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Judiciary Committee
March 30, 2007

[LB377]

The Committee on Judiciary met at 1:30 p.m. on Friday, March 30, 2007, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB377. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Vickie McDonald; Amanda McGill; Dwite Pedersen; and Pete Pirsch. Senators absent: DiAnna Schimek.

SENATOR ASHFORD: (Recorder malfunction)...I appreciate everyone being here today. Let me tell you a few things. First of all, my name is Brad Ashford. I'm Chairman of the Committee. I will be actually introducing LB377, so my colleague, the Vice Chair of the committee, Senator Lathrop, will be chairing the hearing. But there are a few things that I'd like to get out and get straight before we get started. We're allotting an hour and a half for the hearing. There are some senators that are going to have to leave, and so we're going to equally divide the time between the proponents and the opponents, and leave some time...and there may be some neutral testifiers here, I understand, so we'll also leave some time for that. It is unlikely that we will have an Executive Session today, but it's possible. But it's unlikely. So we're planning to be finished by 3:00 and then adjourn for the day. A couple of things. We would ask that...we have a light system. And I know some of you have not been here before and are not used to testifying, but we have a little light system up at the...on the front...at the front of...on your table, witness table there. And we'd ask you...we're asking you to confine your testimony to three minutes. When there's one minute to go, the yellow light will go on, which tells you that you have one minute left. And then the red light, we'd ask you to sum up your testimony. Again, we're going to try to limit the testimony to around 40 minutes per side, and leave about 10 minutes for the neutral testifiers. So if you...those of you who desire to testify, if you have similar testimony, you may want to maybe combine your testimony or thoughts so that we get...you all get a chance to get your ideas out in front of the committee. Let me introduce those of the committee who are here. And I expect most everyone will be here today. Senator Dwite Pedersen, from Elkhorn, is on my far right; Senator Steve Lathrop, Vice Chair, from Omaha; and Amanda McGill, Senator McGill, from Lincoln. Jonathan Bradford is the committee clerk. Jeff Beaty is my legal counsel. And again, my name is Brad Ashford. Again, I do expect...well, here's Senator McDonald, from St. Paul, Nebraska, is here; and Senator Pirsch, from Omaha. So with that, Senator Lathrop, could I ask you to...

SENATOR LATHROP: Do you want to wait for Senator Chambers, or do you want to start?

SENATOR ASHFORD: I think we can go ahead and start.

SENATOR LATHROP: We're a little bit early. These clocks are a bit ahead here.

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SENATOR ASHFORD: I'm sorry?

SENATOR LATHROP: The clocks are a little ahead here. Do you want to...

SENATOR ASHFORD: Okay, we'll wait a few...a minute or so for...to see if...well, Senator Schimek is out of town. I know Senator Chambers is here somewhere. So we'll...we will wait a minute or so. But I might ask...why don't you come on up over here, and I'll...

SENATOR LATHROP: While we are waiting for Senator Chambers to arrive, could I just see how many people here are, or intend to testify in support of this bill? Okay. And how many in opposition? Okay. Very good. All right. Thank you very much. Do we have some neutrals, by the way? Okay. Two, three. Okay. Thank you.

SENATOR ASHFORD: Thank you, Senator Lathrop and members of the Judiciary Committee. Good afternoon. My name is Brad Ashford, and I represent Legislative District 20. And today I'm here to introduce AM832, an amendment to LB377, which proposes to amend Nebraska's capital sentencing procedures with the objective of ensuring that individuals executed by the state of Nebraska are truly the worst of the worst, for which there is no alternative means to protect society. I first want to describe to those in the room how we got here today. On January 31, the Judiciary Committee held a hearing on LB476, a bill introduced by Senator Ernie Chambers of Omaha, to repeal the death penalty. There was no opposition testimony at the hearing, and the bill was advanced from committee on a vote of 7-0 with one nonvoting member. LB476 was debated on General File on March 19 and 20, and failed to advance by a vote of 24 to 25. At that time, a number of senators expressed to me and to other members of the committee support for the concept of life without parole in situations where the safety of the public could be ensured. On March 26, the Judiciary Committee met in Executive Session and discussed this issue, determined that the concept raised by members was a concept which deserved consideration by the entire body, and voted to amend LB377 for that purpose. The amendment before you today was drafted based on the discussion at that Executive Session and the ideas presented to members of the committee prior to the Executive Session, and is intended to provide a basis for discussion of this concept. Let me briefly describe AM832. AM832 amends Nebraska's capital sentencing statutes to require the fact finder in the sentencing phase of a capital case to unanimously make the following finding: beyond a reasonable doubt, quote, that the offender poses a present and substantial risk to the lives of others which cannot reasonably and effectively be controlled by institutional security measures. This finding is referred to as the effective security issue, and is made by the fact finder prior to the determination of other aggravating circumstances, the aggravating circumstances that are currently in statute. It is an assessment of the danger the defendant...the offender poses to others, both within and outside of the institution, and the ability of the Department of Corrections to safely incarcerate the individual, utilizing reasonable

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measures. If the fact finder should answer this question in the affirmative, it proceeds to determine the presence of aggravating factors. But if the answer is in the negative, that the individual can be safely incarcerated, the sentencing phase concludes and the offender receives a sentence of life without parole. The remainder of the amendment contains intent language and amends Section 29-2282 to allow courts to award restitution in homicide cases for the pain and suffering endured by the victim. I want to make it clear that this amendment does not repeal the death penalty, but is intended to narrow the class of defendants eligible for death to situations where it is necessary to protect society. In so doing, the amendment addresses some of the concerns with the arbitrariness in the application of the death penalty identified by the Legislature in 1979, the Baldus study in 2001, and by the U.S. Supreme Court in its two major death penalty rulings, Furman v. Georgia in 1972, and Gregg v. Georgia in 1976. I also believe that this proposal will help to ensure procedural fairness in the application of the death penalty, a concept which should be endorsed by all citizens of the state. A recent opinion poll in Kansas indicates that a majority of the public has serious concerns regarding the arbitrary application of the death penalty. Over 70 percent of the respondents in the Kansas study wished that there was a better alternative than the death penalty for punishing those convicted of first-degree capital murder. I believe that Nebraskans share similar concerns, and would support the option of life without parole as the alternative to execution when society can be protected by such a sentence. Research on this issue has demonstrated that a sentence of life without parole is an effective, safe way of protecting society from a convicted murderer in all but the most extreme cases. And the quality and professionalism of the staff within the Department of Corrections only strengthens my belief that this is a viable, safe alternative to the death penalty. Pope John II (sic--John Paul II) endorsed the concept embodied in this amendment when he stated in the Evangelium Vitae that a death sentence is warranted only in cases of absolute necessity--in other words, when it would not be possible to otherwise protect society. The Pope concluded that death is not an appropriate punishment if bloodless means are sufficient to defend human lives against an aggressor, to protect public order and the safety of persons. Let me conclude by just thanking the committee for its willingness to relook at this issue. And I also want to publicly thank those members of the Legislature who took the time to come to me and to others on the committee to express their willingness to look at other options, other than LB476. Mr. Vice Chair, I would wait and...for my...to decide whether to close, till after the testimony comes in at this time. [LB377]

SENATOR LATHROP: Very good. Do any members have questions for Senator Ashford? Seeing none, thank you. We will begin with the proponents. [LB377]

THOMAS RILEY: Good afternoon. My name is Tom Riley, the elected public defender for Douglas County. I appear in support of this legislation. Frankly, it does not respond to all of my concerns about the death penalty, but it does respond to a significant number of objections that many of us have about its application. As Senator Ashford

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just indicated, one of the most consistent problems with the death penalty, as far as legal issues go, purely, is its arbitrariness. And he cited Furman v. Georgia, Gregg v. Georgia, and cases that follow. And legislators throughout the country, in attempts to reinstitute capital punishment, struggled with legislation to respond to this problem. Now, in a practical sense, I've listened to debates on the death penalty, and one of the primary issues that's raised in those debates is the language of the statute in Nebraska. How does it distinguish a capital first-degree murder case from a noncapital first-degree murder case? Well, the answer, I suppose, simplistically, can be, well, the aggravating circumstances. Well, any of you know, first of all, that the way the statutes of Nebraska have been interpreted, the difference between even a first-degree murder and a second-degree murder is miniscule. I don't know how, honestly, one can intend to do something without premeditating it or deliberating upon it, under the definitions that the Supreme Court of Nebraska have attributed to it. So the question becomes, how does a prosecutor determine not only whether it's a second-degree or a first-degree, but whether it's a first-degree with aggravators and is a capital offense? The difference, of course, to the defendant and to society is huge. I don't intend to go through the litany of problems that exist with the arbitrariness that's involved by its very nature in allowing the prosecutor the unfettered discretion, basically, to determine whether or not they're going to file aggravators and make it a capital case. We all know the...there exists the reality that involved in that determination can be the race of the victim, race of the defendant, the ability to pay, the political pressure placed upon a prosecutor by not only police, but the public. Family of the victim, of course, also can enter into play. This is a great neutralizer. This bill distinguishes, as Senator Ashford so aptly put it, the first-degree murder case from the worst of the worst. This is...doesn't have anything to do with the race of the victim or the race of the defendant. The question becomes whether or not the state has the ability to protect the public during a life sentence. And if the answer to that is not beyond a reasonable doubt, no, then the person is not death eligible, and all of these arbitrary aggravators...and even if you're a proponent of the death penalty, you have to agree that the language of the aggravators in many instances, other than multiple homicides, is subject to any number of varying interpretations. This, as I said, is a great equalizer, and it takes a lot of that...the improper influences, but realities, out of the equation, and makes it pretty easy to distinguish between a death case and a nondeath case. And what one more thing is, this does not eliminate the requirement of having aggravators substantially outweigh the mitigators if, in fact, they...the jury determines that the public is not protected, that they still have to go through the aggravators and mitigating hearing. I see the red light is on, so... [LB377]

SENATOR LATHROP: Good. Appreciate your testimony. We'll see if there's any questions from the committee members. I...Pete, do you have a question? [LB377]

SENATOR PIRSCH: Just kind of a follow-up from the last committee hearing. Did you represent...there was, I think, a particular conversation that was...or, some testimony last time around regarding a particular case, the Otey case? [LB377]

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THOMAS RILEY: Yes. [LB377]

SENATOR PIRSCH: Do you remember...did you handle that case? [LB377]

THOMAS RILEY: I handled the trial of the Otey case, yes. [LB377]

SENATOR PIRSCH: What year was that now? Do you remember, approximately?
[LB377]

THOMAS RILEY: Oh, come on. Yeah, I want to say the trial was 1977 or '78. [LB377]

SENATOR PIRSCH: 1977 or '78? [LB377]

THOMAS RILEY: Yeah. [LB377]

SENATOR PIRSCH: At the time, how many years of experience had you had, at the...you were at the public defender's office then? [LB377]

THOMAS RILEY: Yeah, four. Four years. [LB377]

SENATOR PIRSCH: Okay. Had you handled...have you handled those type of cases, death penalty cases, over your... [LB377]

THOMAS RILEY: Well, I handle first-degree murder cases. But I believe that was the first case where it was apparent that the death penalty was going to be sought and aggressively sought after by the prosecutors. That happened...it was going on right around the same time as the Abboud murder case. And both of those cases were...it was apparent to those of us in the courthouse that the prosecutors were going to attempt to have a death penalty sentence be imposed. Don't forget the Furman v. Georgia case, which eliminated all the death penalties across the country, I believe it was in '72 or '73, so there were not that many opportunities prior to probably '75 to even test the validity and whether or not the death penalty was appropriate at all in a given case. [LB377]

SENATOR PIRSCH: Thank you. [LB377]

SENATOR LATHROP: Tom, I'd like to ask you a few questions, just about the application of the death penalty. In...as the law stands right now and as you said it, it's...we've seen it come back since the seventies, after the Supreme Court opinions. But as the law stands right now, it is the aggravators and the mitigators which determine whether or not the death penalty is imposed? [LB377]

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THOMAS RILEY: Under the current procedure, yes. [LB377]

