincoln, Nebraska, and I would just like to say that, as cochair of the Nebraska Green Party, that the Nebraska Green Party strongly supports the abolishment of the death penalty in Nebraska. And also, as cochair...or the chair of the United Nations Association, I can say that no other advanced industrial nations in the world, other than the United States, still allows the death penalty. And so these are some of the issues. But I wanted to bring it home to some of the issues right here in Nebraska. Just this week there was an article about the victims, the family of the police officer who was killed, I think in 1971, when a bomb went off in north Omaha. Anyone who has studied that case has found, if you study the case you know, that there were serious problems in that case and that it's very likely that these two young men were framed. And, in fact, our former Governor Frank Morrison, who lived to be 99 and was one of the wisest Nebraskans I've ever met, maybe next to Ernie Chambers, but...(laughter) said flatly that these two young men were framed by the United States government, by the Omaha Police, and they have been in prison for 36 years. Thankfully, they weren't executed at the time or else those families of the police officer would have suffered even more knowing that the state had killed in...as retribution for...killed innocent people. And so I feel very strongly that we should abolish the death penalty here in Nebraska and begin to get serious about real justice in this country and in the world. Ed Poindexter is one of the two defendants in that case who has been in the penitentiary for 36 years, and because of the color of his skin, because of his low income, because of his political beliefs he was, number one, his attorney, Robert Bartle, is appealing to the state court saying that: number one, he received ineffective assistance of trial counsel; number two, he received prosecutorial misconduct depriving him of due process of law; number three, ineffective assistance of appellate counsel; and number four, infringement of the right to a fair and impartial jury. So on these grounds, I think even here in Nebraska, I think we can see clearly that the

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death penalty should be abolished. And I thank you for your time. [LB476]

SENATOR ASHFORD: Thank you for your comments. Any questions? Thank you. Senator McDonald, welcome. Good afternoon. [LB476]

LELA KNOX SHANKS: (Exhibit 25) Good afternoon. My name is Lela Shanks, and I have listed two reasons why I think we should abolish the death penalty, but I will just speak to one of those reasons, and that is because of the tradition in America of having this double standard of justice which, of course, has been continuously enforced by racial profiling since our country's beginning. I was born in the 1920s and I'm a part of America's history of discrimination based on skin color. I was 43 years old before racial discrimination was declared illegal in America. One of the earliest cautions given to me as a child by my parents was to avoid contact with anyone involved in the criminal justice system at all costs because I could be picked up by the police and never be heard from again and my parents would be helpless to help me. But this double standard of justice of codified in the law including right here in the state of Nebraska where, before 1935, "Negroes," and Indians were declared incompetent to testify as witnesses in court. This is the Nebraska Revised Statute 20-1201, which I've attached there, Reissue 1929, "Witnesses, Incompetent When...." I respectfully call upon you to support abolishment of this inhumane and barbaric law. Thank you. [LB476]

SENATOR ASHFORD: Thank you, Ms. Shanks. Thank you for your comments. Any questions? Thank you for coming. Do we have any other proponents? Any opponents? Any neutral testifiers? Let me say to the group today that this is a very, very difficult issue, obviously, and I appreciate the fact that every single witness came up with a very well-prepared statement, concise statement, and that every statement had something to add to the debate. So I...it's very welcome and I appreciate all of your presence. Thank you. That concludes the hearing on this bill. Senator Chambers, do you wish to...Senator Chambers waives. Do you want to break? Ernie, do you want to just...? Why don't we take five minutes just to clear everybody. [LB476]

BREAK []

SENATOR ASHFORD: I think we'll get going with LB465, if we could all be seated. Senator Chambers. I'm sorry, go ahead. [LB465]

SENATOR CHAMBERS: You ready? [LB465]

SENATOR ASHFORD: Yes. [LB465]

SENATOR CHAMBERS: Okay. Mr. Chairman, members of the committee, I'm Ernie Chambers. I represent the 11th Legislative District. And this bill is not lengthy. What it does is precise and succinct, to the point, so those who have opposition will be able to

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specify precisely what their opposition is, what it's based on, and I should be able to state precisely what it is that I want to do with this bill. The term "jailhouse informer" is a term of art, and it's a term of art in the realm of law enforcement, criminal justice, crimes and punishments. It designates not really just a snitch but a snitch who is used by law enforcement to obtain incriminating evidence against suspects, whether they are guilty or innocent. And the former county attorney in Douglas County had used some snitches and paid money to them to testify and it would have been a frame-up, on at least two men, of murder. Their testimony was so lacking in credibility that the jury spent more time discussing what a terrible thing it was that these snitches would be paid and brought to them. Also, they said that such reliance was placed on these snitches that evidence, DNA, which could have been procured from the crime scene based on a description by the prosecution of various items, such as Styrofoam cups, cigarette butts and so forth, none of that had been examined and both men were found to be not guilty. So when you have snitch testimony which is procured through inducement, then it is inherently unreliable, or at least questionable and problematic. The inducement is not always merely a promise of leniency; it can be a threat of a harsher punishment or action taken against a family member. I received a call today where a person has a significant other who had a million-dollar bond placed not because the person under the bond was thought to be that great a flight risk, but to put pressure on this significant other to become a snitch for the police or law enforcement and then the one who's locked up would get some consideration. So this is a very dirty, reprehensible area of the law. And prosecutors want their job to be made as easy as possible, and I don't mind them prosecuting vigorously, but they should do it fairly, ethically, and remember that the ethics of a lawyer pertaining to a public prosecutor is that the job is not just to procure convictions but to see that justice is done. And because that will not automatically occur, the ethical requirements on a prosecutor is that when evidence that could mitigate or work against guilt is obtained, that information is to be made available to the defense, but it often is not. So when these prosecutors come up here they might call themselves the good guys, but I can show you cases in Nebraska where prosecutors have misbehaved, withheld evidence and done other things which were unethical. This bill clarifies the scope and the intent of the jailhouse informer law to make it clear that the term "in custody" applies whether a person is physically in jail or not, and includes a person detained for questioning. The term "in custody" is to carry the notion that this individual is in the clutches of law enforcement. And the reason it says whether the person is physically in jail or not, a person can have been convicted of a crime but be out on bail, so that person is not physically in jail but falls within the existing definition of a person in custody. So you are convicted, you're awaiting sentencing, but you're not in a lockup facility. You're still in a position to be subjected to inducements. You can be told, when sentencing comes, if you do some snitching we'll put in a word for you. So even though you've been convicted, there is the opportunity between conviction and sentencing for inducements to be offered to convert this person into a snitch. And as Job told...as Satan told God when they were questioning Job and testing him, and God said, you did everything you could and Job is still faithful to me, he

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said, well, yeah, because you told me don't put my hands on him. Skin for skin, all that a man hath will he give for his life. So God told him, then put your hands on him but just don't kill him. The idea is this: You can bring pressure to bear on people and cause them to say things that they know are not true because that urge, that instinct, for self-preservation asserts itself. And although I may not like...I may not dislike Brad, I don't like Brad as much as I like me. So if it's me or he, I would say it is thee. But at any rate, continuing, so that it's clear what this bill would do, point out that "in custody" applies not just to a person who is actually in one of these facilities. In addition, disclosure must be made of investigations known to the prosecutor or law enforcement authority to have involved the particular jailhouse informer. Now if it's felt that that is just too broad and open-ended, language could be added, as far as I'm concerned, that would say a jailhouse informer who had been offered inducements in exchange for testimony. Then nobody can say, well, an investigation could be you're just looking at this or that or the other, and if you merely talk to this person, that would be an investigation; he might be, or she might be, a part of it, but that's still too tenuous a relationship to what the purpose of the law is. So I wouldn't mind saying that it would be this person and an inducement had been offered, whether accepted or not, to put it within what this law is entitled...I meant, is supposed to reach. The rationale of the law is that a person in any form of, quote, custody, may be induced by various means to offer testimony that is of questionable reliability as a part of a quid pro quo. If a person said, I'm just a good citizen and I know something about this crime and I want to tell it and I'll testify, that is not a jailhouse snitch, because I do a weekly program on cable and I've made it clear to everybody who hears me in my community that if you know who's giving guns to these kids, selling guns to them, if you know anybody who has shot somebody in our community and you're afraid, tell me; give me good information. It can't just be somebody coming up and saying, well, I saw somebody driving down the street and he or she did it. Give me some credible information and I'll tell on the person. We need that kind of cooperation. So what is the purpose of this bill? Snitch testimony is not prohibited by any law. What this law is designed to do is to make available information that goes to the credibility of this person, and that information must be provided by the prosecution before that snitch testimony is admissible in court. So if they talk about, well, this witness is not going to come forth and give us information, if the witness is not going to testify in court then this bill is not going to have the bite that they want to make you think it would have. This goes to whether or not that testimony is going to be admissible. If somebody is going to give the police leads, that doesn't make a person a jailhouse informer under what this bill is aimed at doing unless that person is going to testify. And the denial of admissibility is the way that various propositions are enforced. If an illegal search and seizure occurs, the remedy is that any evidence procured in that fashion cannot be used in court. It's not admissible. And that's how you discourage the cops from engaging in that kind of activity, by disallowing the admission of jailhouse snitching. If this background information is not provided, would discourage the prosecution from setting people up to say that they know something happened when they didn't, from being fed information about a crime so that they can give it and pretend

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that they witness something. There have been cases where prosecutors have walked a person through a courthouse or where a defendant is sitting so that that person now recognizes that individual and can identify that person, not just when the person is sitting in the courtroom in the seat of the defendant, but you can give some photographs, you can put that person in a lineup, and the jailhouse snitch can identify that person because, with the complicity of law enforcement or the prosecutor's office, he has been shown that individual. But it will not be disclosed that he was placed in the presence of that individual. And if evidence is brought up by the defense showing that the jailhouse snitch had not been in a position to see this individual at the time this offense occurred, whatever it was, then the prosecution can say, well, how was he able to make the identification? Well, they helped. So this bill is designed to do one thing: To the extent that it can possibly be done, ensure that testimony given by a snitch who has been offered inducements of one kind or another is credible, or if it's not credible there will be information made available which will allow a trier of fact to make a determination as to whether or not such testimony ought to be admissible. And it won't be on whether or not the trier of fact believes what the snitch says. It will be based on whether or not this background information that was to be given about the snitch has been given. So if you have any questions of me, I will either answer them now or I will reserve the right to close and respond to them then. But anything you want to ask me, I'm prepared to respond to. [LB465]

SENATOR ASHFORD: Thank you, Senator Chambers. Senator McDonald. [LB465]

SENATOR McDONALD: So they can still take the testimony from the snitch as long as they've disclosed any deals that were made. [LB465]

SENATOR CHAMBERS: Yes, the information that would be...if they follow what's in this bill, that testimony can be allowed and then it's up to the jury to determine whether they believe it or not. But if this background information is not given, then that testimony is not going to be allowed even to be presented to the court. And there was at least one, maybe two cases where that happened, and the...a new trial, I believe, was ordered because that information had not been given. [LB465]

SENATOR ASHFORD: Thank you, Senator McDonald. There may be some questions later, Senator Chambers. [LB465]

SENATOR CHAMBERS: I understand. [LB465]

SENATOR ASHFORD: Thank you. Any...how many proponents, opponents? Opponents? All right, let's go, Coleen, with the proponents. [LB465]

COLEEN NIELSEN: (Exhibit 14) Good afternoon. My name is Coleen Nielsen, C-o-l-e-e-n N-i-e-l-s-e-n, and I'm representing the Nebraska Criminal Defense Attorneys