SENATOR LATHROP: And it's not in every case that there is a hearing on the aggravators and the mitigators--only when the prosecutor makes the decision at the beginning of the prosecution to seek the death penalty. Is that right? [LB377]

THOMAS RILEY: Until Ring v. Arizona, there was no question...I mean, it was a big question as to whether a case was a death penalty case or not. They didn't have to declare, so to speak, at least in Douglas County they didn't, and here was no requirement that I was aware of that made them do so. After Ring v. Arizona, the law changed, and the state has to include in the information an allegation of the specific aggravators that are purportedly involved. So only...as it stands now, only in cases where the prosecutor decides that they want to pursue the death penalty do they have to call the aggravators and include them in the information. They still have the opportunity, and frequently will file a case as first-degree murder and not allege aggravators, thereby effectively eliminating the possibility of capital punishment. But trying to distinguish between the two as an objective observer is more than difficult. [LB377]

SENATOR LATHROP: And as a consequence, do we have some people that have not had to face the prospect of the death penalty when prosecuted for first-degree murder, and some people that have, based entirely on the discretion of the prosecutors? [LB377]

THOMAS RILEY: That's absolutely right. If the prosecutor does not allege aggravators, upon conviction of first-degree murder, it's life in prison. [LB377]

SENATOR LATHROP: Sometimes we hear the people on death row called the worst of the worst. Is that necessarily the case, then, if prosecutors exercise discretion? [LB377]

THOMAS RILEY: No, absolutely...no. And, you know, I have to tell you that as an individual who's represented lots of people charged with first-degree murder, we get to know them, and we get to know their background, and we get to know their family. And to insinuate that the people on death row are substantially worse, person for person, than some of the other individuals who were charged and/or convicted is fallacious. [LB377]

SENATOR LATHROP: Thank you. Any other questions? Seeing none,...oh, I'm sorry. Senator Pirsch. [LB377]

SENATOR PIRSCH: Just a brief question. One facet of this particular bill is a restitution provision. Is that correct? [LB377]

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THOMAS RILEY: Right. [LB377]

SENATOR PIRSCH: Are you familiar with that particular part, or did you have a chance to look at that? [LB377]

THOMAS RILEY: I read it. [LB377]

SENATOR PIRSCH: In general, is that a real...I guess, the idea being that those who have committed murder would then be financially on the hook for meeting the...what type of general expenses would a victim's family incur, or what type of things are covered through this bill for the victim's family, type of damages? [LB377]

THOMAS RILEY: As I read the bill, the addition was pain and suffering of the victim. That was added. And that would...I would...I've never been a personal injury lawyer. Maybe some of the other folks here have been. But I assume that that means pretty much the same thing as it does in a civil case. And it's not uncommon, Senator Pirsch, as I'm sure you're aware, it's not uncommon at the trial itself for the doctor, coroner, the physician who handled the autopsy to describe in some measure of detail how...not only the cause of death, but the manner of death. And frequently, those issues are at least certainly more than cursorily dealt with. So as I read the statute, that was what the addition was. Realistically, do people on death row have the ability to make payment on restitution? In many cases, no. But in many cases, they don't have the ability to hire an attorney; that's why I'm here. I suppose in an effort to not...to put it in a situation where people who do have some finances...I mean, everyone on death row isn't indigent, or wasn't when they first started. I suppose by the time the case is over they are, if they didn't start that way. But I think it's an appropriate remedy. It's somewhat hopeful, but it's appropriate. [LB377]

SENATOR LATHROP: Thanks. Senator Chambers. [LB377]

SENATOR CHAMBERS: Just on that last point, Mr. Riley. If, say, one of these individuals was involved in a case and somebody would decide to write a book or have that person write a book or do a movie, and revenue was derived, that would go toward the restitution. Is that correct? [LB377]

THOMAS RILEY: Very good example. Yes. Very good example. Yes. [LB377]

SENATOR CHAMBERS: That's all I have. [LB377]

THOMAS RILEY: Certainly not unheard of, as you are well aware. [LB377]

SENATOR LATHROP: Very good. I think that's all the questions we have. Thanks for coming down. [LB377]

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THOMAS RILEY: Thank you. [LB377]

SENATOR LATHROP: Next proponent. [LB377]

JERRY SOUCIE: Mr. Chairman, members of the committee, my name is Jerry Soucie. I'm a Lincoln attorney. I'm appearing here today. I took the vacation time for the afternoon off. My regular employment is with the Commission on Public Advocacy. I'm also appearing here on behalf...but I'm not representing that agency here. Mr. Mowbray will be here later in a neutral position. I speak here in favor of this bill. And I also wanted to let the court know that as a defense counsel, I mean, sometimes we get painted as being insensitive to victims, but in my own personal life, I've had a number of family members who have been impacted by homicides. I've had three...had two people who were married to my first cousins who were victims of homicides. One was a law enforcement officer. I represented the...his children in connection with trying to recover money through insurance proceeds and various other methods. I had a first cousin who I was close to, who my mother was like almost a second mother to, who was killed after his second tour in Vietnam. Came back to Oakland, was shot dead in a robbery while he's waiting to catch a flight back to Nebraska. So I'm not unmindful of the impact and importance that victims have in this process. But I think that also during my tenure as an attorney, I've represented...and I tried to count them up, but I think it's over...well over half a dozen people who have been on death row. And to try and say that they're the worst of the worst just isn't true. I mean, I can name a half a dozen people at the Nebraska State Penitentiary who are not on death row who are much scarier individuals that I would be very uncomfortable with, being in a room alone. I can't say that for the guys that are on death row. Each of them has a story. Each of them has a life. Each of them has experiences that bears upon why they're in that particular predicament. And what happens with a death case that's different from a murder case is that a death case, by its very nature, after you have a conviction, the focus is on the defendant. It's not on the victim's family. And I think that that becomes very difficult for victims' families to understand. They have input in the process, but once you have the conviction of first-degree murder, the decision then is only between life in prison without parole, and death. And that necessarily, under the constitution and under our laws, require that we focus on the defendant, not on the victim's family. And that's not to minimize the pain and suffering that they've experienced. Now, this particular bill, I think,...I have a difficulty opposing a bill that recognizes the fact that society has the moral obligation, the moral right to protect itself from someone who continues to want to do harm. And that's what this bill does. And I really don't have much qualms about that. There may be...well may be some of the people that got death penalty in this state, who are currently on death row, would meet that criteria. But I can't say that everybody does, and I can't say that everybody who's ever been charged with murder meets that criteria. Most murders tend to be crimes of passion, although that passion may be over a period of time long enough to meet premeditation and deliberation. But most of it is a transitory

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act on the part of the murderer. And once that period of time has passed, I think a lot of them end up not being that much of a danger to society, and that we need to consider that when we impose the ultimate punishment. I see I have the red light. If there's any questions? [LB377]

SENATOR LATHROP: Thank you, Jerry. Are there any questions for Mr. Soucie? Seeing none, thank you for your testimony. [LB377]

JERRY SOUCIE: Thank you. [LB377]

AMY MILLER: (Exhibit 9) 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 state affiliate of the American Civil Liberties Union. I'm not going to repeat...because I have great empathy for your position, I'm not going to repeat our fundamental reasons for opposing the death penalty. We've simply reiterated we'd ask that you reconsider the arguments we made in support of LB476, that full abolition is really more appropriate. However, we do support this amendment. America used to allow people to be executed for committing rape, and America used to allow minors to be executed, and America used to allow the mentally retarded to be executed. And each time that we've limited a class of people who are eligible to be executed, it has been an advance towards a better justice system. And since this amendment does again limit the pool of people who can be executed, we support it. Primarily, we want to make sure that you understand that Nebraska is not going to take a unique step. And so to those people, maybe not on this committee, who may still resist this effort to limit the death penalty, Nebraska would join the nine other states that do currently require this finding of future dangerousness. I've given you the statutory citations, but this would bring us into company with Oklahoma, Wyoming, Colorado, Maryland, New Mexico, Washington, Texas, Oregon, and Virginia. And for that reason, it is not an unheard of step. It, again, is just, we think, part of that moving evolution toward a better criminal justice system. Are there any questions? [LB377]

SENATOR LATHROP: Senator Pirsch. [LB377]

SENATOR PIRSCH: With the states that you mentioned that require, currently, this finding, and you mentioned the states, is that...is their structure then the same as this proposed bill? [LB377]

AMY MILLER: If I understand correctly, this proposal is much closer to Texas and Oregon. Each of the nine states does treat this slightly differently for the finding of future dangerousness. And I can certainly send you the follow-up details. But my understanding is, for example, some of those nine states require the future dangerousness to be found as an active aggravator. A couple of those other states allow absence of future dangerousness to be considered a mitigator in the defendant's favor. And only Texas and Oregon actually require this to be a prerequisite in the way

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that the amendment offers. So each one takes it from a slightly different perspective, but all nine of them require that at least to be part of the component that's weighed by the jury. [LB377]

SENATOR PIRSCH: Because in this bill would--and tell me if you agree with this--would propose kind of a two-step process after guilt is established. The first finding, I think, as Senator Ashford pointed out, would then...would require this analysis of whether the defendant would continue to present an ongoing danger to society, or whether that could be mitigated through...or prevented through incarceration, in fact. And only until that analysis is done do you even begin this second analysis, which includes a list, a laundry list of aggravators and mitigators, correct? So kind of a two-step process there that this bill would suggest? [LB377]

AMY MILLER: Yes. And the one that Nebraska is suggesting is slightly different, but it is closer to how Texas and Oregon are using it, because Texas does require a specific finding beyond a reasonable doubt as part of the jury's deliberation. Oregon actually has four issues that a jury has to find, in addition to the aggravators and mitigators, and one of those is future dangerousness. So I guess what I am saying is that even though the statutory structures are slightly different in the states that are allowing this, all of them are constitutional. And so no matter what way that you structure it, whether it's part mused in with aggravators and mitigators, whether it's a separate finding, or whether it's a separate finding with other factors, all of them have been upheld by the courts. [LB377]

SENATOR PIRSCH: Right. But it makes a substantive difference to you, right? You...I mean, your...ACLU would like it not to be as part of a list of aggravators to be considered with other mitigating mitigators, correct? [LB377]

AMY MILLER: I think our position is that including additional aggravators that are a serious issue like this, or the converse of that, being able to forwardly prove this is not someone who's "futurely" going to be dangerous, so that it's a mitigator, either of those is still moving us down the path towards a better justice system. So from ACLU's perspective, it doesn't matter the procedure by which this is implemented. It simply is a good way of assuring that we are applying the death penalty in an appropriate manner, with the understanding that ACLU ultimately believes that abolition is the only way to have a truly fair system. [LB377]

SENATOR PIRSCH: Thank you very much for your statements. [LB377]

AMY MILLER: Thank you. [LB377]

SENATOR LATHROP: Thanks, Senator Pirsch. Any other questions? [LB377]

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AMY MILLER: Thank you. [LB377]

SENATOR LATHROP: Seeing none, thank you very much, Amy. [LB377]

JIM CUNNINGHAM: (Exhibit 10) Senator Lathrop and members of the committee, good afternoon. For the record, my name is Jim Cunningham, and I'm appearing in my capacity as executive director of the Nebraska Catholic Conference, which represents the mutual interests and concerns of the Catholic Archdiocese of Omaha and the dioceses of Lincoln and Grand Island, under the direction of the diocesan bishops. On January 31, when I testified before this committee in support of LB476, proposing to repeal the death penalty, I did not anticipate once again being in front of the committee this year on a bill pertaining to the death penalty. But I must admit that under the circumstances, I'm glad for the opportunity. The Catholic Conference's support for repealing the death penalty is based on having made a judgment that in this modern culture, this technological age, the state need not and should not have recourse to the death penalty because it is not absolutely necessary to use execution in order to defend society from unjust aggressors. We continue to support abolishing the death penalty. Nonetheless, we understand the practical reality affecting the situation in Nebraska at the present time, and we appreciate the further reflection and consideration that has resulted in the offering of AM832 to LB377. While AM832 does not repeal the death penalty as we continue to prefer, we are able to support it because we look upon it as being notably better than the current public policy in the state. It significantly limits the scope of possible imposition of the death penalty. While we have concluded that the death penalty can only fail the test of absolute necessity as a measure of self-defense from those convicted of murder, we realize that many Nebraskans do not agree with this conclusion. Some of these instead hold the view that there are or might be circumstances, presumably quite narrow in scope, in which the death penalty is the necessary response for adequately protecting society and the common good. This category of rare circumstances is, we think, what this amendment is about, what it addresses, and it is the reason why we can support it as an improvement over current policy. As the Catholic Conference, we find that there's a great deal of the essence of AM832 that is consistent with the official teaching of our church on the death penalty, as promulgated in the modern catechism. Attached to my previous testimony on LB476 was a presentation of the relevant paragraphs from the catechism. Paragraph 2267 seems quite close, if not fully on point, to the matter before you. "Assuming that the guilty party's identity and responsibility have been fully determined, the traditional teaching of the church does not exclude recourse to the death penalty, if this is the only possible way of effectively defending human lives against the unjust aggressor. If however, non-lethal means are sufficient to defend and protect people's safety from the aggressor, authority will limit itself to such means, as these are more in conformity with the dignity of the human person." In our view, all Nebraskans personally and collectively face the challenge of turning away from a culture of death, toward a culture of life. This means addressing all ways in which killing is proposed as a solution to a problem. But in

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no way does this diminish the need to always be mindful, to have respect and great concern and sensitivity for the victims of these brutal murders. We commend this committee for seeking to maintain attention on the death penalty, and we urge you to continue to pursue AM832, or some form thereof, in order to allow the Legislature to fully debate this concept this year on this major issue. Thank you for your attention and consideration. [LB377]

SENATOR LATHROP: Thanks, Jim. Are there any questions for Mr. Cunningham?
[LB377]

JIM CUNNINGHAM: Thank you. [LB377]

SENATOR LATHROP: Seeing none, thank you very much for coming down today.
[LB377]

TERRY WERNER: (Exhibit 11) Good afternoon, Senator Lathrop and the rest of the committee. My name is Terry Werner. That's spelled W-e-r-n-e-r. I am the executive director and the paid lobbyist for the Nebraska chapter of the National Association of Social Workers. I just want to formally go on record today with our organization in support of AM832, which is an amendment to LB377. Our organization does not, under any circumstances, support the use of the death penalty. However, we do respect the need to assure citizens that dangerous individuals will have no opportunity to ever harm again. We believe that AM832 properly addresses this. My written testimony also includes the formal policy of our organization, which I will not read today. Thank you for your consideration, and I urge you to please advance AM832. On a personal note, I would like to say that I also am sensitive to the victims in these crimes, and in 1980 became a member of a murder victim's family, and since then have continued to experience, or went through for a period of about 20 years, a death sentence, and all the appeals and the all the pain that goes with that. And I know you're going to hear some emotional testimony later today, but I want to go on record as a member of a murder victim's family in opposition to the death penalty. Thank you very much. [LB377]

SENATOR LATHROP: Thank you, Terry. Let's see if there's any questions. Seeing none, thank you for your testimony. Are there any other proponents who wish to testify? Okay, let's take the first person in opposition. [LB377]

SHIRLEY ANDERSON: Senator McGill, I'm in your district, so I'm glad to meet you.
[LB377]

SENATOR LATHROP: Thank you. What we'll have you do when you sit down is, if you can give us your last...your name, and spell your last name for us. [LB377]

SHIRLEY ANDERSON: Okay. It's Shirley Anderson, A-n-d-e-r-s-o-n. I'm a mother of 6

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and grandmother of 15, and I have two of my grandchildren here today. And I'm formerly from Dawson County, and now I live in Lincoln. I just watched Mr. Smith Goes to Washington, which I think should be mandatory for each Legislature to watch prior to the legislative session. The old movie shows powers that be versus a humble and honorable man trying to do the right thing for the people he serves, without compromise. According to the Bible, which is our guidebook, we often set aside 1 Timothy 2:2: Pray for those who are in authority over us, in places of high responsibility, so that we can live peaceful and quiet lives, spending our time in godly living and thinking much about the Lord. This is good and pleases our Savior. And that's what I endeavor to do. I e-mailed each of you senators a few days ago concerning my views on the death penalty, and I've had seven responses from senators. And I would like to address the death penalty issue. God's laws haven't changed; we have. And he made laws for our purpose and for our good. And I just read this from the Wikipedia, encyclopedia on the Internet. Since we pay attention to surveys, I would like to just throw this one in. An ABC News survey in July of '06, 65 percent of the people favored capital punishment. Half the American public say the death penalty isn't imposed frequently enough. And nine states, which I observe from the Legislative Update that I received just this week, show that nine states are without the death penalty. And do we have to be among those states? Nebraska has only three executions in how many years, 26 years. So I'm asking myself, why are we spending so much time debating this issue? I agree with Senator Tom Carlson, the judicial system needs to be fixed. There is too much time lapse for someone to be 15 years on death row and not receive the punishment for the crime he deserves in a timely manner. And from the Lincoln Police Department, Jim Davidsaver said, an absolute requirement is to maintain the integrity of the judicial system and ensure justice is served. And Senator Ernie Chambers, I know you need a legacy, and may a summarization of your tenure be introduced in the legislation, that you introduced the death penalty in each of the sessions that you've been a part of, not that the Legislature would agree and vote to abolish the death penalty. [LB377]

SENATOR LATHROP: Thank you, Ms. Anderson. Are there any questions? Okay. Thank you for coming down today. [LB377]

JOE KELLY: Mr. Chairman and members of the committee, my name is Joe Kelly. I'm the chief deputy Lancaster County attorney. I'm here in opposition of this bill, on behalf of my office and Mr. Lacey's office. I'll make these comments to you, and I've tried to pick out some of the biggest issues that we have with this particular provision. This bill requires prosecutors to prove certain things beyond a reasonable doubt that, frankly, I don't think prosecutors ever can prove beyond a reasonable doubt. Frankly, we just doubt if it could ever be done in any case. So would it fit anyone? We are very, very skeptical about that. First of all, showing that someone poses a present and substantial risk to the lives of others, followed by showing that the person cannot reasonably and effectively be controlled by institutional security measures. The clear implication to us is that our burden will be to prove that future. Our burden will be to prove the future

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beyond a reasonable doubt, and we cannot meet that burden. A second point regards the retroactivity issue. And I'll say this, I think the legislative findings at the beginning of this bill, as well as the effective date language in Section 5, invite appellate courts to apply this law retroactively. It is my opinion that they would do just that. It is my opinion that everybody on death row or in the appellate process would receive a new sentencing hearing, under this provision. I say that because in Section 1, your bill states that the death penalty is fraught with errors, delayed due to mistakes, not uniformly enforced, results in inequalities. An appellate court searching for a reason for terms or for legislative intent could easily take that and use that as the basis of striking the entire provision. At the end of page 5, this bill...or, amendment states, to the extent possible, this law applies to any murder sentencing proceeding occurring after the effective date. The very language "to the extent possible" indicates to us an acknowledgement of what I think is the obvious--this is a substantive change. When we were here five years ago, dealing with the LB1 special session on the Ring decision, we talked at length about the difference between a procedural change and a substantive change. It was our opinion that we were dealing with a procedural change that would not be applied by the courts retroactively. To that extent, our decision...or, our opinion was borne out. It's our opinion here that this would apply retroactively. I think...that's my time. [LB377]

SENATOR LATHROP: Pardon me. Are there any questions for Mr. Kelly? Senator Chambers. [LB377]

SENATOR CHAMBERS: Mr. Kelly, this is one of those times I'm not going to banter with you, because you recognize how serious the issue is, and I do, too. So my question is asked as straightforward as I can. Are you aware that there are other states that do have a provision very similar to this in Nebraska, where that particular element must be found beyond a reasonable doubt? [LB377]

JOE KELLY: I am aware of other states who have an aggravator like this. I'm not aware...and I haven't done my complete research, and I think some other people might talk to that, because of the quickness of this entire issue. But it's my understanding that that's an additional aggravator, and not an additional super hurdle that the state has to jump over in order to get the death penalty. [LB377]

SENATOR CHAMBERS: That's all I have. Thank you. [LB377]

JOE KELLY: Okay. [LB377]

SENATOR LATHROP: Senator Pirsch. [LB377]

SENATOR PIRSCH: I'm sorry, just in terms of background, just ask the same question. Do you handle...you're chief deputy there at Lancaster County, is that correct? [LB377]

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JOE KELLY: Right. [LB377]

SENATOR PIRSCH: How many murder cases are handled by your office, per year? [LB377]

JOE KELLY: Fifteen to 20 first-degree murder cases. [LB377]

SENATOR PIRSCH: How long have you been with the office? [LB377]

JOE KELLY: Twenty-five years, something like that. [LB377]

SENATOR PIRSCH: Thank you. [LB377]

SENATOR LATHROP: Mr. Kelly, maybe I could ask just a couple of questions. Can you tell us what it means to be a death penalty eligible first-degree murder? [LB377]

JOE KELLY: That, to me, means that the prosecutor has reviewed the file and the history, the known history of the offender and determined that there are aggravators, under our present system, that I've found that there's aggravators. He's committed a murder before, or the murder was committed for hire, whatever aggravator we've chosen. At that point, to me, that case is death penalty eligible. [LB377]

SENATOR LATHROP: The fact that it's death penalty eligible does not mean that the prosecutor will necessarily seek the death penalty. Is that right? [LB377]

JOE KELLY: That's correct. [LB377]

SENATOR LATHROP: For a variety of reasons. [LB377]

JOE KELLY: Variety of reasons, proof problems, whatever. [LB377]

SENATOR LATHROP: Okay. But that can...the decision to seek the death penalty or not can leave some people who would be among the worst of the worst not facing the death penalty, and apparently only 38 people that ever got it. Is that true? [LB377]

JOE KELLY: I understand what you're saying, and yes, what you're saying is true. And if I can just explain, all I want to say is, when I make that death qualified determination, that doesn't mean I think I have great strength or...it's not an evaluation on the strength of the evidence for the aggravators. And a lot of times, I don't really figure that out until I get halfway through the case, or even close to sentencing. Oh, you know what, that case back in Missouri, I don't really have a witness, you know, whatever it is. So I learn about the strength of that aggravator as the case goes on. But under this current scheme, I've got to allege it up front, if I'm going to. [LB377]

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SENATOR LATHROP: Well, you have to allege an aggravator at the outset, am I right? [LB377]

JOE KELLY: You bet. You bet. [LB377]

SENATOR LATHROP: And what you're suggesting is, even though there may be aggravators present in a particular case, making it death eligible, there may be circumstances that lead you to exercise some judgment and not seek the death penalty? [LB377]

JOE KELLY: That's correct. [LB377]

SENATOR LATHROP: And in fact, would it surprise you to know there are nearly 200 death penalty eligible cases since the return of the death penalty in Nebraska? Do you have a quarrel with that number? [LB377]

JOE KELLY: I don't know where the number comes from. What did...I've heard the number used before, but the question is, what did they use for their definition of death eligible? [LB377]

SENATOR LATHROP: Well, my question was whether or not you have an argument, dispute. Is it only 38, or do you think 200 is probably pretty close to the number of homicides in the state of Nebraska since the death penalty came back where an aggravator was present? [LB377]

JOE KELLY: Well, we've only had aggravators for five years, so I would probably agree with that. [LB377]

SENATOR LATHROP: All right. [LB377]

JOE KELLY: Well, we've had aggravators since then. We've only been...we've only had to put it into our information since then. [LB377]

SENATOR LATHROP: Okay. [LB377]

JOE KELLY: Just so I'm clear. [LB377]

SENATOR LATHROP: Good. Thank you. [LB377]

JOE KELLY: Thank you. [LB377]