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Association. I am the registered lobbyist for that organization. Today we had planned to have Douglas County Public Defender Tom Riley testify on behalf of the organization, and he was unable to come. I'm handing out what is his testimony to this committee and I'd like to highlight portions of that testimony for you. Mr. Riley indicates that the amendments or the amended language in the statute addresses two situations. First, the amendment in Section 1 of LB465 clarifies the term "in custody." He indicates that there have been attempts to get around the application of the statute by arranging through the police or through the prosecutor the informant's release from jail, and then claiming that the individual does not fit within the definition of the jailhouse informant because he or she is no longer in custody. This addition to the statute simply makes clear that the legislation is targeted at people who are in trouble with the law, or trying to negotiate themselves out of trouble by making deals with police or prosecutors. And the second area addresses...is in response to the decision of the Nebraska Supreme Court in State v. Robinson, where the court limited the prosecutions obligation to disclose jailhouse informant's cooperation with police only on cases that were actually filed by the prosecuting entity. The interpretation severely inhibits one of the primary purpose of the original statute. It insulates the jailhouse informant from being cross-examined about cases or investigations where the information he or she provided to the police or prosecutors was faulty, incomplete, or a downright lie. In most of these situations a case is not filed and, therefore, under the interpretation of the court in Robinson, the prosecutors don't have to tell the defendant of this event involving misinformation provided by the informant. As a result, the defendant, and likewise the jury, never knows about the informant's spotty track record. As a matter of fact, they are only made aware of the informant's successes, which in some cases may be only a part of the picture and can leave a false impression with the defendant and the jury that the informant has been reliable. This is important because the use of jailhouse informant information occurs in the most serious of cases, usually murders, robbery, sexual assaults, and serious drug offenses. Since the stakes are so high, this body recognizes the questionable credibility of this category of witnesses and acted to provide some of the transparency to the process that has increasingly used these witnesses to obtain convictions. These two amendments are necessary to carry out the Legislature's original intent, and to require full disclosure of the informant's track record, thereby allowing the defendant in a criminal case the right to show the jury that the informant has not always been truthful with police or prosecutors when they are motivated to cooperate, not by a sense of civic responsibility, but rather by their personal instinct to save themselves from the consequences, usually in the form of an extended prison sentence of their own actions. I'd be happy to try to answer any questions. [LB465]

SENATOR ASHFORD: Thanks, Coleen. Any questions of Coleen? Thank you. [LB465]

AMY MILLER: (Exhibit 16) Good afternoon. My name is Amy Miller. My last name is spelled M-i-l-l-e-r. I am the legal director for ACLU Nebraska. I don't have a lot to add to what the Nebraska Criminal Defense Attorneys Association has already provided. ACLU

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testified in support of the original bill that turned into the law we have now, and we strongly support the passage of LB465 because all individuals accused of a crime have a right to full and fair trial under the principle of due process. The due process clause of the Fourteenth Amendment requires the accused to have a full hearing and opportunity, including an opportunity to review exculpatory evidence, and evidence that an informant's testimony has been purchased would be of fundamental importance to one presenting a defense. LB465 puts its finger on the problem that lawyers have long understood--the information provided by convicted felons who wish to purchase advantages or their freedom is of doubtful validity. At the very least, this levels the playing field. Are there any questions? [LB465]

SENATOR ASHFORD: Any questions of Amy? Thanks, Amy. [LB465]

AMY MILLER: Thank you. [LB465]

SENATOR ASHFORD: Any other proponents? Opponents? We haven't had a whole lot of those today, so welcome. [LB465]

LARRY THOREN: (Exhibit 17) Good afternoon. Senator Ashford, members of the Judiciary Committee, my name is Larry Thoren, T-h-o-r-e-n. I am the chief of police for the city of Hastings and am providing testimony in opposition to LB465 on behalf of the Police Chiefs Association of Nebraska. Our opposition is based on the following: The definition of "jailhouse informer" includes persons that are detained for custody. It statutorily designated that a jailhouse informer is deemed in custody. Custody means that a person is not free to leave. The courts have determined that police officers have the right to temporarily detain people while they are conducting an investigation. The combination of custody and questioning requires the issuance of the Miranda warning. LB465 would require that an officer advise individuals who are stopped even for a minor traffic violation or involved in a motor vehicle accident of their constitutional rights under the Miranda decision. This may lead to confusion. This may lead to possibly unnecessary stress of those citizens, and may result in an officer not being able to obtain basic information. Law enforcement officers routinely talk and interview people who are not in custody, including those who may be temporarily detained during an investigation. LB465 will create a standard much greater than established by case law. It will create unnecessary prosecutory burdens. It may...it will conflict with Terry v. Ohio, stop and frisk; and it may jeopardize the safety of our citizens in our communities. What questions can I answer for you? [LB465]

SENATOR ASHFORD: So just Terry v. Ohio, I just want to just make sure that is it, Terry v. Ohio? That's what you're...the case you're relying on? [LB465]

LARRY THOREN: Yes. [LB465]

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SENATOR ASHFORD: Okay. [LB465]

LARRY THOREN: One of the cases. [LB465]

SENATOR ASHFORD: Okay, thanks. Senator Chambers. [LB465]

SENATOR CHAMBERS: Chief, I don't...where do you see all of what you're talking about? Where does this bill say that if a person is detained for questioning Miranda warnings must be given? It doesn't say that the person is a suspect. [LB465]

LARRY THOREN: Oh, it...as I read this bill, and I've testified and been involved in the legislative process for many years and my biggest concern is unintended consequences. While I understand you're targeting paid snitches, or snitches that have some leverage, in listening to your testimony or your briefing on the bill, I would also be concerned about expert witnesses that are...whose testimonies are being induced by fees. That may...may have some conflict with this. But back to your question, a person is detained for questioning, that's a person that's now under the definition, according to this bill, as a jailhouse informer. A jailhouse informer is deemed to be in custody, whether they're physically in jail or not. So if I stop you on the street for a speeding violation, you're not free to leave. Now, instead of being a temporary detention, by this bill it's stating that you're in custody. Now the first thing I have to do if I'm going to ask you questions when you're in custody is advise you of your Miranda warning. Now as an educated adult that may not concern you, but imagine a 15- or 16-year-old kid. You know, it's going to scare them. [LB465]

SENATOR CHAMBERS: Chief, first of all, I've been stopped and given tickets. Who told you the circumstances under which Miranda rights must be given? Do you tell your officers that if they stop somebody for a ticket they have to read that person his or her Miranda rights? [LB465]

LARRY THOREN: No. No. [LB465]

SENATOR CHAMBERS: So then the examples you gave don't even apply, do they? [LB465]

LARRY THOREN: Well, two elements that exist right now today is custody and questioning. Those two things, if they exist, Miranda warnings must be advised. Now... [LB465]

SENATOR CHAMBERS: Chief, just a second, and I have experience in this area. A traffic violation is a crime. When a person is stopped by an officer for a traffic violation, that constitutes an arrest. That's what the Nebraska Supreme Court has ruled. But Miranda rights are not required to be given. And if an officer, even where a felony is

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involved, doesn't give Miranda rights, the officer hasn't violated the law. Information obtained without having given Miranda rights simply cannot be used. But I don't see in this language what you're talking about, but at least your objections are on the record, even though I don't see them as being applicable under this statute. [LB465]

LARRY THOREN: Yeah. Sometimes we see eye to eye; sometimes we don't. [LB465]

SENATOR CHAMBERS: We have, and this...his name is "Thorn," although spelled differently, and when he's going to testify a bill, he says I want to be...you'll know whether I'm a "Thorn" on your side or a thorn in your side. (Laughter) But that's all I would have. [LB465]

LARRY THOREN: Yeah. Yeah. My major concern is that the bill says if somebody is being detained for questioning that they now become in question...they become in custody. Now, you know, when you make a DUI stop, the courts have ruled that an officer may do a temporary detention as they're investigating the elements to see if someone is under the influence or not. They're not placed under arrest as soon as you pull up, you know, you stop them, because you don't...you know, the evidence isn't there. So... [LB465]

SENATOR CHAMBERS: That's all I would have, Chief. [LB465]

SENATOR ASHFORD: Okay. Thanks, Chief. Any other questions of Chief Thoren? Thanks, Chief. [LB465]

LARRY THOREN: Thank you. [LB465]

SENATOR ASHFORD: Any other opponents? Opponents? [LB465]

MARK YOUNG: Good afternoon. Senator Ashford, members of the committee, my name is Mark Young, M-a-r-k Y-o-u-n-g. I have the privilege to serve as the Hall County Attorney and I'm here in opposition to LB465 on behalf of my office and as well of the County Attorneys Association. This law is plainly drafted, but the plain language used really is much broader than perhaps what's been discussed. Of course, as a matter of statutory interpretation, we look at the plain language and the plain meaning of the words used. This bill doesn't define "detain." Detain, according to the dictionary, means to impede, even briefly. And it doesn't use the word "suspect" detained for questioning. It says a person detained for questioning. On my way down here this morning I passed two pretty serious traffic accidents out on I-80. If I had been flagged down by law enforcement to ask if I'd seen anything of interest, I would be, under the plain language of the bill as currently it stands, a jailhouse informant when I'm just a citizen driving down the road. Because of that, there is also a significant administrative burden for county attorneys' offices in trying to keep track. In my county we probably filed 3,000

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felony and misdemeanor cases last year. Trying to keep track of some of the information required under the new language proposed in LB465 is going to be burdensome, expensive, if not impossible. The other concern is because the bill is broad in its language that you would have to disclose, as the bill is written right now, instances where a citizen who has been detained, whatever "detained" may be held to mean in this context, to give information to law enforcement officers, their entire criminal history, even incidents which...in which they were a victim. This would be very intrusive. My last thought is that right now, as a matter of constitutional law and I think as a matter of discovery, if an agreement is made with a witness in exchange for testimony, we turn that over. As a matter of constitutional law, that remedy is already in the law. The bill, I would submit...and, by the way, I've been prosecuting for 20 years. I spent five years as a defense lawyer. During that time I have never had a case where I used a true jailhouse informant. It's a very rare situation indeed in my experience in most places in the state. The bill, as is drafted currently, in my opinion, is intrusive, expensive, and unnecessary because what protections are needed for the true jailhouse informant are already present in other aspects of the law. This law, Senator Chambers is absolutely right, "jailhouse informant" is a term of art in the law. It means a person...it has always meant a person in jail who turns on one of their cell mates in exchange for testimony. This bill broadens it to potentially, under the plain language, whether that was intended or not, to include each and every person who might be questioned by law enforcement, because they may not feel free to leave during that questioning and, in fact, may not be free to leave even if they aren't a suspect. Thank you for your consideration. I'd be happy to answer any questions. [LB465]

SENATOR ASHFORD: Thanks for your comments. Senator Chambers. [LB465]

SENATOR CHAMBERS: Mr. Young, I'm having a great amount of difficulty using...I'm going to use the cliché, wrapping my mind around what you're talking about,... [LB465]

MARK YOUNG: Okay. [LB465]

SENATOR CHAMBERS: ...understand what you said. Are you aware that even under the current law this bill has effect if that person's testimony is to be used? You're aware that this is invoked and comes into play only if that person's testimony is to be used? Are you aware of that? [LB465]

MARK YOUNG: I am. And that's...but... [LB465]

SENATOR CHAMBERS: Okay. Now if I may, so that I can get to what you said, if you're driving down the street and you see an accident or whatever the example was, are you saying that you would want to use the testimony of this person who witnessed the accident, or what was the point you were making in that case? [LB465]

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MARK YOUNG: It is. If I am a witness to any kind of potential criminal activity--traffic accident, burglary, theft--if I happen to be a witness or if someone comes forward and gives me information, as you suggested earlier, I may be used as a witness. [LB465]

SENATOR CHAMBERS: All right, then let me ask you, and you said an ordinary citizen, right? [LB465]

MARK YOUNG: Right. [LB465]

SENATOR CHAMBERS: Okay. Had that ordinary citizen been offered any deal, promise, inducement or benefit that the state or any person acting on behalf of the state has made or may make in the future for...in exchange for that testimony? [LB465]

MARK YOUNG: That was going to vary from citizens, case to case. [LB465]

SENATOR CHAMBERS: That's not going to happen if you got an ordinary citizen. I think what you're doing is making statements out of the context of what this bill is talking about. If this person is going to offer this testimony and there's been no inducement, no deal or whatever, then that person is not going to have to produce evidence...I meant, the prosecutor is not going to produce any evidence of a deal, inducement or benefit. From what you described, the citizen was not being placed in a position of a quid pro quo--if you give this evidence then we're going to give you something. [LB465]

MARK YOUNG: Senator, perhaps I've missed something in the law as it reads and in the way it was...it's being proposed to be changed, but a jailhouse informer is defined as a person detained for questioning. It doesn't say it has to be a person detained for questioning who's been offered a deal in exchange for testimony. [LB465]

SENATOR CHAMBERS: But here's the point. If you're going to...none of this applies or makes any difference if you're not going to attempt to use the testimony of that person. That is what triggers the requirement of this other information being given. You can question anybody you want to, you can offer any deal that you want to, but if you're not going to use the testimony then that person is totally irrelevant to the proceedings. That person becomes relevant when you're going to use his or her testimony. And if you're going to use that testimony, that is the point at which you have to give this information about the deals and so forth. Now if it's an ordinary citizen, even though that person in the definition would be considered a jailhouse informer, that label is not put on that person in any document. It's to let you know the category of persons who would be affected by the necessity of revealing background information if their testimony is to be used. [LB465]

MARK YOUNG: Senator, if I may respond... [LB465]

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SENATOR CHAMBERS: Sure. [LB465]

MARK YOUNG: ...respond at this point, my concern is, is that the bill says a person detained for questioning is a jailhouse informant, period. So that means any witness I call who arguably was detained, how ever briefly, to be questioned, becomes a jailhouse informant. There's no requirement. It doesn't say jailhouse informant and deal. [LB465]

SENATOR CHAMBERS: So what? [LB465]

MARK YOUNG: It just says jailhouse informant. [LB465]

SENATOR CHAMBERS: So what is the consequence of that? If the person has that...that doesn't mean anything. [LB465]

MARK YOUNG: Well, I, the way I read the bill, Senator, is we have to, if I'm called to testify, I've been detained briefly, I give information, prosecutor decides that information is relevant, calls me, subpoenas me, calls me to testify,... [LB465]

SENATOR CHAMBERS: Yes. [LB465]

MARY YOUNG: ...at that point I come under this act,... [LB465]

SENATOR CHAMBERS: Yes. [LB465]

MARK YOUNG: ...with or without a deal. But at that point then, me, as an ordinary citizen, or anybody in this room as an ordinary citizen, is going to have their entire criminal history turned over to the defense, is going to have any investigation, whether they're a victim or a defendant, turned over to the defense to make whatever use of they choose. And I apologize, but I come from a jurisdiction where information is being just handed to defendants and left with them forever, including personal identifying information. [LB465]

SENATOR CHAMBERS: So then you're concluding, from your personal, acknowledged admittedly, limited experience as a prosecutor in Hall County, you're extrapolating from that and concluding that that is the way business is conducted by prosecutors throughout the state. That's what I'm gathering from what you're telling me. [LB465]

MARK YOUNG: Well, I correspond and discuss items of interest with prosecutors all over the state, Senator. When I was a defense lawyer, I practice in about 18 different counties... [LB465]

SENATOR CHAMBERS: Let me ask you this. [LB465]

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MARK YOUNG: ...with 18 different prosecutors. [LB465]

SENATOR CHAMBERS: If a person is testifying for the defense and that person has done things which would go to that individual's credibility, can you ask questions about past conduct of that individual if it goes to credibility? [LB465]

MARK YOUNG: In very limited settings. [LB465]

SENATOR CHAMBERS: But you can do it. [LB465]

MARK YOUNG: I can. And under current law I would be giving that information under other sections of law to defense counsel without this bill. [LB465]

SENATOR CHAMBERS: Well, but that's not always done. But here is the kicker in all of this. The testimony would not be admissible if this information is not given. If the information is given, the testimony is admissible and the question of believability is left up to the jury. [LB465]

MARK YOUNG: My... [LB465]

SENATOR CHAMBERS: This gets is into court. No longer can you just pull somebody out of a jail cell or off the street. See, I know young guys who have been converted into snitches in my community by threats, not promises, but how easy it is to set them up. And the former county attorney brought some of the practices from the federal government into the Douglas County Attorney's Office and they would have a snitch accuse me of being a part of a drug conspiracy. Well, his uncorroborated testimony is not enough, so they bring in a snitch from Kansas City who corroborates this snitch's fingering of me, and there you've now got the accusation by a snitch and corroboration by a snitch. And people may ultimately beat that, but in the meantime they stay in jail and languish for months and months, and that happens, now maybe not in Hall County. And if I'm making this up and I'm saying it on the public record, Heavican, who is now the chief judge, ought to have counteracted him when he was the U.S. Attorney. Stu Dornan should have held me up to be a liar. But all you'd have to do is look at the kind of charges and cases that they brought. So I hear what you're saying but I don't think it's applicable to this, so we have a difference of opinion there. [LB465]

MARK YOUNG: Senator, I appreciate that. My concern is I think this bill turns all of us into snitches, if we end up being called to testify, because of the way the language is currently drafted. Thank you. I'd be happy to answer any other questions. [LB465]

SENATOR ASHFORD: Thank you. Any other questions? Thank you. Any other opponents? This is the last opponent. [LB465]

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JIM PESCHONG: Senator Ashford, members of the Judiciary Committee, my name is Jim Peschong, P-e-s-c-h-o-n-g. I am here on behalf of the Police Officers' Association of Nebraska and we are opposed to LB465. By including language in the existing jailhouse informer law that says "persons detained for questioning," is overly broad. It is very hard for anyone to know when a person has been detained or even offered statements against another person, or to know all investigations in which the detained person was involved in. It just isn't something that is known without getting into the specifics of each and every investigation. Law enforcement personnel detain people all of the time. While they investigate matters and sort things out that they have been called to do people provide us with statements about what they do or do not know. It is very problematic for us to be able to know any and all of these incidents. This bill seems to be very unwieldy. It requires a lot of work for prosecutors and law enforcement, and is apt to backlog our court systems even further with appeals because someone missed something. For the purpose...excuse me. If the purpose of this bill is to ensure the credibility of any witness who is to testify, I believe this process is already well-grounded in current case law. To my knowledge, we would be the only state in the Union that would have such a law. Imposing such restrictions on prosecutors and law enforcement is counterproductive. If you have any questions, I'd be happy to answer those. [LB465]

SENATOR ASHFORD: Thank you for your comments. Any questions? Senator Chambers. [LB465]

SENATOR CHAMBERS: Officer Peschong, are you currently an officer? [LB465]

JIM PESCHONG: Yes, I am. [LB465]

SENATOR CHAMBERS: And you don't know when you've detained somebody? [LB465]

JIM PESCHONG: Yes, I know when I detain someone. [LB465]

SENATOR CHAMBERS: I thought you said it's hard to know when somebody has been detained. [LB465]

JIM PESCHONG: There's a differing of opinion. Obviously, I may feel if I've detained someone or not detained someone, but ultimately the court is the one who's going to wind up ruling whether or not I detained someone or I didn't. [LB465]

SENATOR CHAMBERS: Now... [LB465]

JIM PESCHONG: You know, the court... [LB465]

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SENATOR CHAMBERS: Right there, so we won't go too far,... [LB465]

JIM PESCHONG: Okay. [LB465]

SENATOR CHAMBERS: ...does this bill stop you from detaining a person no matter what that means? [LB465]

JIM PESCHONG: Absolutely not. [LB465]

SENATOR CHAMBERS: So you can continue to detain people. [LB465]

JIM PESCHONG: That is correct. [LB465]

SENATOR CHAMBERS: You can continue to question people. [LB465]

JIM PESCHONG: That is correct. [LB465]

SENATOR CHAMBERS: So why is it overly broad and unwieldy, and how will it interfere with what you're doing since you can continue doing everything you're doing right now? [LB465]

JIM PESCHONG: Well, is what happens is we detain people all of the time, but this requires law enforcement or the prosecutors to advise someone, when somebody is going to be used as a witness in a particular case, any time that they have been detained for any kind of questioning and that they... [LB465]

SENATOR CHAMBERS: Where do you see that? [LB465]

JIM PESCHONG: ...that they have... [LB465]

SENATOR CHAMBERS: Where do you see that? [LB465]

JIM PESCHONG: Obviously you interpret this much differently than I and some of the other people who testified. [LB465]

SENATOR CHAMBERS: No, I am being fair to you. I just want you to show me where you see it and I will be...I will take that instruction. [LB465]

JIM PESCHONG: Okay. On page 2, a person who is detained for questioning, okay? I'm sorry, I can be a little bit more specific--line 15. [LB465]

SENATOR CHAMBERS: Yes. [LB465]

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JIM PESCHONG: Okay. And then if you revert over to line 3...or I mean, sorry, page 3 on line 12, 13 and 14, and this is the underline: and all investigations which a jailhouse informer was involved in, in any manner. [LB465]

SENATOR CHAMBERS: Read the next word. [LB465]

JIM PESCHONG: Okay, known to the prosecu... [LB465]

SENATOR CHAMBERS: Known. If it's not known, how can it be required to be given? [LB465]

JIM PESCHONG: Okay. Let me finish that sentence. [LB465]

SENATOR CHAMBERS: Okay. [LB465]

JIM PESCHONG: Known to the prosecutor or the law enforcement authority. Okay? So there are 317 commissioned law enforcement officers on the Lincoln Police Department. We, last year let's pick, we handled 144,000 requests for police services. About half of those required no report whatsoever, so that means the officer goes, there's an investigative detention on a lot of those. We're trying to sort out the truth in regards to what actually happened. Is there a crime? Isn't there a crime? What have people told us? What haven't they told us? And there's no reports. It doesn't say that a specific law enforcement officer. It says the law enforcement authority. [LB465]

SENATOR CHAMBERS: Officer Peschong, if you detain a person... [LB465]

JIM PESCHONG: Correct. [LB465]

SENATOR CHAMBERS: Are you going to know, if a point is going to be reached where information given by that person to you, if that person is going to be called as a witness, would you know whether or not you were the officer who detained that person? Would the prosecutor tell you, Officer Peschong, you detained this guy and he gave you this information; do you remember him giving you this information? Suppose you said, I don't remember detaining him; I don't remember any information he gave me. They're not going to use him as a witness, are they, because they don't have the source of that information. [LB465]

JIM PESCHONG: On that particular case, no, but... [LB465]

SENATOR CHAMBERS: Okay. So then that person is not going to be called as a witness. There's nothing you have to give as far as an investigation because you don't even remember that you detained him. I don't understand what you're talking about. Now let me go through this with you... [LB465]

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JIM PESCHONG: Okay. [LB465]

SENATOR CHAMBERS: ...because you mention line 15, then you jumped away, because I think you saw right in front of "or a person detained," you saw "criminal suspect." So this individual is distinguished from a criminal suspect, and the chief ignored that also when he talked about advisories. The criminal suspect is the one who gets the advisory. And there is a comma after "suspect," to set that off. Then we come to another category--"or a person detained for questioning." [LB465]

JIM PESCHONG: Uh-huh. [LB465]

SENATOR CHAMBERS: You can still detain. [LB465]

JIM PESCHONG: Correct. [LB465]

SENATOR CHAMBERS: You can question. [LB465]

JIM PESCHONG: Correct. [LB465]

SENATOR CHAMBERS: And if no deal is made with that person, you don't have to disclose a deal. If no promise or inducement was made, no promise or inducement has to be disclosed. If none of these things that are listed in the law apply then that person's testimony can be accepted even though he was placed in this particular category. [LB465]

JIM PESCHONG: I don't believe that. I don't believe that's what this... [LB465]

SENATOR CHAMBERS: Oh, well, okay, what you believe is inconsequential. [LB465]

JIM PESCHONG: I think...well, I think if you want...if what you're telling me true then on page 3, line 3, you should insert the word "and," because... [LB465]

SENATOR CHAMBERS: Page 3, line 3? [LB465]

JIM PESCHONG: Yes. Because and...it says any deal, promise and inducement, that stands alone. It doesn't say that it has to be a part of everything. [LB465]

SENATOR CHAMBERS: I don't know what you're talking about. What do you mean, on line 3: make in the future to the jailhouse... [LB465]

JIM PESCHONG: Make in the future to the jailhouse informant, semicolon, and; I think it should say "and" there, the same as what line 15, after the semicolon it says "and."

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[LB465]

SENATOR CHAMBERS: No, this is...when you're giving a series and you set them off by a comma, but if there are commas within the phraseology, you set it off with a semicolon. So that is one category in lines 1 through 3. Then the next category relates to the specific statements. That's set off with a semicolon, after line 6. And that's why those semicolons are there. And you put the "and" between the next to the last and the last in the series. But it's not joining all of those. It's saying these are different categories, like if I say it can be fish, carrot, or bread. [LB465]

JIM PESCHONG: Uh-huh. [LB465]

SENATOR CHAMBERS: It doesn't have to be all of them. But anyway, I want to come down to this language on page 3, then I'm going to leave you alone:... [LB465]

JIM PESCHONG: Okay. [LB465]

SENATOR CHAMBERS: "And all investigations in which the jailhouse informer was involved in any manner known to the prosecutor." If the prosecutor doesn't know, the prosecutor is not required to give what is not known. If the law enforcement authority doesn't know, the law enforcement authority is not required to give it. It doesn't say what they know or should know, or that they have to go out and investigate. If they know, they have to give it. That's all it is. [LB465]

JIM PESCHONG: And who is the law enforcement authority? [LB465]

SENATOR CHAMBERS: Doesn't matter. [LB465]

JIM PESCHONG: So if one officer says, I didn't know that, that's good enough? The others, if they do know it, that's...that doesn't count? [LB465]

SENATOR CHAMBERS: If that law enforcement officer is involved with this witness; if the prosecutor, in talking to these various police officers, becomes aware. What you're saying, Officer Meschong...Peschong, is really showing how police can dummy up and pretend they don't understand things and how they don't...that they don't know how they conduct their affairs and how prosecutors conduct their affairs. That's why this kind of legislation is necessary. People are not always straightforward and direct and lacking in disingenuousness. But at any rate, you did get your testimony before us, but it doesn't make a lot of sense to me. [LB465]

JIM PESCHONG: Okay. [LB465]

SENATOR ASHFORD: Any other questions of Officer Peschong? Thanks, Officer.