STEVE GABRIAL: Mr. Chairman, members of the commission, my name is Steve

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Gabrial, and I work in the Douglas County attorney's office, and I'm here to testify today in opposition to the proposed law, and I'm here to testify on behalf of the Nebraska County Attorneys Association, as well as the Douglas County attorney's office. We, as an organization...or, as organizations, have some concerns with the law as it is written. Obviously, and you're certainly aware of this, one of the primary responsibilities that county attorneys in this state and their offices have is to ensure and to enforce the law in a fair manner. And in our opinion, the law as written will effectively prevent us from being able to enforce a law that will be on the books. In other words, we will still have a capital punishment law on the books, but because of the way this law is written, we will...there's no way that we can realistically ever prove, as Joe Kelly said just a minute ago, what we would be required to prove in order to get the death penalty in a particular case, and even if it's a deserving case. Other concerns that we have is, even if we were able to, theoretically, be able to prove that someone presents a risk, a substantial risk to the lives of others that can't be reasonably and effectively addressed by an institutional setting, even if we were able to do that, we have...one problem we have is that we are punishing people...we would, in effect, be punishing people not for what they did, but rather for what they might do. And in fact, you could have a situation where two people commit basically the same crime, and maybe the identical crime--they could have been involved in the same murder and be the types of people that deserve the death penalty--and yet one person might get the death penalty in that case because he or she is determined to be a substantial risk that can't be reasonably and effectively addressed by the institution, whereas his codefendant, or her codefendant, can't be, you can't prove it, and it isn't determined that they're a substantial risk. And so you will have a problem with unequal treatment with like defendants. Finally, we have some concerns about the costs that are involved with something like this--not only the costs that would be involved in the actual trial itself and attempting to try to prove what is required to be proved under the statute, that may entail having expert witnesses that we would not normally have to have; but also collateral costs that might be associated with this, for example, the appeals that would be instituted by the defense to challenge some of the language that we see in the bill, for example, what does "substantial"...what does "effectively controlled" mean, what does "substantial risk" mean? And so we feel that that would be a problem, as well. And another cost that would be involved, or the cost of litigating...litigation that might be...might result from the defense challenging or arguing that this should be applied retroactively, versus proactively. And Joe Kelly addressed that to a certain extent. The bottom line is that we are in opposition. We have always maintained a neutral position with respect to the death penalty itself, the death penalty law itself. But with regard to this particular law, we are in opposition to it, for the reasons I've stated, those being that it will effectively prevent us from fulfilling our responsibilities as law enforcement in the state of Nebraska, and it will...I see the red light is on, so that's all I have to say. [LB377]

SENATOR LATHROP: Okay. Just a moment. Senator Chambers. [LB377]

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STEVE GABRIAL: Yes. [LB377]

SENATOR CHAMBERS: Mr. Gabriel,... [LB377]

STEVE GABRIAL: Yes, sir. [LB377]

SENATOR CHAMBERS: ...how long have you worked with the Douglas County attorney's office? [LB377]

STEVE GABRIAL: I have worked in the Douglas County attorney's office since January, so about three and a half months. [LB377]

SENATOR CHAMBERS: So you don't have any experiential background with the Douglas County attorney's office, other than the three months that you've been there? [LB377]

STEVE GABRIAL: Well, not directly, although I did do...I did prosecute some cases on behalf of Douglas County when I worked in the Attorney General's Office in Lincoln. I worked there prior to working in the Douglas County attorney's office. [LB377]

SENATOR CHAMBERS: So how long had you worked with the Attorney General's Office? [LB377]

STEVE GABRIAL: A little over three years. I was in the child protection division, and I prosecuted child abuse cases. [LB377]

SENATOR CHAMBERS: So that would be the totality of your prosecutorial experience? [LB377]

STEVE GABRIAL: No. Prior to that, I was in the Air Force for almost 26 years, and I was a prosecutor for many years in the Air Force. [LB377]

SENATOR CHAMBERS: Did you prosecute criminal offenses under the Code of Military Justice? [LB377]

STEVE GABRIAL: In the Air Force? Yes. Yes, sir, I did, including a capital murder case. [LB377]

SENATOR CHAMBERS: And did you win that case? [LB377]

STEVE GABRIAL: No, the individual was given a life sentence. We did not get a unanimous verdict on the death penalty. [LB377]

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SENATOR CHAMBERS: You assumed that when I said "win," that it came out the way you wanted it to. Was justice served in that case? [LB377]

STEVE GABRIAL: Well, that depends on your definition of justice, and... [LB377]

SENATOR CHAMBERS: Well, I mean you, as... [LB377]

STEVE GABRIAL: I mean, it really does. In my opinion, no, because that was a very bad guy who was a very dangerous person, and still is. [LB377]

SENATOR CHAMBERS: Are you familiar with the case of a man named Clarence Victor, who was on death row in Nebraska? [LB377]

STEVE GABRIAL: No. No, sir, I'm not. [LB377]

SENATOR CHAMBERS: You mentioned something about codefendants, one receiving the death penalty and the other not. [LB377]

STEVE GABRIAL: Theoretically, yes, under these provisions. [LB377]

SENATOR CHAMBERS: Well, actually, are you aware of an instance where two persons were involved in a murder, and the one who actually did the deed may have been the one to turn state's evidence on the other, and the other one got the death penalty, and that one did not get it? [LB377]

STEVE GABRIAL: I have no doubt that's the case. That's certainly happened. [LB377]

SENATOR CHAMBERS: And that happens right now, doesn't it? [LB377]

STEVE GABRIAL: Certainly does. But... [LB377]

SENATOR CHAMBERS: So that by itself is not an argument against what's proposed here, is it? If that's one of your arguments, and that happens under the current system, if that's not an argument against the current system, how can it be an argument against this? [LB377]

STEVE GABRIAL: Well, I'm not sure it's an argument for the proposed legislation either, just because a deserving individual fails to get the punishment that he got doesn't mean that you take another deserving individual, in my opinion--this is just my opinion--doesn't mean you take another deserving individual and let him off the hook and not get the punishment he deserves. [LB377]

SENATOR CHAMBERS: That's known in some places as selective law enforcement,

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and it's practiced, and some people think it's all right. But I want to limit what I have in exchange with you to questions, and not argument. [LB377]

STEVE GABRIAL: Yes, sir. Yes, sir. [LB377]

SENATOR CHAMBERS: Even though the questions may seem argumentative, that's not my purpose. Crimes in Nebraska are all statutory. There are no common law crimes in Nebraska. Do you agree with that? [LB377]

STEVE GABRIAL: I agree with that, to the best of my knowledge. [LB377]

SENATOR CHAMBERS: Your...that's true, but I'm just establishing for the record. [LB377]

STEVE GABRIAL: Sure. [LB377]

SENATOR CHAMBERS: We're on the same page. The only way a crime can come into existence is if the Legislature creates it. Do you agree with that? [LB377]

STEVE GABRIAL: Yes. [LB377]

SENATOR CHAMBERS: And the Legislature must establish the elements of that crime when it creates the crime. Do you agree with that? [LB377]

STEVE GABRIAL: Yes. [LB377]

SENATOR CHAMBERS: And when a criminal prosecution is brought, every element must be proved beyond a reasonable doubt. Do you agree? [LB377]

STEVE GABRIAL: That's true. Yes, sir. [LB377]

SENATOR CHAMBERS: The Legislature formulates policy for the state. Do you agree with that? Which body, other than the... [LB377]

STEVE GABRIAL: Yes. [LB377]

SENATOR CHAMBERS: ...Legislature, establishes the public policy of the state? [LB377]

STEVE GABRIAL: I'll agree with that. [LB377]

SENATOR CHAMBERS: Okay. If the Legislature chooses to enact a law of the kind we're discussing today, that would be a policy decision taken by the Legislature. Would

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you agree with that? [LB377]

STEVE GABRIAL: Yes. But I would also add that I think it's bad policy, because it effectively, as I said, will result in a law being on the books that's unenforceable. [LB377]

SENATOR CHAMBERS: Well, that's beside the point. That's the point that you brought when you came here. [LB377]

STEVE GABRIAL: Yes, sir. [LB377]

SENATOR CHAMBERS: But the Legislature makes the determination of what it feels, collectively, is in the best interest of the state, when it enacts a policy decision. [LB377]

STEVE GABRIAL: You would like to think that they do that, yes, sir. [LB377]

SENATOR CHAMBERS: Okay. So regardless of what prosecutors may feel in terms of the impact that policy decision may have on their job, they still would do their job based on what the law is at the time they're called on to do their job. Would you agree? [LB377]

STEVE GABRIAL: If I think...if I understood your question correctly, we will continue to do the job to the best of our ability. [LB377]

SENATOR CHAMBERS: And if a policy adopted by the Legislature makes that job more difficult, that's a complaint you might have, but that does not nullify the validity of that policy, does it? [LB377]

STEVE GABRIAL: Well, if it just makes your... [LB377]

SENATOR CHAMBERS: Who determines that the policy is invalid? [LB377]

STEVE GABRIAL: If it makes your job more difficult, that's one thing. But what I'm saying is, this makes our job impossible. And we're the ones that have to meet with the victims and try to explain to the victims and the public why it is that we have the death penalty in Nebraska but we can't pursue it. [LB377]

SENATOR CHAMBERS: Well, you don't have to explain that. You just say, the law of Nebraska is what it is. Why cannot there be a mandatory death penalty in this country? Are you aware that there cannot be a mandatory death penalty in this country? Are you aware of that? [LB377]

STEVE GABRIAL: Well, I thought we were talking about Nebraska, but I'm not sure

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what that means. [LB377]

SENATOR CHAMBERS: Well, that would mean that Nebraska cannot enact a mandatory death penalty law also. First of all,... [LB377]

STEVE GABRIAL: Oh, yes, that's correct. I understand that. [LB377]

SENATOR CHAMBERS: Right. And that has been a principle established by the U.S. Supreme Court, isn't that correct? [LB377]

STEVE GABRIAL: I understand what you're saying. [LB377]

SENATOR CHAMBERS: So then,... [LB377]

STEVE GABRIAL: And I think the system that we have in Nebraska right now is satisfactory. [LB377]

SENATOR CHAMBERS: So if there were a murder committed, but it did not contain the aggravators, you'd have to explain that to a victim's family, wouldn't you, why you couldn't seek the death penalty? [LB377]

STEVE GABRIAL: That is true. That is true. [LB377]

SENATOR CHAMBERS: You're paid to do difficult things, aren't you? [LB377]

STEVE GABRIAL: That is true. I'll agree with that. [LB377]

SENATOR CHAMBERS: And part of that job is to talk to victims' families and explain why you do what you do. Isn't that true? [LB377]

STEVE GABRIAL: As well as testifying in front of committees. Yes, sir. [LB377]

SENATOR CHAMBERS: And as long as you are willing to do that job, you hold on to it, is that true? [LB377]

STEVE GABRIAL: Yes, that's true. [LB377]

SENATOR CHAMBERS: And when the job becomes untenable, or too difficult for you to carry out your duties under that job, you leave the job. Is that correct? [LB377]

STEVE GABRIAL: You can certainly leave it. That's correct. [LB377]

SENATOR CHAMBERS: Thank you. That's all that I have. [LB377]

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STEVE GABRIAL: Any other questions? [LB377]

SENATOR LATHROP: Senator Pirsch. [LB377]

SENATOR PIRSCH: Just briefly, now,...and I don't know if you have the back...let me ask you this question. How long did you say you've been in Nebraska, then, with the Attorney General's Office? [LB377]

STEVE GABRIAL: Well, I retired from the Air Force in 2002. I started work in the Attorney General's Office in 2003, so going on about four years. And I did participate in the prosecution of a capital murder case here in Nebraska, Arthur Lee Gales, Jr. [LB377]

SENATOR PIRSCH: I see. And did you participate, or were you there in some capacity with regards to...I think it had been alluded to, a case Senator Chambers had brought up, of Jeremy Sheets' case? Were you involved in that case at all? [LB377]

STEVE GABRIAL: No, but I did see that case on-line, as one of the people that opponents of the death penalty claim is an innocent person who was released from death row. And so that, of course, got me concerned. And I looked into that case and read the appellate decision, which did not say he was innocent. [LB377]