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[LB465]

JIM PESCHONG: Thank you. [LB465]

SENATOR ASHFORD: One more? One more opponent. Any neutral testifiers? [LB465]

DEAN OLSON: Opponent. [LB465]

SENATOR ASHFORD: Okay. [LB465]

DEAN OLSON: Is that okay? [LB465]

SENATOR ASHFORD: You're up. [LB465]

DEAN OLSON: Good afternoon. My name is Dean Olson. I'm a captain with the Douglas County Sheriff's Department. I've been employed there 28 years. I don't think there's really a dispute that improperly handled jailhouse informants are a problem. In a study by Northwestern University called the snitch system, they point out or highlight 43 cases of wrongful convictions in which fully 23 percent of them the snitch, jailhouse snitch, was actually the perpetrator of the crime. So really, I'm not here to dispute that, but I am here to talk about the fact that Senator Chambers' bill does not include a lot of what are considered best practices by other jurisdictions, and I'm not sure that the law, in and of itself, is necessary if some other arrangements can be made to establish best practices. Let me get to the point here I want to...I'll run out of time, otherwise. First of all, in some studies done by the Los Angeles County Attorneys...District Attorney's Office, they set up a prosecution screening committee and that committee consists of senior prosecutors who, before somebody, a young deputy county attorney or young prosecutor, wants to use the testimony of a jailhouse informant, they have to go to the screening committee. They look at the details and determine whether or not justice is going to be served by allowing that type of testimony. So far in the past three years they haven't allowed any of it because there have been problems with jailhouse testimony, jailhouse informant testimony. In addition, the Morin Commission out of Canada, that had a great deal to say about jailhouse informants, based on some egregious misconduct of jailhouse informants, said that screening committees are very effective and, again, they're outside the legislative initiatives. They're induced by the...or begun by the prosecutors themselves; are very...looking at the facts of the case, for instance things like...factors like the specificity of the informant's information, the extent to which the informant's information includes what we in the investigative business call hold-back information, other words, information that the public may not know about, only the perpetrator of the crime may know about; you know, essentially judging whether or not that jailhouse informant has information that is genuine, is going to be truthful and honest, rather than something that he or she determined by rifling through a defendant's court papers in a cell; whether or not a factor like whether or not the informant has

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provided reliable information in the past. Some of the other best practices include written agreements that, say, specify for the court exactly what was promised, who was there, things like that; audio and videotaping of all interviews with the informant; prosecution of the informants if they give false information or testify or perjure themselves; and, most importantly, training police officers that jailhouse informants are a special category of informant, emphasizing the inherent risks of dealing with that type of informant and, having dealt with jailhouse informants, recognizing the fact that, you know, there's incentivized testimony which is inherently suspect and obviously some miscarriages of justice can occur. One other point I'd like to make before I close is that I'm especially troubled by Section 2, item (4), at line 7 on page 3. That's Section 2, item (4), line 7 on page 3. That last sentence, it says: "all investigations in which the jailhouse informer was involved in any manner, known to the prosecutor or law enforcement authority." The problem I have with that is it appears to be overly bold and I can see some fear on the part of maybe a legitimate informer who happens to be in custody, fear of coming forward for retribution. Any information that they've provided in the past, as broad as that statement is, could be brought out that they provided confidential information in the past, specifying who they provided it against, and obviously with the retribution that can occur on the street, I'm concerned that that particular line gives me a lot of heartburn. In conclusion, I'd like to point out that, contrary to popular belief, detectives solve a lot more crimes based on information provided by concerned citizens, jailhouse informants, not necessarily the type that would lie and perjure themselves but people that come forward saying, hey, they guy told me this, or whatever, and confidential informants. It's a fact of this business that sometimes you have to get in the gutter and deal with people that aren't very savory, and it's an unfortunate side effect of this business that sometimes they have good information, because obviously you in this room are probably not going to be rubbing elbows with the type of person that's going to know who's selling dope or who just killed somebody. But, unfortunately, the public has a conception that detectives solve cases by deductive reasoning, and that's not true. In most cases the cases are solved because somebody comes forward with information. And I don't want to see a law that's passed in Nebraska that would be unique to Nebraska that would take away or have a chilling effect on some of that law. [LB465]

SENATOR ASHFORD: Thanks, Dean. [LB465]

DEAN OLSON: You bet. [LB465]

SENATOR ASHFORD: Any questions of Dean? Thank you for your comments. [LB465]

DEAN OLSON: You bet. [LB465]

SENATOR ASHFORD: Senator Chambers. [LB465]

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SENATOR CHAMBERS: I do want to close. Mr. Chairman, members of the committee, I'm Ernie Chambers, the introducer of this bill. I still represent the 11th District in Omaha. I've dealt with police for decades, from chiefs down to recruits. I've dealt with a category known as a public safety director, which some cities don't have. That's a person who is above the chief and has more authority than the chief, appointed by the mayor. Police officers lie. Courts know that they lie, and courts say it's all right for them to lie. That's a part of the business. Police officers feed information to snitches which the snitch does not know and nobody else will know. So if I'm the snitch and we're going to get Senator Pirsch, then the information that was fed to me, the snitch, I will say this is what Senator Pirsch told me, and then the prosecutor says, aha. The snitch has no way of knowing that information other than having received it from somebody who knows, but they won't say that they gave it to me. They'll say that proves in and of itself that he's credible and that what he said about Senator Pirsch is true, because Senator Pirsch had information which nobody else had. But they don't go back to me and say, is it possible that the snitch is not telling the truth, that he didn't get the information from Senator Pirsch? He's got the information all right, but he got it from the prosecutor who wants to get him, or from the police who want to get him. Some people are so naive, they don't believe cops frame people. They don't believe cops plant dope on people. They don't believe cops will shoot somebody and throw down a gun or a knife. Not long ago a man who's slightly older than I am, 70 years old, was in a disagreement with a law enforcement officer who happens to be the son of a deputy chief, the deputy chief's last name is Sundermeyer and the cop's name is Sundermeyer. This elderly gentleman, because he felt menaced by the officer, drove his car and was going to the north precinct, which is a police station. When he got there this cop dragged him out of the car, threw him to the ground, beat and kicked him and broke his arm. And guess what? The video is missing, the video of the conduct engaged in by Deputy Chief Sundermeyer's son. Now I'm saying this in public. If I'm a liar, let Chief Warren establish that I'm a liar and produce that video. And if they produce the video, all is well. I'll say I was mistaken. But if they can't produce it then what are we going to say? How does it happen just by coincidence the video of the deputy chief's son breaking a 70-year-old man, he's black, breaking his arm, is missing? Omaha Police do things that are not done in other jurisdictions. There's a...well, I won't give the lawyer's name, because he wouldn't mind, but he's handled the case of several elderly black people whose doors were kicked in by the police. In one of the situations, the police supposedly had this house under surveillance for days on end, and the house is on this corner and they kick the door in on the other corner. Now if they had it under surveillance, shouldn't they know which house it is? When they kicked the door in they found these elderly people. I think most of them were women. One was on a walker, one was bedridden, and all of them were terrified. The cops tore up the house and then, when they discovered that they were at the wrong house, the women didn't even get an apology. That's what happens in Omaha. The cops ram their way into a house. There is a woman, she's about 80 years old because her daughter is 60-something, they terrified the elderly woman and threw her daughter, who is in her 60s, on the floor and put their knee in her

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back because she's interfering with an officer in their home. That happens in Omaha, and I'm saying it on the public record. And it's why I have no respect whatsoever for Chief Thomas Warren because when these matters are brought to his attention he is totally unresponsive. The only time they'll go after a cop is if they have so much evidence that if they cover it up they're going to be on the hot seat for having covered it up. That's the only reason they did something about this cop who "tased" this man in handcuffs ten times. Cops were worried that it was such a horrendous thing and that the man might even die that they had better clean themselves up, so they ratted out the one who did it. And Warren had no choice, the chief, but to fire him. But they've covered up other acts of violence by the police. So when these men come up here, and I'm going to assume they're all well-intentioned, but some of them obviously don't know what they're talking about when they want to interpret the law and say how it applies. If I'm stopped for a traffic ticket, they don't have to give me Miranda warnings. If I'm charged...if I'm going to be charged with murder, they don't have to give me a Miranda warning, but any evidence they get they can't use. That's what the significance and consequence is if you don't give the Miranda warning when you should. But if you think you should give it, then give it. That's common sense, isn't it? To an ordinary person, who's not trained in law enforcement, would have sense enough to say if this person has good evidence...I meant good information and is speaking as a witness, why would you give Miranda warnings if the person is not a suspect? You give warnings to suspects, not to witnesses. So if there's a witness, a person that they want to use as a witness, but they're also going to consider that person a suspect and the offense rises to the level where Miranda warnings are required, then you give that person a warning and by so doing you notify that person that you are a suspect and anything you say can...it will be used against you; you have the right to remain silent; you have the right to get a lawyer; if you can't afford a lawyer, we'll get you one; all of those things that you hear on television. So the kind of stuff they told you here today, if that's the best argument they have against this legislation, they don't have an argument. It's a knee-jerk reaction. We've got an experienced prosecutor here. We've got a chief of police. We have an officer with reams of experience who doesn't realize that under this bill they can do everything that they have ever done. It doesn't stop them from doing any of those things at all. And if a person is simply a witness giving information, you don't have to give the information in this bill because you didn't make a deal with that person to get the information. You didn't offer the person anything. They just ran up and said, I saw the one who ran into that car and it was Senator Pirsch. I won't make you the bad guy all the time. [LB465]

SENATOR PIRSCH: (Laugh) [LB465]

SENATOR ASHFORD: Senator Chambers, can I ask you a comment on that? [LB465]

SENATOR CHAMBERS: You can ask me anything you want to. [LB465]

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SENATOR ASHFORD: Is that the point? I mean, if in fact what we're getting at is the deal, the inducement is the trigger, isn't it? Or... [LB465]

SENATOR CHAMBERS: And anything. It's like the quid pro quo. [LB465]

SENATOR ASHFORD: Okay. [LB465]

SENATOR CHAMBERS: These are not the kind of upstanding citizens that the first witnesses talked about. It comes closer to being the kind of person that the last witness told us about. All of those speaking know the kind of persons that this law is aimed at, and they know the kind of person that I'm talking about. [LB465]

SENATOR ASHFORD: And so are we draft...have we drafted this narrowly enough to get at that? [LB465]

SENATOR CHAMBERS: I'm willing to work on that. [LB465]

SENATOR ASHFORD: Okay. [LB465]

SENATOR CHAMBERS: I said in the beginning... [LB465]

SENATOR ASHFORD: I just...I see your point. I was just trying to...if we get at the issue, which I clearly understand...okay. [LB465]

SENATOR CHAMBERS: Yes. [LB465]

SENATOR ASHFORD: All right. Thank you. It takes me an hour or so (laugh) to listen. (Laugh) [LB465]

SENATOR CHAMBERS: Then that will end my...now that I know where you are, that will end my closing. [LB465]

SENATOR ASHFORD: Thank you. [LB465]

SENATOR CHAMBERS: Thank you, Mr. President, Mr. Chair. (See also Exhibit 15) [LB465]

SENATOR ASHFORD: Okay, LB470, Senator Chambers. Any...how many testifiers do we have on that bill? Okay. Oh my, Alan and Ms. Miller, and Marty, and...welcome. (Laugh) [LB470]

SENATOR CHAMBERS: Mr. Chairman and members of the Judiciary Committee, I'm Ernie Chambers. I represent the 11th Legislative District, and I'm going to go ahead and