SENATOR PIRSCH: What was the holding in the...what was the situation of the Sheets' case? [LB377]

STEVE GABRIAL: The holding was that they had let in some inadmissible hearsay evidence. But the Supreme Court specifically found that the evidence was still sufficient, and that's why they allowed a retrial. Even absent the error, the evidence was still sufficient, and they allowed a retrial. And why the prosecutor...I haven't talked to the prosecutor. Why the prosecution declined to retry the case I have no idea, but I suspect it's because the person, their primary witness, was dead,... [LB377]

SENATOR PIRSCH: I see. [LB377]

STEVE GABRIAL: ...which was the whole problem in the first case. The primary witness died and committed suicide before the trial, and the trial...prosecutor admitted or offered into evidence, and had admitted into evidence, hearsay statements from the witness. And on appeal, the appellate court said that was in error. But they were...they, again, allowed a retrial in the case. They did not say that Jeremy Sheets was innocent. [LB377]

SENATOR PIRSCH: Thank you. [LB377]

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SENATOR LATHROP: Senator Chambers. [LB377]

STEVE GABRIAL: Yes, sir. [LB377]

SENATOR CHAMBERS: Mr. Gabriel, the reason I'm asking you these questions is because you're speaking on behalf of the County Attorneys Association, if I understand you correctly,... [LB377]

STEVE GABRIAL: Correct. [LB377]

SENATOR CHAMBERS: ...as well as the Douglas County attorney's office. [LB377]

STEVE GABRIAL: That is correct. [LB377]

SENATOR CHAMBERS: All right. You're familiar with the principle that a person is innocent till proved guilty? [LB377]

STEVE GABRIAL: Of course. [LB377]

SENATOR CHAMBERS: And you say that Jeremy Sheets, at one stage, had been proved guilty because he was convicted and sentenced to die. Would you agree with that? [LB377]

STEVE GABRIAL: Yes, legally. [LB377]

SENATOR CHAMBERS: When the Supreme Court reviewed the case, they determined that evidence which ought not to have been allowed in had been allowed in, and the conviction could not stand. Is that true? [LB377]

STEVE GABRIAL: That's true. They reversed the case. That is correct. [LB377]

SENATOR CHAMBERS: So when this person came...when the case went back for a new trial, the presumption of innocence attached, since it's for a new trial, not just a resentencing. Isn't that true? [LB377]

STEVE GABRIAL: Well, that's true, but that doesn't mean the person is innocent. [LB377]

SENATOR CHAMBERS: But,...please, because you're an officer of the court, and you believe in Anglo-Saxon jurisprudence. The presumption of innocence attached at that time. Is that true, since it's back here for a new trial? [LB377]

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STEVE GABRIAL: In the legal context, yes, sir. [LB377]

SENATOR CHAMBERS: But your view is that despite that, he's guilty? [LB377]

STEVE GABRIAL: No, I didn't say that. I said he wasn't innocent, that no one has ever proved that he's innocent. [LB377]

SENATOR CHAMBERS: So Jeremy Sheets, in effect, was an innocent person who was in prison. [LB377]

STEVE GABRIAL: No, I don't believe that. [LB377]

SENATOR CHAMBERS: Had it been proved? [LB377]

STEVE GABRIAL: He was found guilty and sentenced and put in prison. [LB377]

SENATOR CHAMBERS: But the case...that didn't end the case. The case came back, and the prosecutor chose not to prosecute. Is that correct? [LB377]

STEVE GABRIAL: That's my understanding. That's correct. [LB377]

SENATOR CHAMBERS: And that man, then, he was presumed to be innocent. Is that correct? [LB377]

STEVE GABRIAL: Yes, that is correct. [LB377]

SENATOR CHAMBERS: Would you have wanted him to go back to prison without a trial, because you were convinced he was guilty? [LB377]

STEVE GABRIAL: No, of course not. No, of course not. And I'm not necessarily convinced he's guilty. What I'm saying is, it's overstating the case to say that he's innocent just because he wasn't retried. That's all I'm saying. [LB377]

SENATOR CHAMBERS: Are you aware that there are people committed far worse murders in terms of the method used, of heinousness, the apparent relishing of the crime, those kinds of murders committed in Nebraska, but pursuant to plea bargain, there was no death penalty sought? [LB377]

STEVE GABRIAL: I'm not personally aware of those, but I'm sure that's happened. [LB377]

SENATOR CHAMBERS: So then the worst of the worst are not necessarily on death row. Is that correct? [LB377]

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STEVE GABRIAL: No, I don't agree with that. I'm only personally familiar with one person on death row, and that's Arthur Lee Gales, Jr., and he's the worst of the worst, Senator. [LB377]

SENATOR CHAMBERS: Well, if I gave you information as established from court records, you'd be able to draw a conclusion for yourself by reading the facts as found by the court. Wouldn't you be able to do that? [LB377]

STEVE GABRIAL: I don't...honestly, sir, I don't understand that last question. I really don't. [LB377]

SENATOR CHAMBERS: All right. If you read the facts as found by the court in first-degree murder cases,... [LB377]

STEVE GABRIAL: Yes. [LB377]

SENATOR CHAMBERS: ...you'd be able to look at the facts as found by the court to make a comparison among various cases where facts also had been found, and the comparison could lead you to the conclusion that some of these murders were "worse," and I put that in quotation marks, than some of those committed by people on death row. You'd be able to make that comparison, wouldn't you? [LB377]

STEVE GABRIAL: Yes, I agree with that. I...if that...yes. [LB377]

SENATOR CHAMBERS: Okay. And that's all I'm asking. [LB377]

STEVE GABRIAL: I agree with that. [LB377]

SENATOR CHAMBERS: I don't want to push you beyond what you personally know. Thank you. [LB377]

STEVE GABRIAL: I understand. I agree with that, Senator. [LB377]

SENATOR CHAMBERS: Okay. [LB377]

SENATOR LATHROP: Thank you. Any other questions? Seeing none, thank you for your testimony. [LB377]

STEVE GABRIAL: All right. Thank you. [LB377]

SENATOR LATHROP: Appreciate you coming down, Mr. Gabriel. [LB377]

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VIRGIL JACOB: (Exhibit 12) Senator Lathrop, other senators of the committee, this is some very important information to be considered in opposition of LB377. [LB377]

SENATOR LATHROP: Sir? [LB377]

VIRGIL JACOB: I only represent the people... [LB377]

SENATOR LATHROP: Sir. Could you give us your name, spell your last name for me? [LB377]

VIRGIL JACOB: I'm sorry. My name is Virgil Jacob, J-a-c-o-b. [LB377]

SENATOR LATHROP: Okay. Thank you. [LB377]

VIRGIL JACOB: I only represent the people who researched this information. I have a copy of this information, "The Meaning of Life," for each of you, which she's handing out, and one for the record, that pertains to why LB377 cannot be passed without changing the Constitution of the state of Nebraska. Copies of this article were sent to each and every Nebraska state legislator approximately one month ago, and there was no response. I personally am against the death penalty, but also against a life sentence without parole. Nebraska is the only state that has a constitution that overrules the legislators. The Article IV, Section 13 of the Nebraska Constitution forbids the legislation from creating criminal penalties without parole eligibility. This has not been changed since the 1920 Nebraska Constitutional Convention. I would like to quote from the Nebraska Constitution. Article IV, Section 13 of the Nebraska Constitution forbids the Legislature from creating criminal penalties without parole eligibility. The relevant portion of today's Article IV, Section 13 says: The Legislature shall provide for the establishment of a parole board and the qualifications of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judgment, under such conditions as may be prescribed by law, for any offenses committed against the criminal laws of this state, except treason and of impeachment. This article was researched by several people who worked in the law library for more than ten years at the Nebraska State Penitentiary. This was written by the legal aides and posted on the web site of www.nebraskapen.org. If you have any questions, I would have the names of these persons, and they would be more than glad to meet with any or all of you to clarify this situation. I personally am not knowledgeable to answer your questions about this, but the legal aides who personally researched and created this article really are, and they would be glad if any...to hear from you or have them visit and explain this, as they have researched it for many years. Any questions? [LB377]

SENATOR LATHROP: We'll see in just a second. Any questions from the committee? No, doesn't appear to be. Thank you for coming down, Mr. Jacob. [LB377]

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VIRGIL JACOB: I would like to have one request. Senator Pedersen I know is familiar with the person I'm speaking of, or the persons, and I would like for him to visit them. I can get with you and give their names and who to see. I think it's something that really needs to be looked into, because it involves a change in the Constitution of the state of Nebraska. [LB377]

SENATOR LATHROP: Okay. [LB377]

VIRGIL JACOB: Okay. [LB377]

SENATOR LATHROP: Thank you very much. We appreciate your input. [LB377]

BILL SUN: (Exhibit 13) Senators, thank you for giving me this opportunity to speak with you today. My name is Bill Sun, and I want to tell you about September 26, 2002, the day that my world was destroyed. Samuel Sun, my father, was shot in cold blood in an attempted bank robbery, a botched bank robbery in which no money was taken. The pain that I felt that day and every day since then is one that affects me in everything that I do. It is a pain that I try to forget, but I am never really able to let it go. I think back to that horrible day, and I can remember every detail. I remember sitting in my car at the postal exchange parking lot on Offutt Air Force Base, screaming in agony. I remember how I hit the steering wheel with my fists over and over again, yelling at the top of my lungs, this can't be true, oh God, don't let this be true. I remember how I felt the day the funeral home director handed me my father's personal effects and waited for me to pick out his casket. And I remember looking at the still photographs from the bank security cameras, knowing the precise moment my father was shot in the head. These are the images that haunt me to this day. Not a day goes by that I don't think about how much I miss my father. I think about how he will never meet my wife, and how someday my children will never meet their grandfather. I think how all of this pain and heartache was caused by men who feel no guilt, no remorse, and have no conscience. It pains me to think that in some way these men believe that they have become celebrities, and that they will not be punished for their crimes. I know this because I have looked at the faces of these men as they were given the death sentences. I know this because I have seen the smiles, the smirks, and the stone-cold glares on their faces as they were led out of the courtroom to the waiting television cameras. I believe that the death penalty was created for crimes that are so senseless and so heinous that there are no rational explanations for them. I believe that the death penalty was created for crimes such as the one that I just spoke of. The thought of these individuals living long lives and enjoying their delusional celebrity status at the expense of the hardworking people of Nebraska is worse than the senseless murder. It is worse because by allowing these evil people to enjoy the one thing that they took and destroyed, life, is like saying that my father, Sam Sun, was not as good as the men who murdered him, that he was not good enough to live. The death penalty is not about redemption. It is not about race, color, or creed. The death penalty is about justice. It is about not sentencing someone

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who has committed unspeakable acts to a long, healthy life with a roof over their head, free food to eat, and no bills to worry about, and trying to call it justice. I am in favor of the death penalty. I am in favor of taking a stand against those who choose to spend their last waking breath defending the criminals, all the while forgetting the victims. I ask you today to take a stand. Do not forget the victims. Keep the death penalty in Nebraska. Your actions can give hope to all of the victims. You can tell them by simply upholding the death penalty that their loved ones did deserve to live, that they are not forgotten, and that those that committed the acts are not more deserving of life. Thank you. [LB377]

SENATOR LATHROP: Thank you, Mr. Sun. Let's see if there are any questions from the committee. Seeing none, thank you for coming down. [LB377]

BEN SUN: My name is Ben Sun, S-u-n. I'm here before you today also as a surviving son of Samuel Sun, who was maliciously struck down without cause during the U.S. Bank massacre in Norfolk, Nebraska. Since that blood-drenched morning, there has been a pain inside me that has been growing with each passing day. And it feels that I'll explode at some points. And I know the only release that I'll ever have is when his murderer is justly executed. I've been told that if that murderer were sentenced to life, that I could finally move on with my life and find closure. I'm here to tell you that, no, I will not find closure, knowing that the man who murdered my father is sitting in prison, basking in the benefits of free room and board, without the slightest chance of feeling remorse. I will not find closure, knowing that the sociopath who killed my father will outlive my grandmother, who has been devastated since her son's death. I will not find closure knowing that someday that murderer could be free. I wouldn't, and I know that no other surviving victim could. How is that just? I read in a study that an average costs...it costs \$2 million more to execute a felon than it does to incarcerate them for 40 years. When I first read this, I questioned the validity of that number. It doesn't even seem logical that it costs less to house a prisoner that's less than...for less than 30 years than a 40-year term. My second thought was, I'm sure, the same as yours if you've heard same...a similar statistic, is, why? Why does it cost \$2 million to hold a prisoner for up to 30 or 40 years less than a life sentence? And the only answer I can think of is that there's something wrong with the death penalty and how it's carried out. But I'd beg you, do not abolish this entire system that provides the only equivalent punishment and brutally and vindictively ripping the innocent life out of a person's body, a life so dear to so many loved ones, with a bill that essentially eliminates the death penalty with legal terminology that I'm not sure anyone fully understands, just to save \$2 million. Revise the system; do not erase it with such terminology that is in this amendment. Two million dollars. I had no idea that such a price tag was on the peace, closure, and satisfaction of my family and so many others that are, by the Devil's hand, in the same shoes as I; \$2 million for the peace, closure, and satisfaction of, God forbid, all the husbands, wives, kids, and other loved ones that may someday in the future find themselves in my shoes. What an insult to them, to us. Two million dollars is quite the

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going rate for justice. Sometime during a millennium of official support for the death penalty from the Roman Catholic Church, St. Thomas Aquinas said that just as a physician beneficially amputates a diseased organ if it threatens the corruption of the body, so the ruler executes evil men just as sinlessly to protect the peace of the state. If not here in Nebraska, the heart of the country that is supposed to be the beacon of justice and liberty, where? Where will I tell my future children that they can find justice in this world? I beg you, do not again make victims of the surviving families who have already lost so much. Do not take justice away from them, from the deceased, from future victims and their families. Do not pass this amendment. [LB377]

SENATOR LATHROP: Thanks, Ben. Are there any questions? Thanks for coming down. We appreciate it. [LB377]

DENNIS VAN FOSSEN: Thank you. My name is Denny Van Fossen, V-a-n F-o-s-s-e-n. I came here today when I first heard the repeal of the death penalty. I thought, oh good, you know, it's over with. I support the simpleminded people, and I thought it was all said and done. But obviously, it is not. And so I thought, well, why are we doing this? Is this done because we're bitter? Are we angry about something? Is this why we're trying to get another appeal for murderers? And I thought about that for a while, and I sat there and told myself, you know, you were in the same boat as these people were. I had a family member killed about five years ago, a double murder, and the person who did the killing got a double life sentence from a three-judge panel. We were very angry. The person should have gotten the death penalty. That person didn't. And for a long time, we were bitter and angry about it. And finally, one day, we kind of got together at a reunion and says, hey, you know, maybe we better move beyond this. You know, what is done, what judges have decided, has been decided. We all know that judges make different decisions on different things. Two of them can listen to the same thing and one give one observation or sentence, another one give another one. Was it a judge in western Nebraska, didn't send somebody to prison because they were too short? That's the way it is. That's the way our system is. And this bill...very simply, what this bill does, it gives another chance for appeal for murderers. That's what it does, another chance. They have too many chances already, but this is just another chance for those people to get another chance for appeal to get out of their death sentence. I think this committee, to be honest with you, I think it needs to move on to other things, and I think we can be more productive by doing that. Thank you. [LB377]

SENATOR LATHROP: Very good. Appreciate your thoughts. [LB377]

DENNIS VAN FOSSEN: Thank you. [LB377]

SENATOR LATHROP: Let's make sure no one has a question for you. [LB377]

DENNIS VAN FOSSEN: Oh, I'm sorry. [LB377]

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SENATOR LATHROP: Doesn't appear to be. Thanks for coming down, Mr. Van Fossen. [LB377]

DENNIS VAN FOSSEN: Thank you. [LB377]

SENATOR LATHROP: Are there any other opponents, care to testify? How about those in a neutral capacity? Anyone here in a neutral capacity? [LB377]

KIRK BROWN: (Exhibit 14) Mr. Chairman, I'm Kirk Brown. I'm currently the Solicitor General for the state of Nebraska. And for approximately 20 years I have defended first-degree murder sentencing process enacted by this Legislature. Out of deference to the senior senator and out of deference to the Legislature as a coequal branch of government, the Attorney General has requested that I appear here today and testify neutrally on this legislation. That said, we have significant concerns about these amendments. First, let's not kid ourselves, the language of these amendments would effectively end the death penalty in Nebraska. We also have significant concerns about the practical and ethical problems this amendment would cause Nebraska's prosecutors. The amendment requires prosecutors to prove what might happen in the future. That approach is both unworkable and, in our judgment, unfixable. When confronted directly with the question of repealing the death penalty, this session has already rejected that proposal. This amendment appears to attempt to accomplish indirectly what the session has already refused to do directly. This amendment would make it virtually impossible to obtain a death sentence, regardless of how many lives the murderer has snuffed out or how horribly the victim suffered before their death. This amendment would not reserve the death penalty for the worst first-degree murders. Instead, it would exempt the worst of our first-degree murderers from the punishment they could receive under current Nebraska law. This amendment will certainly, if enacted, create new litigation with regard to both new first-degree murder cases and old first-degree murder cases. Our current first-degree murder sentencing system is not broken, but this amendment has the capability to break it. Second, Nebraska has a long and proud history of requiring that sentencing decisions be based upon provable facts. For the first time in the history of Nebraska, to my knowledge, this amendment requires a sentencing decision to be based upon raw speculation about the future, the future behavior of a convicted first-degree murderer. We believe our current first-degree murder sentencing system, based upon facts capable of proof, produces the most accurate sentencing decisions, and therefore is the best public policy. Third, it borders on the impossible to prove at all, much less prove beyond a reasonable doubt, what will take place in the future, if that is what the language of these...this amendment requires the state of Nebraska to prove before a sentence of death may even be considered, much less imposed. Fourth, we note that no other state in this country uses language even remotely similar to the "effective security" language of the amendment to sentence their first-degree murderers. Only three states currently include speculation about a

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murderer's future behavior in their first-degree murder sentencing process, that we have discovered. None of those states have enacted language even remotely similar to what is contained in these amendments. No state has experience with similar language. And there is no case law in this country discussing similar language. Finally, we all know about, both prison staff and prisoners are assaulted and killed within the walls of even our best prison systems. Since 1993, two Nebraska prisoners have been murdered by fellow prisoners. Each of those victims was murdered by a person already serving a sentence of life without parole for first-degree murder. There was never a finding in either case that, quote, reasonable institutional security measures were not being employed at the time those murders were committed. The existence of the reasonable institutional security measures language mentioned in the amendments does not ensure a convicted murderer already serving a sentence of life without parole will not murder again. No correctional professional worth his salt is going to come into a courtroom and say, I don't think we'll be able to control this individual, because controlling all prisoners is the professional responsibility of correctional professionals. I think they do, as somebody previously mentioned, a good job in this state. That does not ensure that these types of homicides by these types of human beings will not occur again. I thank you for your time, and I'd be happy to entertain any questions the committee might have. [LB377]

SENATOR LATHROP: Very good. Thank you, Mr. Brown. Senator Chambers. [LB377]

SENATOR CHAMBERS: Mr. Brown, if I understood you correctly, you said no other state in the country has language of this kind, which would mean that if Nebraska adopted this, it would be the only state with language of this kind on its books. Is that true? [LB377]

KIRK BROWN: There are three states that use future dangerousness as an aggravator, but their definition of future dangerousness is significantly broader than the language in this amendment. That's my point. [LB377]

SENATOR CHAMBERS: Okay, but there is similar type...a similar approach taken in other states. [LB377]

KIRK BROWN: Yes, Senator. I think in the handout, Texas...I was able to find language in Texas, Virginia, and Oregon, where the language is almost identical whether there is a probability that the defendant would commit criminal acts of violence--not necessarily homicide--and that would constitute a continuing threat to society. That language is contained, but it doesn't...that is not the same language that is in these amendments, and none of these involve the correctional component that is contained in the language of these. That was the point I was attempting to make. [LB377]

SENATOR CHAMBERS: Okay, and I'm not quarreling with that. I did get that from what

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you'd said. [LB377]

KIRK BROWN: Okay. [LB377]

SENATOR CHAMBERS: Do all states that have aggravating circumstances have the identical aggravating circumstances? [LB377]

KIRK BROWN: No, that's a matter of policy for their individual legislatures. [LB377]

SENATOR CHAMBERS: So legislatures do decide to develop policy positions different from those in other states. Would you agree? [LB377]

KIRK BROWN: That's true. My point with regard to the language is, Senator,... [LB377]

SENATOR CHAMBERS: No I understand. I'm not... [LB377]

KIRK BROWN: ...we will be...we'll be arguing about it. But no, you're absolutely right. [LB377]

SENATOR CHAMBERS: Okay. You were not unclear. [LB377]

KIRK BROWN: Okay. (Laugh) [LB377]

SENATOR CHAMBERS: You were not disingenuous. I'm not even dealing with that. I'm speaking as a legislator, remember, and we're trying to formulate policy, and we want to get input from the public. Name me one other state in this country which has electrocution as the sole means of execution. [LB377]

KIRK BROWN: As the sole means, there is none. [LB377]

SENATOR CHAMBERS: But you would defend execution by the electric chair as constitutional, wouldn't you, as a member of the Attorney General's Office? [LB377]

KIRK BROWN: I do. That's my obligation as long as that's the choice of this Legislature. [LB377]

SENATOR CHAMBERS: And if this law were attacked, you would defend this law, wouldn't you? [LB377]

KIRK BROWN: I would if I thought I could. [LB377]

SENATOR CHAMBERS: So the Attorney General's job is not, as stated in statute, a mandate to defend enactments of the Legislature that are challenged in court? Is that

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mandatory, or is that discretionary? [LB377]

KIRK BROWN: That's mandatory. My only hesitation, Senator, in giving you a blank answer is, if circumstances arose in which simply, ethically, as an attorney I could not conceive of a defense for that statute, I would be compromised. Absent that, we have an affirmative obligation to defend any enactment of this Legislature. [LB377]

SENATOR CHAMBERS: Right. When I say "you," I'm speaking of the Office of Attorney General, because you're not here speaking as J. Kirk Brown; you're here speaking as J. Kirk Brown, representing the Office of the Attorney General. Is that your role here today? [LB377]

KIRK BROWN: That's certainly the understand I was given, yes. [LB377]

SENATOR CHAMBERS: And if you had had your way and your wish, you would have come here in opposition to the bill, wouldn't you...this amendment, wouldn't you? [LB377]

KIRK BROWN: If I were here as a citizen, yes, I would have. [LB377]

SENATOR CHAMBERS: And if you could have persuaded the Attorney General, you would have come in to speak against this amendment, wouldn't you? [LB377]

KIRK BROWN: I'm sorry, Senator. I didn't follow that. [LB377]

SENATOR CHAMBERS: If you were going...if the Attorney General were discussing the position his office ought to take on this amendment, you would have argued that his office should have come in, in a position opposing this amendment, wouldn't you? [LB377]

KIRK BROWN: Yes. [LB377]

SENATOR CHAMBERS: Okay. But being a good employee, you acceded to the decision made by your superior. Is that correct? [LB377]

KIRK BROWN: I am not the elected Attorney General. That's another policy issue where we leave that to the elected individuals. [LB377]

SENATOR CHAMBERS: But he is your superior, correct? [LB377]

KIRK BROWN: Oh, yes, he is. [LB377]

SENATOR CHAMBERS: And he makes the policy for that office. Is that correct?