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read my statement of intent because it will lay out what this bill is about. This bill was formulated in consultation with Omaha City Prosecutor Marty Conboy, who happens to be here today, to provide for the removal from the public record a notation of arrest after expiration of a specified period of time in cases for which (a) no charges are filed as a result of determination of the prosecuting attorney; (b) no charges are filed as a result of a completed diversion; (c) charges are dismissed by the court on motion of the prosecuting attorney or as a result of a hearing not the subject of a pending appeal. What we're dealing with here are people arrested but not convicted of any crime. That notation of arrest currently stays on that person's record forever. There is no instrumentality or means made available under the law for a person who is innocent to have the record of this arrest removed. There are numerous people who have lost employment opportunities because a background check was undertaken and the notation of arrest popped up. There are people who were working and then the company instituted background checks and the notation of arrest came up and they were terminated. So we're talking about people who are in these categories and I gave a listing of the amounts of time that the notation could remain a public record. In the first case where no charges are filed, a year from the date of the arrest. The reason this needs to be done, because there is language about active prosecution and that leaves everything wide open and nobody knows what active prosecution means or when it is taking place or when it terminates. So this bill brings specificity. If no charges are filed as a result of the determination of the prosecutor, who could hardly be said to be a bleeding heart liberal or working in league with criminals, one year from the date of arrest. That would give enough time for that determination to be made. In the case of a completed diversion, two years from the date of arrest. That will mean that the person successfully completed that diversion even if it included community service and maybe a period of something else. I don't know what all they put on these people. But within a two-year period that could have been completed successfully. Then the notation is no longer a matter of public record. When the charges are dismissed by the court on motion of the prosecuting attorney or as a result of a hearing, that is something which could take more time to occur. Maybe it takes awhile to develop that there is not sufficient evidence, or evidence that seemed to have credibility at the time no longer does. These periods of time are not written in stone, but the rationale for the differing periods are what I gave to you. And in a letter to me, Mr. Conboy made this statement, and I think it sums up the whole thing. Quote: It is surprising how many innocent people are unknowingly affected by a record entry they may not even realize exists. It is even more surprising when they learn that while convicted people have several methods of clearing their record, those arrested but not convicted face a permanent entry. Now there are certain individuals who would still have their records made available to the public, and that would be somebody who is currently an announced candidate for or holder of public office, if the person is currently the subject of prosecution or correctional control as the result of a separate arrest. So there are still categories of persons where their notations of arrest will be a matter of public record. If you look for the background check, it will pop up. These are people who ought not have to carry this millstone

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forever. You can't go to the Pardons Board because you have not committed a crime and there's nothing for you to be pardoned for. You can't tell a court to expunge because there's nothing to be expunged. You weren't convicted of anything. So this is the only means by which this can be achieved. I was looking for the Chairman, but he must have eased out. [LB470]

SENATOR LATHROP: He did. [LB470]

SENATOR CHAMBERS: Okay. There might be a question. [LB470]

SENATOR LATHROP: Thank you, Senator Chambers. Senator Schimek. [LB470]

SENATOR SCHIMEK: Thank you, Senator Lathrop. Yes, Senator Chambers, I'm pretty sure I know the answer to this, but I need to ask it anyway for clarity. It says that these notations of arrest shall be expunged or removed from the public record. Is there such a thing as an unpublic record? [LB470]

SENATOR CHAMBERS: Well, law enforcement and for some court purposes things are in their records which are not made available to the public. A court document could involve the names of people, but the document could be sealed. So that remains in that court's records, but it is not available to the public. [LB470]

SENATOR SCHIMEK: Well, let me...let me tell you what my concern might be. [LB470]

SENATOR CHAMBERS: Okay. [LB470]

SENATOR SCHIMEK: It is if somebody is predisposed to certain types of criminal activity but have never been charged, have maybe been suspected but never charged, and yet maybe ten years down the line they're finally caught. They're finally...they finally made a mistake. They're caught. There's nothing in that...in the record of any kind to note that these persons had ever been held and questioned for these kinds of suspected activities? [LB470]

SENATOR CHAMBERS: Well, here's the thing. Although it's troublesome to a lot of people... [LB470]

SENATOR SCHIMEK: Under your...under your bill that would be. [LB470]

SENATOR CHAMBERS: ...there is...there is in this country a presumption of innocence. [LB470]

SENATOR SCHIMEK: Right. [LB470]

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SENATOR CHAMBERS: If a person has not been convicted, that person is deemed innocent. If the charges are not filed, if the charges were filed but dismissed pursuant to a motion by the prosecutor, that person is innocent under the laws of this country. [LB470]

SENATOR SCHIMEK: Right. [LB470]

SENATOR CHAMBERS: Rumors, gossip are not enough, no matter how strongly the person who is saying it believes it can be a basis for holding something over somebody's head. And if they are picked up and charged with something later, say, well, you know years ago there was a lot of scuttlebutt and whispering about what this person had done, and all that whispering ought to be allowed, it wouldn't even be evidence. [LB470]

SENATOR SCHIMEK: No. [LB470]

SENATOR CHAMBERS: Even if it was in a record some place, it couldn't be brought forth and be used against a person. You cannot use something from the past as evidence to prove that the person did what you're charging the person with and trying the person with right now. [LB470]

SENATOR SCHIMEK: I'm probably not stating this very well, but I understand the point that you're making and I understand that part of it, I guess. But what you're telling me here is that there is only a very limited unpublic record, and those would be sealed kinds of records for the most part. [LB470]

SENATOR CHAMBERS: Well, why don't you, when Mr. Conboy comes, maybe he will understand better what you're asking than I do... [LB470]

SENATOR SCHIMEK: I don't know that I'm asking... [LB470]

SENATOR CHAMBERS: ...and then he... [LB470]

SENATOR SCHIMEK: ...it right, but... []

SENATOR CHAMBERS: Well, I just may not know the answer. [LB470]

SENATOR SCHIMEK: (Laugh) I doubt that, but thank you very much, Senator. [LB470]

SENATOR LATHROP: Senator McDonald. [LB470]

SENATOR McDONALD: Say 40 years ago that there was a murder and they were...they had suspects who they thought maybe might be involved in it. They ended

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not ever solving the murder, but those people that they thought, you know, could have been involved, they didn't pursue that. So they're saying, okay, you know, we don't...we think you probably didn't kill this person, and then 40 years later then they find the body and they're able to get that information. Would there not be a record of those that they had questioned and testimony that... [LB470]

SENATOR CHAMBERS: Sure, unless the police or whoever did the questioning destroyed those records. But you wouldn't be able to go down there, as a private citizen, and say Mr. A I know was a suspect and I want all the information you got on Mr. A. Well, they're not going to disclose investigative reports or the information on the people involved. This is dealing with the public record, that which somebody can go down and demand that they be shown. But like they talk about all these cold and old cases, there is information in there I'm sure that gives the names of people, gives the names of suspects and why they were suspected. But if there's not enough evidence to bring a charge, those persons are still presumed to be innocent and it's why they didn't go out and arrest them and take them to trial, because there was not enough evidence to get a conviction, maybe not even enough evidence to make an arrest. So we're talking about public records here. And it's up to the police agency to determine how long they're going to keep files and records on hand. I don't know if there's anything that precludes them, after 40 or 50 years, from disposing of it. Maybe wisdom would indicate that they never should. But that information is not a matter of public record, you know, the individuals who were named in there, and I don't think it should be. [LB470]

SENATOR McDONALD: Thank you. [LB470]

SENATOR LATHROP: Senator Schimek. [LB470]

SENATOR SCHIMEK: And I think that, Senator Chambers, thank you, Mr. Chairman, I think Senator McDonald helped clarify that. That's really what I was getting at, was... [LB470]

SENATOR CHAMBERS: Okay. [LB470]

SENATOR SCHIMEK: ...investigative records, is actually what I'm getting... [LB470]

SENATOR CHAMBERS: And Mr. Conboy will be here and he knows everything. [LB470]

SENATOR SCHIMEK: Yes. Okay. [LB470]

SENATOR CHAMBERS: Okay. [LB470]

SENATOR SCHIMEK: We'll look forward to it. [LB470]

SENATOR LATHROP: Proponents? [LB470]

MARTY CONBOY: Thank you, Mr. Chairman, senators. Marty Conboy, C-o-n-b-o-y, the city prosecutor in Omaha, and I'd like to thank Senator Chambers for introducing this bill and it is, I guess, the result of many years of having dealt with citizens who, under our system, are presumed innocent and are not convicted. And in our system there are a lot of repercussions for a conviction for any crime. Some are serious: You can't get a license in employment, a bonding, whatever it happens to be, a military commission. But for people who are not convicted for the various reasons stated in this bill there are now more and more consequences in a competitive society for people who are innocent. Some, as you might suspect, and I guess the inclination is, well, they were accused of something, they must have done something, and that, I guess, is a presumption made frequently when people see, well, the police arrested them, there must be a good reason. And perhaps there was, but the fact is, if there is then the prosecutor should have taken it through court and got the appropriate conviction. If there's not, there ought to be some finality to it. These people who are, for the most part, anonymous and powerless, it's not like they can go to court and do something about it or come down here and lobby, because it's kind of counterproductive, if you think about it. They're trying to put this behind them, not to have it be a public matter, and yet it does have an effect on their lives. In answer to your question, Senator, I guess maybe one way of putting it, the police do keep two sets of books. The internal records of law enforcement, which includes the investigative and intelligence information, the things that might be if somebody made a report who, you know, was listed as a witness or was cited or arrested at some point but dismissed. Those kinds of things would retain in a separate record of the police department. You're going to hear from a representative of the State Patrol who will talk about how they will have to adjust their record programming to allow that. I checked with the Omaha Police and our county dot-com people to see how difficult a task it would be to remove these records from that which is disseminated to the public. They are distilled from the overall records to what is considered a public record, and I know, Senator Pirsch, Senator Lathrop, you've seen those kinds of records, perhaps Senator Ashford, in looking over a criminal history that is kept internally, and how different that is from what the public has access to, because its purpose is limited to allowing you to go back and find those old investigative reports by their numbers and their dates and so forth. When this was...this is actually part of an act that was drafted in the late seventies and that was a time when there was no criminal history kept electronically. It actually provided, and the legislative history revealed, that it was intended that these things drop off the record and not be permanent if there were no convictions. They use this language which talks about after one year without active prosecution. Unfortunately, there's no real definition of that and, as a result, that lack of clarity has never really allowed this to be effectuated. They don't drop off the record. It was intended originally that they do, but in real practice they don't. And so, as a consequence, you have a lot of innocent people, you know, innocent by

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definition, by law, who are suffering consequences. And again, I don't think a lot of people realize if they went to diversion or if their case was dismissed because it turned out to be a false accusation that years later other people are looking at that entry on their record and making these presumptions and relying on them to the detriment of a person who should not have that to carry around with them. Be happy to answer any other question that you have or clarify. [LB470]

SENATOR ASHFORD: Thanks, Marty. Do we have any questions of Marty? Senator Pirsch, (laugh) you have intimate knowledge of this probably. I just...but thanks, Marty, for your comments. [LB470]

MARTY CONBOY: Well, thank you. [LB470]

SENATOR ASHFORD: Proponents? Do we have opponents of this bill? Okay. [LB470]

ALAN PETERSON: Neutral. [LB470]

SENATOR ASHFORD: Oh, neutral. Alan is neutral? (Laugh) That's an unusual... [LB470]

ALAN PETERSON: It is. [LB470]

SENATOR ASHFORD: ...position for you to be in. [LB470]

ALAN PETERSON: But it's so relaxing. [LB470]

SENATOR ASHFORD: Yes. [LB470]

JERILYN BURESH: My name is Jerilyn Buresh, J-e-r-i-l-y-n B-u-r-e-s-h. Chairman, senators of the committee, I am here to support LB470. To put it in simplest terms, the question before you today is, does innocence matter in the state of Nebraska? I come here not to speak just for myself. Today I am here to represent all those who have lost their voice due to the impact the current wording of this law has on their lives. I am here to represent all those who may not even realize their arrest record is still haunting them. I am here because I have a responsibility. My voice has been given back to me and I must use it on behalf of others. In 2000 I was falsely accused of a crime and arrested. Nine months later the case was dropped pretrial. My attorneys pleaded the court to have my record set aside, but it was denied because I wasn't a convicted criminal. Time and again I have been denied jobs because of the record. Although I've done nothing wrong, I have been viewed as a criminal. I didn't know anyone who was willing to take this issue on, and was forced to face all of this seemingly alone. For six years I've been voiceless and powerless. Most people didn't even believe that Nebraska had a law that was so unclear. So I was told to get over it, to move on, that there was nothing I could

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do because getting laws changed in Nebraska is too hard. This kind of negativity only added to the self-doubt the arrest created. During the past year, I discovered others were equally concerned about this law. It was only through their support that my voice has been given back to me. Through discussions and conversations, I learned the fullness of the injustice of this law. Yes, I say injustice. There can be no justice when a convicted criminal is afforded more opportunities than an innocent person. In Nebraska, convicted criminals who have served their time have the chance to have their record set aside. However, as my case demonstrates, this same opportunity isn't afforded to those innocent people who are arrested and the charge or case is dropped prior to trial. What I have learned through my experience is because of this dichotomy my innocence doesn't even matter. In a day and age where people complain their freedoms are being encroached upon in the name of national security, many in this state aren't granted the basic freedom of our innocence simply because this law is poorly worded. As elected officials, as representatives of the people of Nebraska, you have the obligation to justice. You have the duty to prevent innocent people from paying a price higher than is expected of the guilty. You have the responsibility to allow a person's innocence to matter. That is what LB470 will do, so I urge you to allow this bill to move forward. Thank you for your time. [LB470]

SENATOR ASHFORD: Thank you. Thank you for your comments. Appreciate the comments. Any questions? Thanks. Thanks. It's not out of lack of interest that we're not asking you questions. Ms. Miller. [LB470]

AMY MILLER: Lacking any pages, should I distribute on my own? [LB470]

SENATOR ASHFORD: Well, we could...Jono, could you? Jono can't do it. There comes Kristine. She was getting me a Pepsi. [LB470]

AMY MILLER: Excellent. [LB470]

SENATOR ASHFORD: Okay. [LB470]

AMY MILLER: (Exhibit 18) My name is Amy Miller. My last name is spelled M-i-l-l-e-r. I'm legal director for ACLU Nebraska, and I'm currently experiencing the euphoria of testifying on the same side as Martin Conboy. (Laughter) [LB470]

SENATOR ASHFORD: Yeah, I thought Marty was in sort of an interesting position, but it's good to see him. (Laugh) [LB470]

AMY MILLER: Definitely. The two points that I'd like to make in our support for LB470 is because of the categories of people that are most likely to find themselves facing the sort of problem that we have here where innocent people have a record that may affect their ability to find housing, to find employment, to get college scholarship fund, or in

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any other situation where someone may believe that where there's smoke there's fire. The first category that I'd like to point out is that very often individuals who are engaged in First Amendment protest or demonstration-type work frequently find themselves caught up in situations where the police, in order to clear a protest, a demonstration or a rally, will take a kitchen sink approach. They arrest dozens, maybe tens of dozens of people. This happened in Omaha when the war in Iraq first broke out. There was a spontaneous demonstration in downtown Omaha and police, uncertain apparently of how to deal with the situation, arrested many, many people. Most of those charges were later dismissed, but many of the people that contacted our officer were concerned because disorderly conduct and assault of an officer now appear on their record, not as a conviction but as an arrest, and those clearly would give one pause before you would consider taking that person into your home, taking that person into your business. So again, First Amendment protest-type expression is very likely to result in perhaps a charge that was simply designed to clear the area, and the charges are not actually pursued. The second category of people we want to point to are the harms of racial profiling, because there are too many people of color who are swept up by police or stopped by police or arrested by police, and then those get sorted out by prosecutors, judges and juries later. It is a disproportionate percentage of people of color who are likely to have on their records an arrest which is not actually a meritorious charge. I've attached to my testimony the most recent report issued by the Nebraska Crime Commission on Law Enforcement and Criminal Justice. This is the April 1, 2006, report, and I've only given you, on the very back page of my testimony, the executive summary. But if you look at that, the ongoing racial profiling study that this Legislature commissioned to find out whether or not we do have a racial profiling problem in this state, all of the reports coming back are indicating, yes, we actively have a problem with racial profiling. If you look at those bullet points, it notes that in 2005 about 5 percent of traffic stops in Nebraska resulted in someone being taken into arrest. Twenty percent of blacks who were stopped were taken into custodial arrest. Ten percent of Native Americans who were stopped were taken into custodial arrest. Again, the color...the percentage of people of color in this state only equals about 9 percent of our population. We are disproportionately stopping, charging, and arresting people of color. The study also found that stops that involved Hispanic and Native American drivers were about twice as often to be arrested, and searched more than two times as often as the overall population. Again, it is possible that those sort of charges would later be taken care of, perhaps on a motion to suppress, that found that there was racial profiling. Perhaps the charges were dropped and were not held to be meritorious. But because it's such a large population of people of color who are being arrested, searched and stopped, it is also those percentage of people who are facing this unjust situation where they are innocent and yet find themselves facing an arrest record. For those reasons, we urge the committee to pass LB470 to the floor for full debate. [LB470]

SENATOR ASHFORD: Thank you. Any questions? [LB470]

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AMY MILLER: Thank you. [LB470]

SENATOR ASHFORD: Thanks. Neutral testimony? Alan. [LB470]

ALAN PETERSON: Thank you, Mr. Chairman. Senator Ashford and members of the Judiciary Committee, I'm Alan Peterson, P-e-t-e-r-s-o-n. I am the counsel and lobbyist for Media of Nebraska, which is the coalition of five groups: the Nebraska Press Association; the Nebraska Broadcasters Association; the daily newspapers association, which is really all of the outstate dailies as well as Lincoln and Omaha; and then the Omaha World-Herald Company; and the Lincoln Journal Star. Those five components retain counsel and a lobbyist to fight for open government, open records, open meetings, First Amendment issues and so forth, and that's me and I've done it for a long time. In fact, I plead guilty right now. I think in 1979 I drafted the language about active prosecution as a compromise in getting this criminal history information bill passed, working with other people involved. It is ambiguous. I'm neutral because, frankly, it seems to us that what is proposed in this bill is a perfectly reasonable adjustment of an old, old law that's bounced around for a long time. It still allows access of the public and my clients, the news media, if somebody consents to having the old arrest record come out or if they are again involved in a prosecution, being prosecuted for some new crime under another arrest, or if they're running for public office. Sorry about that. But those are the exceptions that were in existing law. They are retained, by Senator Chambers' proposal, and the only problem with the bill and even with the existing law is it's so darned complicated. There are exceptions, and then exceptions to the exceptions. It's not the only place where we have that problem and it's not something I think we can cure here. But while I'm neutral on the bill because it's not, strictly speaking, a news media interest, we don't find this offensive to open government or the right to obtain important information when it's really important. But we have no objection to it and we appreciate the efforts to adjust this old open government law, the Criminal History Information Act. [LB470]

SENATOR ASHFORD: Any...thanks, Alan. Any questions of Alan on this? Thank you. [LB470]

ALAN PETERSON: Thank you. [LB470]

JOHN SHELTON: (Exhibit 19) Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Lieutenant John Shelton, S-h-e-l-t-o-n, and I serve as the commander of the Criminal Identification Division of the Nebraska State Patrol. I'm here today to testify in neutral capacity on LB470. The purpose of my appearance here today is strictly to address the operational and fiscal impact of LB470 on the Nebraska State Patrol. We want to ensure that, should this bill pass, we are able to implement the bill in the manner which the Legislature desires. The Nebraska State Patrol is statutorily tasked with retention of criminal history information for the state of Nebraska. The

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information that is placed into the criminal history database is generated by submissions from criminal justice agencies from across the state. When a person is arrested for a criminal offense, fingerprints are obtained by the booking agency and submitted to the Nebraska State Patrol for retention. This information begins the process of creating the criminal history. Currently, an automated process to implement the requirements of LB470 is not available. Implementation would necessitate the setting of multiple flags within that database to allow for the electronic management of that database. It would require a vendor to develop a flag for each level of time line criteria that is mentioned in the LB. The cost of a vendor to develop and implement such a system with multiple flags may vary greatly and an exact amount is unknown at this time. Recent projects which required modifications to the criminal history database would indicate that a project of this scope would have an estimated fiscal impact of approximately \$400,000 to the agency. As mentioned earlier, the accuracy and contents of the criminal history database is dependent upon the information provided by other criminal justice agencies. Therefore, the implementation of LB470 would require close coordination with prosecutors, diversionary programs, and county and district courts in order to accurately fulfill the requirement of the bill. Thank you for the opportunity to present. I'd be happy to answer any questions you may have of me. [LB470]

SENATOR ASHFORD: Lieutenant. Any questions of Lieutenant Shelton? Yes, Senator Pirsch. [LB470]

SENATOR PIRSCH: Just briefly. You mentioned a recent project that costs \$400,000. What was that particular project? [LB470]

JOHN SHELTON: There was a...there's a project currently, the criminal history migration from the state mainframe database to be housed within the Nebraska State Patrol Sequel server. Think of it like taking a CD database and moving it from the state mainframe over to the Nebraska State Patrol, housing it, and then the implementation of creating all those interfaces with all the criminal justice agencies that we have. That project, which also includes our AFIS interface, ran just under \$500,000, and that doesn't include the intelligent logic that this LB is asking the database to perform, which is recognize dates of arrests and then separate the noncriminal justice access from the criminal justice access. [LB470]

SENATOR PIRSCH: Thank you. I appreciate (inaudible). [LB470]

SENATOR ASHFORD: Thanks, Lieutenant. Any other questions? Thank you very much. Thanks for your testimony. [LB470]

JOHN SHELTON: Thank you, Senator. [LB470]

SENATOR ASHFORD: Those are always concerns. Money is an issue. [LB470]

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JOHN SHELTON: Thank you very much. [LB470]

SENATOR ASHFORD: Thank you. That concludes the hearing, unless, Senator Chambers, do you wish to...? Senator Lathrop, LB674. How many proponents do we have? Okay. How many opponents? Have the opponents gotten together as a group and the proponents, so that we don't have redundancy of testimony, hopefully? I know we have. Thanks. Any neutral testifiers? All right. I don't want to...obviously, everybody has an opportunity to testify, but if we do have the opportunity to talk with each other so that we can keep the testimony going, that would be great. Senator Lathrop. [LB470 LB674]

SENATOR LATHROP: Thank you, Senator, Chairman Ashford, members of the Judiciary Committee. I'm here today to introduce LB674. LB674 is offered in response to a growing problem across the country with identity theft. In 2006 nearly 9 million Americans became victims of identity theft. The Social Security number is the primary piece of data that enables identity theft. Once your Social Security number is available and identity theft occurs, you can have accounts taken over, your credit card applications filled out and completed and your credit abused by someone. You can have those who acquire false identifying documents, which is called identity cloning, and thereafter work with your Social Security number, secure driver's licenses and passports. These are just some examples of the problems that follow identity theft and, again, the Social Security number is in many cases the primary piece of data that enables that theft. LB674 is intended to protect employees from identity theft by prohibiting the unnecessary use of an employee's Social Security number. Use of an employee's Social Security number by an employer for any reason other than for federal and state tax purposes would be punishable as a Class IV misdemeanor. You would think this would be noncontroversial, and I think I have as many witnesses today as they did for the death penalty. What's happened.. [LB674]

SENATOR ASHFORD: Well, it's close. (Laughter) [LB674]

SENATOR LATHROP: ...what's happened is we have a very simple concept and I think the people that have raised their hand as opponents will come up here and tell you that the problem is, and their objection is, is that we've cast the net too broadly and we need to be able to change and make amendments to LB674 before it leaves the committee to account for some legitimate uses within the employer situation other than for tax reasons. So I would ask that the bill be advanced to General File after we've had an opportunity to work with those people who have concerns about the scope of the prohibitions in LB674. [LB674]

SENATOR ASHFORD: Any questions for Senator Lathrop? Thank you. And that's a good offer, so we'll see how it goes. Thank you. Any...Mr. O'Connor. [LB674]