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[LB377]

KIRK BROWN: That's correct. [LB377]

SENATOR CHAMBERS: And if he directs you to take a position representing your office, that's what you do. Is that correct? [LB377]

KIRK BROWN: I would if I thought I could ethically do so, yes. [LB377]

SENATOR CHAMBERS: Well, today...you must have felt you could ethically be neutral today, didn't you, or you wouldn't have come. Is that true? [LB377]

KIRK BROWN: Maybe I should clarify, Senator, I'm not sure that...when I say I would oppose it, I oppose this...my personal opposition, if I were to express it, is simply because I don't see the system is un...is workable. I don't think it accomplishes what an aggravator should accomplish. Whether this body has the ability to enact it is not something I'm here to argue about. I'm simply trying to inform the committee. [LB377]

SENATOR CHAMBERS: I understand that. But your opposition, even at the personal level, does not rise to the level of unethical opposition, does it? [LB377]

KIRK BROWN: Not...you mean with respect to my testimony? No. [LB377]

SENATOR CHAMBERS: Yes. Okay. Were you working for the Attorney General's Office when the case of Clarence Victor, which resulted in his being removed from death row, took place? [LB377]

KIRK BROWN: I was. [LB377]

SENATOR CHAMBERS: Are you aware that the court that sentenced Clarence Victor to death was the Douglas County District Court? [LB377]

KIRK BROWN: Yes. [LB377]

SENATOR CHAMBERS: And that...when we passed a law as the Legislature saying that a person who is mentally retarded could not be executed, it was maintained by his defense counsel that Clarence Victor fell under the requirements of that law and should be removed from death row, and that issue was taken back to Douglas County District Court. Is that more or less accurate, without legalese? [LB377]

KIRK BROWN: I think that's completely accurate. The Legislature afforded him an opportunity to litigate that question once they created that exemption. [LB377]

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SENATOR CHAMBERS: And Douglas County District Court was the place where it could be litigated, and in fact, that happened. [LB377]

KIRK BROWN: Yes, it did. [LB377]

SENATOR CHAMBERS: Don Kleine was the representative of the then Douglas County attorney, was he not? [LB377]

KIRK BROWN: That takes me a little...I assume Don was in the office, but I...that I can't... [LB377]

SENATOR CHAMBERS: Oh, by name you may not be aware. Okay. But you're aware that the Douglas County Attorney's office is the one which would have argued that case when it came back to Douglas County District Court. Is that correct? [LB377]

KIRK BROWN: Yes, it would have been their responsibility. [LB377]

SENATOR CHAMBERS: Now, the Attorney General could have put in an appearance in that action, couldn't he, if he chose to do so? [LB377]

KIRK BROWN: Could have. [LB377]

SENATOR CHAMBERS: But he chose not to. Is that correct? [LB377]

KIRK BROWN: I can't tell you whether that was an affirmative decision. Certainly, we did not appear. [LB377]

SENATOR CHAMBERS: Okay. And the Douglas County attorney's office did not object to what was being requested. And there being no objection, Judge Coffey granted the request and removed Clarence Victor from death row. Is that more or less correct? [LB377]

KIRK BROWN: I know that in the end, Mr. Victor was found to be mentally retarded and removed from death row. I don't know the niceties of the proceedings. [LB377]

SENATOR CHAMBERS: Right, and that's why...I'm not holding you to that, just the broad outline. [LB377]

KIRK BROWN: Yes. No, that's correct. [LB377]

SENATOR CHAMBERS: At some point, did the Attorney General's Office appeal that decision to the Nebraska Supreme Court? [LB377]

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KIRK BROWN: Senator, I don't recall. [LB377]

SENATOR CHAMBERS: If I were to represent to you that in fact the Attorney General's Office, under Mr. Stenberg, did appeal it, and the Supreme Court rejected his appeal, stating...because Mr. Stenberg's challenge was that the law was unconstitutional, and the court said that the issue of constitutionality cannot be raised for the first time on appeal to the Supreme Court, could you accept that as an accurate representation of what happened, and because of that, the Attorney General's appeal was rejected, that the Attorney General... [LB377]

KIRK BROWN: Well, certainly, if that... [LB377]

SENATOR CHAMBERS: ...could have raised the issue in district court, but chose not to, for whatever reason? [LB377]

KIRK BROWN: I'm embarrassed, Senator, because if that came up, it may well have been my case. But I just simply don't have an accurate memory of what took place there. [LB377]

SENATOR CHAMBERS: But one thing is sure. Clarence Victor is off death row. [LB377]

KIRK BROWN: Certainly, that...let me say this. That is the rule before the Nebraska Supreme Court. An issue has to be raised in the district court. [LB377]

SENATOR CHAMBERS: Okay. And the reason I asked it as questions, I didn't want to seem argumentative or badgering. [LB377]

KIRK BROWN: Oh, I know that. [LB377]

SENATOR CHAMBERS: Okay, but that's all that I would have. Thank you. [LB377]

SENATOR LATHROP: Thank you. Any other questions? Seeing none, thanks for coming down, Mr. Brown. [LB377]

KIRK BROWN: Thank you. [LB377]

SENATOR LATHROP: Any other neutral testimony? [LB377]

JIM MOWBRAY: Senator Lathrop, members of the committee, my name is Jim Mowbray. I'm chief counsel for the Nebraska Commission on Public Advocacy. And that's M-o-w-b-r-a-y. I'm here basically to testify in a neutral position regarding this particular bill, since our office handles a number of first-degree murder cases, and I've been doing basically criminal defense work for the last about 21 years. One of the

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things that, again, I think is important to point out, that this particular bill is different than Texas and Oregon and some of the other states. They may have aggravators regarding future dangerousness. But I think the key here is, in Nebraska what we're trying to do--and I'm...that's why I think this bill is important--is to have a threshold test, and that is whether or not this individual presents either a present or future danger to other inmates or to society as a whole. And the reason I say that's important is, as you've already heard from all this testimony, that the county attorneys, for whatever reasons, will on some occasions seek the death penalty, and other occasions, don't seek the death penalty. Prior to LB1, we never knew whether they were going to seek it or not until the case concluded in a conviction. Since LB1, at least we have a clue they may attempt to do that, so that we can actually prepare for that process. But the bottom line is, we have no idea how they...and when they decide to make those decisions. Here, we know that they have to--and I think it's important--go over a super hurdle. If they're going to seek the ultimate death...penalty of death, they should have to go over something higher than any other time that they exercise their judgment on what to charge, whether it's a capital case or not, whether it would be a first-degree or second-degree. I think we should require they have to jump over this hurdle. And if they can, then we're also succeeding in trying to make sure that the death penalty is only being applied to the appropriate people. Now, they talk about how you can't prove it. Well, let me give you a simple case, and I think, as just lay people, I think you could find beyond a reasonable doubt that this individual would meet this standard, and that's David Dunster, who killed somebody, ended up in prison; while in prison, he killed somebody else. He ended up in Nebraska, and what did he do? In prison, killed somebody else. Now, as a reasonable jury, and I've provided that information to you and asked you, do you think he presents a substantial risk, I think you wouldn't have too much trouble coming to a conclusion beyond a reasonable doubt. He's done it before, there's a likelihood he'll do it again, and yes, he is. So it's not impossible to prove. You have to prove substantial...like an attempt charge, you have to prove a substantial step. County attorneys prove substantial all the time. Mental health commitments, they're talking about future dangerousness. Sexual predators, we're talking about future dangerousness. So don't let them convince you that they can't prove it. They certainly can. In fact, I've never heard a prosecutor tell me, I can't prove this. If they can't prove it, we wouldn't be there. Basically, the last, though, I think is important to emphasize that this does provide a way that we can balance and look at all the facts and make sure that if the state is going to seek the death penalty, that they only seek it in the cases where it's absolutely necessary to protect other inmates, guards, and society as a whole. That, I think, is extremely important. This is not a repeal. This is simply limiting as to who can receive the ultimate penalty. Thank you, and I'll answer any questions. [LB377]

SENATOR LATHROP: Very good. Thanks. Senator Pirsch. [LB377]

SENATOR PIRSCH: I appreciate your coming down here today and testifying. You had mentioned that David Dunster would be an individual you would think would meet

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this...would not meet the test that was set out, and would therefore, in your opinion, be death penalty eligible, correct? [LB377]

JIM MOWBRAY: Correct. [LB377]

SENATOR PIRSCH: At the time that the original...and he killed two people, murdered two people while in prison, correct? [LB377]

JIM MOWBRAY: Yes. [LB377]

SENATOR PIRSCH: But at the time of the original murder, right, and before he had committed the second...well, I take it he was in jail for murder to begin with, correct? [LB377]

JIM MOWBRAY: Correct. [LB377]

SENATOR PIRSCH: Right. And so before the second murder, at the sentencing of the first murder, would he have met that test at that point in time, in your opinion? [LB377]

JIM MOWBRAY: I don't think so. No, I don't think he would have. [LB377]

SENATOR PIRSCH: So you would...would you say the rule would be, then, you'd have to have murdered once while in incarceration to demonstrate that? Or have...or are there other factors that could be present that would lead you to also conclude that? [LB377]

JIM MOWBRAY: I think you would have...if they have been in prison before, that you would have assaultive behavior, either towards other inmates or guards, whether they actually succeeded in killing someone. I think you can look back again at their past, as to what they've done out in the public, in terms of how many other prior assaults or murders that they committed prior to that. I think there's a number of ways that you can prove. I mean, they certainly don't have problems proving future dangerousness in Texas. That's got the highest population of death row in...like, right now, ranks not too low below China. [LB377]

SENATOR PIRSCH: Sure. And based upon that, then, the assessment, besides Mr. Dunster, there are now nine other individuals who sit on Nebraska death row. Is that correct? [LB377]

JIM MOWBRAY: That's correct. [LB377]

SENATOR PIRSCH: Based on the criteria that you put forth, and your understanding and your evaluation, would any other of those, in your opinion, qualify, besides Mr.

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Dunster? [LB377]

JIM MOWBRAY: I think so. [LB377]

SENATOR PIRSCH: Which other individuals would those be? [LB377]

JIM MOWBRAY: I'm not going to specifically say. But I think that there are some of those individuals that you could show are future dangers to either inmates or to the public at large, from the facts that I know of those particular cases. [LB377]

SENATOR PIRSCH: Thank you very much for your testimony. [LB377]

SENATOR LATHROP: Thank you. Senator Chambers. [LB377]

SENATOR CHAMBERS: Thank you, Mr. President. I mean...excuse me, that's how we address the Speaker. (Laughter) Just like sometimes they address us as they do when they're in court. Mr. Mowbray, it is often said that the possibility of facing death brings more fear to a person than incarceration. Are you aware of a man currently incarcerated who asked to be executed because he did not want to continue with his incarceration? [LB377]

JIM MOWBRAY: Yes. [LB377]

SENATOR CHAMBERS: Are you aware of a case like that in Nebraska? [LB377]

JIM MOWBRAY: Yes. [LB377]

SENATOR CHAMBERS: Mr. Mowbray, when you mentioned the possibility of somebody doing something in the future being a basis for various even public policies, is there, to your knowledge, any provision in Nebraska law relative to people who are considered sexual predators which would lead them to not be freed even after having served the sentence required by law for their crime? [LB377]

JIM MOWBRAY: Yes, that they are now going through a civil commitment process, once they're released from prison. [LB377]

SENATOR CHAMBERS: And they will be in a lockup situation? [LB377]

JIM MOWBRAY: Yes. [LB377]

SENATOR CHAMBERS: And that's because of what? [LB377]

JIM MOWBRAY: Future dangerousness to children. [LB377]

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SENATOR CHAMBERS: Mr. Mowbray, are you aware that there are--and if you're not aware, then you can just answer no--that there are prosecutors in Nebraska who will never seek the death penalty because they have scruples along that line? [LB377]

JIM MOWBRAY: I can't say for sure. No, I can't say for sure. [LB377]

SENATOR CHAMBERS: Are you aware of cases involving homicides, murders, which were far more atrocious than those committed by people currently on death row, but the perpetrators did not get sentenced to death, that they were not charged with an offense that would carry death, because no aggravators were mentioned in the information, so no death penalty was even going to be sought, meaning, they were not facing the possibility of a death penalty, to make it simple? [LB377]