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ROBERT O'CONNOR: Mr. Chairman, members of the committee, my name is Robert E. O'Connor, Jr. I am an attorney in Omaha. I am the past president of the Nebraska State Bar Association. I'm an adjunct professor of law at the Creighton University School of Law, where I have taught labor and employment issues for the last 15 years. I have practiced here in Nebraska for about 32 years. Substantial portion of that practice has been devoted to labor and employment law. Recently, this last summer, I had the opportunity to file a lawsuit against the Union Pacific over identity theft. They lost a computer and a bunch of names, about 26,000 were lost, including the people's Social Security numbers. That actually kind of opened the door to what Senator Lathrop has introduced as legislation here today. It came to my attention, in the prosecution of that case, that Union Pacific and many other employers, many other employers, have rather promiscuous use of people's Social Security numbers. What it comes down to is that there are lots of lazy employers. Rather than assigning employee identification numbers, they continue to use Social Security numbers. In this day and age, with the access available to people either through the Internet or by other means, this is just unacceptable and it's not something an employee should be subjected to without some remedy. The purpose of this legislation, as I understand it, is to provide some sort of remedy for the individual employee who would not otherwise have this type of opportunity to stop the use of his Social Security number. I've asked the clerk pass out to you a handout from the Social Security Administration with regard to identity theft and Social Security numbers. There's a substantial amount of information available through the Federal Trade Commission with regard to the severity of the problem and, quite simply, the problem is not just people picking up your Social Security number on the Internet. It's fellow employees taking it. It's fellow employees having access to it. In my particular litigation it's come to our attention that there are many, many employees who have access through the computer system to other people's Social Security numbers for which they no longer have any use or should not have had any use in the first place. We believe this litigation and this...in this bill provide people with some hope, some reasonable assurance that their Social Security numbers will be used for the purpose for which it was originally intended, which is for tax purposes. I mean this is really pretty simple stuff. We're not trying to do anything fancy here and we're not trying to interfere with what other people are using it for. We may have some opinions about that they shouldn't be doing it, but what we're trying to do here today is talk about the employer-employee relationship and stopping that particular abuse of something. I appreciate your time and I appreciate...anything I can answer for anybody? [LB674]

SENATOR ASHFORD: Thanks, Bob. Any questions of Bob? Yes, DiAnna. [LB674]

SENATOR SCHIMEK: Yes, thank you, Mr. Chairman. Mr. O'Connor, I hate to even raise this, but when it says at the bottom of page 2 that an employer shall only be permitted to use an employee's Social Security number for federal or state tax purposes, does that then give them a way to avoid immigration questions? [LB674]

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ROBERT O'CONNOR: No, not at all, ma'am. [LB674]

SENATOR SCHIMEK: Okay. [LB674]

ROBERT O'CONNOR: Immigration questions are treated in several other fashions. The first thing you got to remember is that a Social Security number is personal to the person to whom it was issued. [LB674]

SENATOR SCHIMEK: Right. [LB674]

ROBERT O'CONNOR: And that protection is all we're trying to take care of here. The immigration question really goes more to green card and abuses of people obtaining false documents. The reality is, quite frankly, that you could, if you're an illegal immigrant, you can get a Social Security number. I mean that's a fact, a legitimate one. [LB674]

SENATOR SCHIMEK: A legitimate one, yes. [LB674]

ROBERT O'CONNOR: Yeah, they want you to pay taxes, so... [LB674]

SENATOR SCHIMEK: Yes. [LB674]

ROBERT O'CONNOR: ...it would have nothing to do with any immigration problems or issues that arise in employment. [LB674]

SENATOR SCHIMEK: So if there were a raid at a meat packing plant and there was an investigation as to the employer's actions in checking for identification, that could be part of the evidence, I presume then, that...the Social Security number. [LB674]

ROBERT O'CONNOR: It would certainly be part of the evidence, but that would be with regard to a criminal investigation, which is really not the subject... [LB674]

SENATOR SCHIMEK: And that would be... [LB674]

ROBERT O'CONNOR: ...of this, of this legislation. It's got nothing to do with government asking employers about do people have the numbers. This is restricting the employers from using it for things that just don't have anything to do with taxation or their job. [LB674]

SENATOR SCHIMEK: Okay. Thank you. [LB674]

SENATOR ASHFORD: Bob, but...or, I'm sorry. Senator McDonald. [LB674]

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SENATOR McDONALD: Go ahead. [LB674]

SENATOR ASHFORD: No, I just was... [LB674]

SENATOR McDONALD: How about for insurance purposes? [LB674]

ROBERT O'CONNOR: This doesn't address that. I mean, that's a whole different can of worms. I mean, I think the insurance industry...I've spent a lot of time in the last six months looking at this problem, Senator, and it's a very...it's an all pervasive problem throughout society in America today, and each different segment is going to have to address it in their own fashion. Certainly we're all aware that insurance companies and hospitals request that information because it's an easy identifier. It's also abused, and those people suffer too. There really ought to be a better way of doing it, but this bill has nothing to do with that, just doesn't. [LB674]

SENATOR ASHFORD: Am I missing something, Bob? (Laugh) Doesn't it prohibit an employer from giving out that information? [LB674]

ROBERT O'CONNOR: It prohibits them from giving out that information, but the deal between, if you're talking about insurance... [LB674]

SENATOR ASHFORD: Well, insurance, and also your immigration forms that you're required...that I am required to fill out... [LB674]

ROBERT O'CONNOR: Yes. [LB674]

SENATOR ASHFORD: ...at Nebraska Clothing, and I have three employees, two of whom are related to me. But I mean if...I would still have to provide that information... [LB674]

ROBERT O'CONNOR: You would have to provide that information to the government. [LB674]

SENATOR ASHFORD: ...to Immigration, Naturalization. [LB674]

ROBERT O'CONNOR: Absolutely. [LB674]

SENATOR ASHFORD: But I...but it doesn't...that's fine. I mean, we can work that out. I see your point. I see your point. It just doesn't cover that in that section. Thanks. [LB674]

ROBERT O'CONNOR: Anything else? Thank you very much for your time. I appreciate

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it. [LB674]

SENATOR ASHFORD: Thanks, Bob. [LB674]

RAY LINEWEBER: Mr. Chairman, members of the committee, my name is Ray Lineweber, L-i-n-e-w-e-b-e-r. I'm here today representing the United Transportation Union. We have some members who live in Senator Lathrop's district and, Senator Lathrop, thank you for bringing this forward. We, in the railroad industry, the employees I represent, one of the railroads, we don't have a problem at all; on another one, we do with the using the Social Security number instead of an assigned employee number. It's very easy in some circles in the railroad industry to get to the Social Security numbers of a number of people, so that's what Senator Lathrop is honorably attempting to do here. We appreciate that very much. A number of other folks have come forward. We're certainly willing to work through those problems and that's the whole amendment process, and I think we support the bill as is, but obviously, if they've got major concerns, let's look at them and let's address them based on fact and move forward. So I know you've had a long day. Thank you very much, unless there's any questions. [LB674]

SENATOR ASHFORD: Thanks, Ray. Any questions of Ray here? Thank you. The next proponent. [LB674]

JAIMEE NAPP: Mr. Chairman, members of the committee, I thank you for allowing me to...this opportunity to speak on behalf of LB674. My name is Jaimee Napp, it's J-a-i-m-e-e N-a-p-p, and I am the founder and executive director of the Identity Theft Action Council of Nebraska. Employers who use employees' Social Security numbers for reasons it was never intended unintentionally contribute to identity theft in the workplace. Almost two years ago my name, birth date, and Social Security number were stolen and used to apply for four credit cards. The person accused of this crime was a manager and my former employer, and is believed, through the police investigation, my information was stolen from employer records. When a victim's credit card or bank account is stolen, the crime usually stops when victims are able to close the account and open a new one. Once someone's Social Security number is stolen, there is really no quick fix. Victims can be victimized over and over again because the Social Security number is not a number that you...should be changed. It's very hard to describe in words what it's like to be betrayed by your coworker and former employer. My imposter had a previous criminal record, but I wouldn't have know it. She seemed very much like me--a mother dedicated to her children--and what is most hurtful is that my imposter intentionally did this to me knowing why and what she was going to do with it. Identify theft is not a victimless crime, and this crime has affected my family, my finances, my job, and threatened my financial future. To reduce the instances of identity theft in the workplace, employers need to stop using employees' Social Security number when it's not necessary. Maybe if my former employer would have taken more responsibility with

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her employees' personal information, including Social Security number, I may not be sitting here today as an example of everything an identity theft victim can lose due to this crime. I thank you. Do you have any questions for me? [LB674]

SENATOR ASHFORD: Thank you. Thanks very much. Thank you for coming and waiting to testify. We appreciate it. Thank you. Any questions? Thank you. [LB674]

AMY MILLER: (Exhibit 20) Good afternoon. My name is Amy Miller. My last name is spelled M-i-l-l-e-r, and I'm legal director for ACLU Nebraska. The fact that the growing use of Social Security numbers as a universal identifier poses serious privacy concerns, and because your privacy is an essential right protected under the constitution, the ACLU strongly urges that LB674 be passed on for General File. It's interesting, listening to the previous testimony, one testifier actually referred to Social Security numbers were originally used for tax purposes. That just shows how much the function creep of the Social Security number has gotten out of whack. Actually, the Social Security numbers were first designed in 1930s solely for the new retirement program and not for any other reason. And there was a great outcry in the 1930s as Americans were concerned about the use of Social Security numbers and were worried about privacy concerns, and the federal government had to go to great lengths to assure people that those numbers would only be used for the retirement program. Now, of course, the government is just as guilty as private entities of having allowed that function creep to get out of control. But since the Social Security number is one of the most valuable pieces of information for an identity thief, we strongly support LB674 as just one more way to protect privacy rights of individuals from identity thieves or other prying eyes. It's been a long day. We're privacy freaks. Are there any questions? (Laughter) [LB674]

SENATOR ASHFORD: You know, it has been a long day but it's been great testimony, so thanks, Amy, for your comments. And that when the heater...Senator Schimek, we turned the heat on when it was an icebox in here the first few days, and it speaks to us. That's why apparently they had turned it off. That's what the noise is coming from the heater. Any questions of Amy? Thank you. [LB674]

AMY MILLER: Thank you. [LB674]

SENATOR ASHFORD: Any other proponents? Opponents? [LB674]

LAURA PETERSON: (Exhibit 21) Good afternoon, Senator Ashford... [LB674]

SENATOR ASHFORD: Good afternoon. [LB674]

LAURA PETERSON: ...members of the Judiciary Committee. My name is Laura Peterson, P-e-t-e-r-s-o-n. I'm legal counsel for the state Department of Administrative Services, and I'm here in opposition to LB674 as it's drafted. LB674, as you've heard,

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will prohibit use Social Security numbers except for federal and state tax purposes. Of course, the state, as an employer, uses employees' Social Security numbers for tax purposes. We also use Social Security numbers for other purposes. What I'm having them pass out is a list of the uses that we know of that state government uses employees' Social Security numbers for. While DAS does not use Social Security numbers for optional internal purposes, such as ID cards, we do use Social Security numbers when it's required by others. As an example, some of our uses of Social Security numbers are mandated by federal or state law, such as reporting of information for Medicare data match purposes, reporting for unemployment insurance, I-9 forms verifying employment eligibility for new employees, reporting to the federal and state new hire directories for child support enforcement purposes, and reporting workers' compensation injuries. The state could face significant penalties for failing to comply with some of these requirements. For example, there's a fine of up to \$1,100 per employee for failing to complete and properly retain the I-9 form. Other uses of an employee Social Security number are mandated by vendors for employee-elected optional benefits, such as electronic depositing of payroll, payroll debit cards, credit union contributions, etcetera. If LB674 passes as drafted it's unclear if these vendors would discontinue requiring the use of Social Security numbers or if employees would no longer be able to take advantage of these elected benefits, such as having their paycheck directly deposited into their bank account or placed on a payroll debit card. I appreciate the opportunity to explain the current use of employees' Social Security numbers by the state. DAS has worked hard to reduce the usage of employees' Social Security numbers and now uses them only when mandated by others. I'd be happy to answer any of your questions. [LB674]

SENATOR ASHFORD: Thanks, Laura. Any questions of Laura? Thank you. Senator McKenzie. [LB674]

JANIS McKENZIE: Senator Ashford, members of the Judiciary Committee, it's a rare event that I get to come appear before you, but it's my pleasure this afternoon. For the record, my name is Jan McKenzie, spelled M-c-K-e-n-z-i-e. I'm executive director and registered lobbyist for the Nebraska Insurance Federation. I'm here to testify in opposition to the green copy of the bill. We are certainly, as an industry, as concerned about identity theft as probably any other financial services industry is and, in fact, we have supported security breach legislation and other forms of legislation that's passed in Nebraska in the past that would guarantee that for our purposes people's identity is not hacked into and stolen along with, in many cases for us, medical information and other very private information. Twenty-seven other states have passed legislation similar to this with restrictions on Social Security number use. In all cases the language is very similar to each other, and uniformity is always an issue to us as our companies in Nebraska do business all over the United States. In all cases the language focuses on the public display or posting of Social Security numbers; requiring an individual, an employee, to transmit a Social Security number in order to access Internet or their web