JIM MOWBRAY: Correct. Yes, I can think of 10 to 15 cases. The most recent that just comes to mind are the two individuals--of course, one was not death eligible because she was only 17--but that executed the two family members in the country outside of Plattsmouth, and executed them. They received...they were only charged with second, pled to second, and received life sentences. [LB377]

SENATOR CHAMBERS: There are blunders by prosecutors under the existing law which may lead to a person not being death eligible. Is that true? [LB377]

JIM MOWBRAY: Yes. [LB377]

SENATOR CHAMBERS: In the case you mentioned, did the prosecutor fail to notify the court, based on what the law requires, that he wanted to seek the death penalty? [LB377]

JIM MOWBRAY: Yes, he failed to file a notice of aggravators with the information...original information. [LB377]

SENATOR CHAMBERS: So if people are going to blame the system or the court, that would be inappropriate in that case, because the prosecutor simply didn't do his job or take advantage of what is available under the law. [LB377]

JIM MOWBRAY: Well, he obviously did not follow the law, and therefore, when he tried to do it, the judge said, you're too late. [LB377]

SENATOR CHAMBERS: The law was clear on what he had to do, in other words. [LB377]

JIM MOWBRAY: It's very...it's right in black and white, it must be filed with the

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information. [LB377]

SENATOR CHAMBERS: That's all I would have. Thank you. [LB377]

JIM MOWBRAY: Thank you. [LB377]

SENATOR LATHROP: Any other questions? Okay. Thanks, Mr. Mowbray. [LB377]

JIM MOWBRAY: Thank you. [LB377]

SENATOR LATHROP: Anyone else to testify in a neutral capacity? Okay. And with that,... [LB377]

SENATOR ASHFORD: Very briefly, Mr. Vice Chair? [LB377]

SENATOR LATHROP: ...we'll let our Chairman close. [LB377]

SENATOR CHAMBERS: Are you going to be neutral? [LB377]

SENATOR ASHFORD: I was here, Senator Chambers. [LB377]

SENATOR CHAMBERS: But this is for the neutral testimony. [LB377]

SENATOR ASHFORD: No, they're all done, I think. [LB377]

SENATOR LATHROP: We're done. We're ready for him to close. [LB377]

SENATOR CHAMBERS: Oh, I'm sorry. (Laugh) [LB377]

SENATOR LATHROP: Senator Ashford, to close. [LB377]

SENATOR ASHFORD: Well, I appreciate the testimony and the effort to come here by the many witnesses today. Let me just remind you why I believe we're here, again, and why we are here so close to the decision by the Legislature on the repeal statutes last week. In the testimony today, clearly, without rehashing, and most certainly, the discussion on the floor involving LB476, for every case that is death eligible and does not...and where the death penalty is assessed, there are at least five to ten cases of similar cases where the death penalty is not assessed. We heard this on the floor of the Legislature from various senators who very passionately either supporting LB476 or opposing LB476 describing crimes that were as heinous as anybody could ever describe, where the death penalty was applied in one case and the death penalty was not applied in another case. We simply can't get around the fact that the death penalty in Nebraska, for a variety of reasons, whether it is because the county attorney, for

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whatever reason, does not file for the death penalty, or whether it's the courts remand a case for a different sentence, or whether the Supreme Court changes the rules, as is the case with Ring and other cases, for whatever reason, the death penalty is not applied in a consistent manner. It is...it seems to me it is our job as state senators to understand that fact, to not shy away from it, to not turn our backs to it, but to address it. That's why we are spending the time today. That's why we spent the two days on the floor of the Legislature to discuss this. And that's why we met in Executive Session last week. We need to get this right, as best we can. And no, we aren't going to get it perfectly right, because this is a very difficult issue. There probably is no more difficult issue, because we're dealing with the state deciding life and death of individuals. I'm bringing this to you today, members of the Judiciary Committee, because I believe that we have an absolute obligation, not even debatable, to address what clearly is true, and that is, the law as currently applied is not applied consistently and fairly across the board. Therefore, we have no other choice, despite the heinous nature of the crimes that have been described today...and we can only feel so terribly badly about what happened to those families. That does not distract us from what is our overriding responsibility, and that is to address what is plainly in front of us. That's why we're here. That's why we are going to continue to discuss this, and that's why we are going to continue to debate it. I appreciate the efforts of this committee, of all the members of the Legislature, all the people who are here today that have brought so much to this discussion. Thank you, Mr. Vice Chair. [LB377]

SENATOR LATHROP: Thank you, Senator Ashford. Senator Chambers. [LB377]

SENATOR CHAMBERS: Senator Ashford, a couple of questions I want to put to you, because they may have seemed argumentative if I'd have put them to any of the testifiers, either pro, con, or neutral. When the Legislature enacts a tax law, that is a statewide law. Is that correct? [LB377]

SENATOR ASHFORD: That's correct. [LB377]

SENATOR CHAMBERS: And it's supposed to be uniform across the state. Is that correct? [LB377]

SENATOR ASHFORD: That's correct. [LB377]

SENATOR CHAMBERS: If the law says that residential property should be assessed at 90 percent of market value, is that a state law, and it's to apply everywhere? [LB377]

SENATOR ASHFORD: That's correct. [LB377]

SENATOR CHAMBERS: If an assessor assesses the property of a wealthy person at 80 percent of market value and the public becomes aware of it, do they say, well, the

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fact that his was not assessed at 80 percent...90, mine still should be assessed at 90, and he should have only had his assessed at 80? What is the public's reaction in a situation like that? [LB377]

SENATOR ASHFORD: Well, it's outrage. We try to pass laws uniformly, that have uniform application, I think, and...Senator Chambers. And I think certainly then that's what has bothered me so much about this issue. It bothered me the eight years I was here before, and it bothers me now, we're dealing with an ultimate penalty,... [LB377]

SENATOR CHAMBERS: And is the death penalty a statewide law? [LB377]

SENATOR ASHFORD: It is. [LB377]

SENATOR CHAMBERS: As you mentioned in your testimony, in 1979, the Legislature attempted to put guidelines into the statute to do away with this what you might call up-and-down, or "ununiform" implementation of the death penalty. Is that correct? [LB377]

SENATOR ASHFORD: That's correct. [LB377]

SENATOR CHAMBERS: And it hasn't been successful, has it? [LB377]

SENATOR ASHFORD: That's correct. [LB377]

SENATOR CHAMBERS: You've heard testifiers on both sides acknowledge that there are murders committed which may be worse than those committed by people on death row, but the perpetrators in some instances were not even put in a position to be eligible for the death penalty. We've heard that testimony. [LB377]

SENATOR ASHFORD: Clearly the case. [LB377]

SENATOR CHAMBERS: And such being the case, we can say there's no longer any argument that there's a lack of uniformity in the imposition of the death penalty. [LB377]

SENATOR ASHFORD: No one here today, Senator Chambers, nor has anyone in at least this time that we've discussed this during this session, has anyone said that it's applied uniformly. [LB377]

SENATOR CHAMBERS: And as policymakers for this state, and we become aware of the fact that a law that was enacted with the intent that it be uniformly applied, but because the Legislature does not enforce its own laws, and others are given that responsibility but they take a different view, so it's like patchwork here and there, then is it your view that the Legislature has an obligation to come in with a different policy, to

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ensure that similarly situated people will be treated in a similar fashion? [LB377]

SENATOR ASHFORD: And that...that's correct. That's my view, Senator Chambers. And I do believe that there are cases where people cannot safely be allowed to live in society, and I believe that that's the case. And I don't know what those cases all are. I can't characterize them. Yeah. [LB377]

SENATOR CHAMBERS: Okay. Now...because I don't want to seem argumentative, even with you. One of the young men testifying brought into sharp focus the cost of prosecuting death penalty cases. [LB377]

SENATOR ASHFORD: Correct. [LB377]

SENATOR CHAMBERS: I'm sure you've read cases where the U.S. Supreme Court pointed out that the death penalty is so much different from any other punishment that it cannot really be compared to any other punishment. [LB377]

SENATOR ASHFORD: Correct. [LB377]

SENATOR CHAMBERS: And because of Supreme Court decisions, there is a process that you might say is a death penalty case process, which because of its very nature in trying to avoid sentencing innocent people to death, or those whose crime did not merit death, that cannot be shortened into, say, six months because some people would feel better if a person were executed in that brief period of time. In other words, let me simplify the question,...okay. [LB377]

SENATOR ASHFORD: That's correct. No, I understand your question, Senator Chambers, and I absolutely...obviously, we as policymakers hear that a lot--why don't you just make it six months and get it over with? [LB377]

SENATOR CHAMBERS: But the delays... [LB377]

SENATOR ASHFORD: That's not possible under the current law. [LB377]

SENATOR CHAMBERS: ...the delays spring from court decisions, because they've seen mistakes made. And if that expedited process of execution were put in place, some people who have been on death row for over a decade and found to be innocent--not a technicality, innocent--they would have been executed, as innocent people. Isn't that true? [LB377]

SENATOR ASHFORD: And that's true. And Senator Chambers, we haven't really talked a lot about that part of the...side of the issue, but that is obviously an issue that bothers many people, and that is the possibility that someone can be eventually shown to be not

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guilty of the crime. [LB377]

SENATOR CHAMBERS: Okay. And focusing, though, on the...what some people feel the drawn-out process, that process is expensive, and there's no way for it to not be expensive. Isn't that true? [LB377]

SENATOR ASHFORD: There's no way, under current law, that that process can be somewhat extrajudicial, so to say, that it can be expedited, and where experts on both sides, lawyers, many of whom were...few of them were here today, who are experts...you can't get around that. [LB377]

SENATOR CHAMBERS: My final question. And I feel like I can kind of interrogate you like I didn't do the others, because you're the Chairman. Mr. President, Mr. Chairman, if a Legislature were to put on the statute books--because a Legislature can put anything on the books it wants to, though a court may later strike it down--if the Legislature put on the books that when a person has been convicted of first-degree murder with aggravating circumstances and sentenced to die, that sentence shall be carried out in six months, do you think the U.S. Supreme Court would allow a law like that to stand? [LB377]

SENATOR ASHFORD: No. [LB377]

SENATOR CHAMBERS: Even under Nebraska's Constitution, where an appeal is automatic in death cases,... [LB377]

SENATOR ASHFORD: No. [LB377]

SENATOR CHAMBERS: ...we couldn't pass a law like that, even if we wanted to. [LB377]

SENATOR ASHFORD: No. No. [LB377]

SENATOR CHAMBERS: Do you think part of the problem is that the public has been uneducated or uninformed as to what is entailed in carrying out a death sentence, even if that's the desire of everybody involved in the process? [LB377]

SENATOR ASHFORD: That's part of the problem. I think the other part of the problem, if I might, Senator Chambers, is that I think to some extent, the politics of this has entered into it for many, many years, certainly since Furman v. Georgia, where there's a perception that the death penalty equates to toughness on crime. And that...I think that places in the public perception that view, when in fact it has nothing to do with toughness on crime or crime rates. In fact, it just...it's the opposite. But I think that's a major part of it. And I think we just need to get down to something here that we can

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enforce as consistently as possible, under the guidelines that the Supreme Court has placed upon us, and we need to focus on those things we can do as a Legislature to reduce crime in all of its facets. And that's what we should do, and I think we...I can tell you this. This is not...in the eight years I was in the Legislature before and we discussed issues like this many, many times, it was never a waste of time, and it's never a waste of time today, because we need to get it right. Crime continues to go up, especially in areas like your district, Senator Chambers, where there's a great deal of poverty. We need to figure out why that is. And so I believe that it's never too much time. [LB377]

SENATOR CHAMBERS: That's all that I had. Thank you, Senator Ashford. [LB377]

SENATOR LATHROP: Anyone else? Seeing no other questions, thank you, Senator Ashford, and that will conclude our hearing today. (See also Exhibits 1-8) [LB377]

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Disposition of Bills:

LB377 - Advanced to General File, as amended.

Chairperson

Committee Clerk