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site, or secured materials inside the business unless it is also encrypted; and in all cases there is language that exempts the use of a Social Security number as required by state and federal law, or use of Social Security number for internal verification or administrative purposes. I know it's been long but I will just quickly give you three examples of how the bill would affect internal use in the insurance industry from employer to employee. If in fact someone in the industry, employed in an insurance company, is injured on the job, in order to report the...the first report of the occupational injury or illness to the work comp court, it is required that the form include a Social Security number by state law. The second is if a potential employee or even an employee moving from one position to another, which would require different maybe drug testing, for example, also requires a Social Security number on those documents. And finally, Nebraska is one of a few states that's participating in the I-9 pilot project which is an attempt by the federal government to verify legal employable persons, and those applications by potential employees and employees also require a Social Security number. What we would like to be able to work with the senator and the committee on is finding a way to keep what Nebraska passes in line with what's happening in other states and not pass something so restrictive that it is prohibitive to the continued growth of the industry in the state. Many of you who have been here know we've continued to attract companies to Nebraska to redomicile here and bring new jobs, and we think having too restrictive language and requirement would be detrimental. I'd answer any questions. [LB674]

SENATOR ASHFORD: Thank you, Jan. Any questions of Jan? Thank you. [LB674]

JANIS McKENZIE: Thank you. [LB674]

SENATOR ASHFORD: Bill. [LB674]

WILLIAM PETERS: Mr. Chairman, members of the committee, my name is Bill Peters, B-i-l-l P-e-t-e-r-s. I'm appearing today in front of you in opposition to this legislation, LB674, as a registered lobbyist for Burlington Northern Santa Fe. As the testimony has proceeded, our opposition has gone downhill somewhat. I think we definitely subscribe to the theory that the Social Security number should not be used unless necessary. I'm primarily appearing here to caution you about the law of unintended consequences. Limiting it to the use of federal or state tax is sort of narrow. Within the railroad industry, we don't have a Social Security issue. We have a railroad retirement issue--definitely a better program. I can tell you we are...you're not going to access anything or give them anything unless you use the Social Security number. We have the temporary problem on some of our benefits. It's, you know, as we make contributions to 401(k) plans, to different retirement plans, a lot of our insurance, we're required to provide the Social Security number. It's not necessarily that we support that, but we...we may be pretty good size, but we're not as big as some of our benefit providers and if they want that number for our employees' insurance, I guess we're going to give it to them until we can

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get things changed. So I think the direction here is right. My main concern is, and our main concern is, that limiting it to state and federal taxes may be just a bit too tight but, as has been expressed, people are willing to talk and work on it. I think the ultimate goal is no problem. [LB674]

SENATOR ASHFORD: Thanks, Bill. Any questions? Thank you. Virg. [LB674]

VIRGIL HORNE: My name is Virgil Horne, V-i-r-g-i-l H-o-r-n-e, representing the Lincoln Public Schools. Only concern was we don't really know how we would check background checks. We're now being asked to consider checking the backgrounds of people who even come in and volunteer in cafeterias or libraries or things of that nature. Without a Social Security card, I don't know how we would do that. Thank you. [LB674]

SENATOR ASHFORD: Thanks, Virgil. Thank you. I don't see any questions. Any other...where are we, opponents? Jack. Do you have anything new to add? [LB674]

JACK CHELOHA: I might. Good afternoon, Senator Ashford, members of the Judiciary Committee. My name is Jack Cheloha, last name spelled C-h-e-l-o-h-a. I'm a registered lobbyist for the city of Omaha. I wanted to be on record opposing this bill. In case there's a working group, we could have an opportunity to participate in that. We believe that the concept behind this is noble and when we do use Social Security numbers in terms of the city's human resources department we do our best always to guard those and keep them private. One concern that hasn't been mentioned in the bill is if we do move forward on this we would need some time to convert some numbers to actually do employee ID numbers, and so with that, we would ask for an execution date of the bill, you know, some time down the road to give us time to do that. We've already talked about researching job applications. I guess we read that to say if they're not our employee now, we could still utilize it to do background checks, if you will. However, though, as this law would become implemented, you would find less and less information as other employers would not have that source of identifying their employees. So that was one concern. And finally, some forms that we have to list Social Security numbers on have to do with our drivers in public works and the parks department as they take drug testing, random drug testings, for their federal CDL license and regulations. That's another one that's a concern that calls for it in addition to state forms. And so for those reasons, we're opposed to the bill and I'll try and answer any questions. [LB674]

SENATOR ASHFORD: Thanks, Jack. I don't...seeing none, next opponent. [LB674]

BOB HALLSTROM: Chairman Ashford, members of the committee, my name is Robert J. Hallstrom. I appear before you today as registered lobbyist for the Nebraska Bankers Association in opposition to LB674. I believe our concerns, although I haven't been in the committee hearing room, from talking to other parties, I think the concerns of the

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bankers have been raised with Senator Lathrop and some discussions have taken place. One issue that may or may not have been touched on and perhaps is worthy of comment are other state or federal laws or regulations that require us to provide Social Security numbers. First injury reports on workers' compensation I think might be an area where we have to provide the Social Security number, but I would imagine that carving out exceptions for those types of things would be a fairly easy undertaking and would work with Senator Lathrop and the committee on those issues. Be happy to address any questions. [LB674]

SENATOR ASHFORD: Seeing none apparently, thanks, Bob, for... [LB674]

BOB HALLSTROM: Thank you, Senator. [LB674]

SENATOR ASHFORD: ...thanks for coming in. It's not always easy. Yes, any more...any opponents? I guess we're still on the opponents. Neutral? [LB674]

PERRY PIRSCH: I think we're both neutral. [LB674]

SENATOR ASHFORD: Neutral? Do we have a neutral? Go ahead. I think I recognize him. [LB674]

PERRY PIRSCH: Good afternoon,... [LB674]

SENATOR ASHFORD: (Laugh) Are you related to...go ahead. [LB674]

PERRY PIRSCH: Yeah, the resemblance is uncanny, isn't it? (Exhibit 26) Chairman Ashford and senators of the Judiciary Committee, my name is Perry Pirsch, P-i-r-s-c-h, and I'm the deputy state treasurer and general counsel under the State Treasurer, Shane Osborn, here today to testify in a neutral capacity on the impact of LB674 on the Treasurer's Office. The Treasurer's Office currently utilizes Social Security numbers for both tax identification purposes and for other often related purposes. For example, the numbers have been used to track child support payers and payees by the Nebraska Child Support Center, Health and Human Services and their employees; track individuals entitled to research unclaimed property from various submitting financial institutions; and track vendors who receive payments from the state of Nebraska. All of these uses have some tax implications, and nontax purposes are often intertwined. Because so many components of the current state system rely on Social Security numbers to ensure correct identification prohibiting their use would create a substantial immediate impact on our current system. Troy Reiners, the director of the Nebraska Child Support Payment Center, estimates, to make up for lost productivity, the Treasurer's Office would have to hire an additional six to eight full-time employees, or roughly \$22,000 per month in labor, to ensure, with the same accuracy, the identity of payers. Further, to change our existing computer models, we would anticipate another

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\$100,000 in immediate programming costs, with an expected \$20,000 per year in additional maintenance fees. I would also note that child support disbursements through the state are a joint federal-state partnership. Director Reiners estimates, if Health and Human Services cannot provide the Child Support Disbursement Unit with the Social Security numbers it uses, the CHARTS computer system would have to be reconfigured to the cost of perhaps several million dollars. Finally, I would note that the Nebraska Administrative Code 9-008.04B, the federal withholding...federal income withholding form and the Nebraska electronic clearinghouse file formats require the use of Social Security numbers and these would have to be either changed or ignored. Before the Legislature adopts this policy, it might consider less expensive alternatives to reach the same objection...or objectives. For automated clearinghouse transactions for the state, currently the Treasurer's Office employs 128-bit RC4 encryption technology, which is consistent with current national banking standards. Thus, when a Social Security number is stored in the Treasurer's banking computer files, the number and other personal information is encrypted and could not be used, even if stolen. Further, for printed documents, another alternative to an outright ban may be to allow for just the use of the last four digits of the Social Security number which, when used in conjunction with the name, would provide sufficient proof of identity for our purposes. The Nebraska Child Support Center, currently working with HHSS, has already implemented this particular change in monthly billing statements which are mailed, as well as the warrants issued to pay child support. In conclusion, we realize that in some arenas the gratuitous collection of Social Security numbers has been abused. Further, some government entities have received black marks for their failure to adequately protect Social Security numbers from identity thefts. For this reason, the State Treasurer's Office is already addressing many of these concerns and stands ready to implement whatever changes the Legislature enacts into law. However, I hope you will consider the impact this bill will have on state agencies, consider other viable alternatives prior to a blanket prohibition or, in the alternative, be ready to provide us with funding so that we can make the changes to absorb the impact. Thank you. [LB674]

SENATOR ASHFORD: Thank you. Any questions? Good job. Thanks. Any other neutral testifiers? [LB674]

DAVID LECHNER: Just one, Mr. Chairman. [LB674]

SENATOR ASHFORD: Thank you. I hope the rest of these people aren't here on LB215. [LB674]

DAVID LECHNER: (Exhibit 27) Senators, good afternoon. My name is David Lechner. I'm vice president for business and finance at the University of Nebraska. I'm speaking in a neutral posture on LB674 as I'm very much in favor of the spirit of the bill, but will have difficulty complying. You've heard enough about that. I'm going to take seriously the admonishment of the Chair, the generous offer of Senator Lathrop, and say that we

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are willing to work forward on this in any way possible. I'll just give you one little example and leave you with that. Today is payday. We paid all our employees. They got paid on time, and we probably made, oh, several hundred thousand hand-offs today, all of them electronically, and Soc. numbers are very important with that. So we would ask your help in moving forward here in a positive manner that won't cause us a lot of consternation. I appreciate your efforts today. You put up with a lot. I'll leave you with that. [LB674]

SENATOR ASHFORD: Thank you. [LB674]

DAVID LECHNER: Thank you. [LB674]

SENATOR ASHFORD: Senator Lathrop. [LB674]

SENATOR LATHROP: I'll waive closing. [LB674]

SENATOR ASHFORD: Waive closing. That concludes the hearing. LB215. Anyone here on that bill? Because hopefully not. (Laughter) [LB674 LB215]

SENATOR SCHIMEK: Is that why you put it at the end of day, Senator Ashford? (Laugh) [LB215]

SENATOR ASHFORD: I did. I didn't know when it would come up, but... [LB215]

SENATOR LATHROP: Senator Ashford,... [LB215]

SENATOR ASHFORD: Thank you. [LB215]

SENATOR LATHROP: ...please go ahead. [LB215]

SENATOR ASHFORD: Senator Lathrop, thank you. Brad Ashford, 20th Legislative District, appearing to introduce LB215. LB215 proposes to strike and readopt language clarifying that the current alternative to the death penalty in Nebraska is life imprisonment without parole. In 2001 the Nebraska Legislature, in special session, addressed Nebraska's capital sentencing scheme in light of the court ruling in Ring v. Arizona. During that special session, language was adopted to clarify that the current penalty for Class I, Class IB felonies when the death penalty is not utilized is life imprisonment without parole. In 2004 the Nebraska Supreme Court, in the case of State v. Conover, struck down the "without parole" language added by the Legislature during the special session, claiming that it was outside the scope of the Governor's call. LB215 strikes the void instances of the words "without parole" and proposes to readopt them during the regular session with the Legislature's...where the Legislature's authority will allow it to do so. [LB215]

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SENATOR LATHROP: Anybody have any questions? Senator McDonald. [LB215]

SENATOR ASHFORD: Oh boy. (Laugh) [LB215]

SENATOR McDONALD: I guess I don't understand, you know, as I look through the crossed out language and you add that back in. What is the purpose of striking, then putting it back in? [LB215]

SENATOR ASHFORD: The court's...the court's decision in Conover left it out, or basically struck it. So if we wish, as a matter of policy, to have the penalty say without...life imprisonment without parole, we need to add it back in, essentially. So it was struck out by the court, the Legislature put it back in but the court found that it was outside the call of the Legislature, so we need to put it back in again, apparently. [LB215]

SENATOR McDONALD: Okay. [LB215]

SENATOR LATHROP: Any other questions? Waive close on this one? [LB215]

SENATOR ASHFORD: Thank you. Yeah, I waive closing. [LB215]

SENATOR LATHROP: All right. That will conclude our hearing on LB215. (See also Exhibits 28-30) [LB215]

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Disposition of Bills:

LB215 - Held in committee.  
LB465 - Advanced to General File, as amended.  
LB470 - Advanced to General File.  
LB476 - Advanced to General File.  
LB674 - Advanced to General File, as amended.

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Chairperson

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Committee Clerk