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Transcriber's Office

Judiciary Committee
February 01, 2008

[LB839 LB1063 CONFIRMATION]

The Committee on Judiciary met at 1:30 p.m. on Friday, February 1, 2008, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on a gubernatorial appointment and on LB1063 and LB839. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Vickie McDonald; Amanda McGill; Dwite Pedersen; Pete Pirsch; and DiAnna Schimek. Senators absent: None.

SENATOR ASHFORD: Good afternoon, everyone. You're in the Judiciary Committee so if you don't have anything before the Judiciary Committee you're in the wrong committee, but welcome to everyone. Some of you I recognize and have been here many times, and some possibly are new to the committee. Go ahead. We have three matters on the agenda today. The first matter is a gubernatorial appointment, which should not take much time, and we're going to do that first. But first of all, I want to introduce my colleagues: Senator Pete Pirsch from Omaha to my left; Dwite Pedersen from Elkhorn, Nebraska; Steve Lathrop from Ralston, from Omaha; Amanda McGill from Lincoln; and Senator Ernie Chambers. Senator Chambers will be introducing the second bill today. Jonathan Bradford is the committee clerk, and LaMont Rainey is the legal counsel. Excuse me, Lamont. With that, we have an appointment. Shall we start with that, please? Esther Casmer, welcome. And Esther, we do have a copy of your remarks, too, so we'll have those as well, but you feel free to read them into the record. [CONFIRMATION]

ESTHER CASMER: (Exhibit 1) Thank you. Good afternoon, Senators. My name is Esther Casmer. I come before you requesting your support to continue my current capacity as chairperson of the Board of Parole. For the past 31 years, I have been employed by this great state. I was initially appointed to this board after 19 years of continuous employment with the Department of Corrections. My initial appointment to the Board of Parole occurred in September 1995. This six-year appointment was made by former Governor Benjamin E. Nelson. In September of 2001, I was reappointed by former Governor Mike Johanns. I was given an opportunity to serve as vice chairperson from September 1999 to April 2005, at which time Governor Heineman appointed me as chairperson of the board. In September 2007, I was once again given an opportunity to continue to serve the Board of Parole for another six-year term as chairperson. My performance has been one of diligence, pride, and focus. During my appointment as chairperson the numbers of paroles have increased significantly, always keeping in mind public safety. (Baby vocalizing in audience.) [CONFIRMATION]

SENATOR PEDERSEN: Excuse me, Esther, could you hold up just a minute, please? [CONFIRMATION]

SENATOR CHAMBERS: That's all right. [CONFIRMATION]

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SENATOR PEDERSEN: We want to hear you. [CONFIRMATION]

SENATOR CHAMBERS: I can hear her. [CONFIRMATION]

SENATOR PEDERSEN: (Inaudible) (Baby ceases vocalizing.) Thank you. I'm sorry.
[CONFIRMATION]

ESTHER CASMER: That's quite all right, sir,...always keeping in mind public safety. I have led this board in establishing and maintaining open communication with the Department of Corrections, of which I would like to add has been one of continuing dialogue to address the issues of prison population control. This board is cognizant that parole is one of the many tools necessary to accomplish this extremely sensitive situation. I have been part of developing and implementing programs that will enhance an offender's transition from incarceration to community: example, Parole Violators Program and the Re-Entry Program. I have also worked very closely with the Department of Corrections to establish smooth transition to treatment and parole for individuals suitable for Work Ethic Camp. I have also worked with various organizations outside of the institutions to establish resources once an offender has been paroled, of which I will name two--Gold Star, and Healing Circle Recovery, Incorporated. I am also a voting member of Community Corrections Council. I look forward to answering any questions you may have. Thank you. [CONFIRMATION]

SENATOR ASHFORD: Thank you, Esther. Anyone have any questions of Esther? Seeing none, thank you...Senator Pedersen. [CONFIRMATION]

SENATOR PEDERSEN: It's just from my position, being here in the Legislature for 16 and now going on my 18th, no, 16th year, thank you for what you've done. You've done really a well job and you've really served us well. Thank you for your work.
[CONFIRMATION]

ESTHER CASMER: Thank you, sir. [CONFIRMATION]

SENATOR ASHFORD: Yes, Senator Chambers. [CONFIRMATION]

SENATOR CHAMBERS: Since hard-bitten Senator Pedersen opened the way for a bit of sentiment to be expressed, this is the last time I'll be able to be with you like this, but I do appreciate also the work that you've done. [CONFIRMATION]

ESTHER CASMER: Thank you, Senator. It's quite an honor. [CONFIRMATION]

SENATOR ASHFORD: Thank you, Esther. [CONFIRMATION]

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ESTHER CASMER: Thank you. [CONFIRMATION]

SENATOR ASHFORD: Thanks for your service. Okay, Senator Chambers' is the first bill, LB830...is that? No, that's not right. LB1063. Just a little housekeeping. How many of you are here to testify on LB1063? Okay. Most of you are aware of the light system or if you're not, we have a little light system that gives you three minutes to give your remarks. Senator Chambers has whatever time he needs, but then you'll see a yellow light that will tell you to sum up and the red light will be the end of your testimony, or ask you to finalize your remarks. Senator Chambers, it's an honor to have you introduce this bill again. [LB1063]

SENATOR CHAMBERS: Thank you, Mr. Chair, and it's a pleasure for me to be here. The death penalty...I'm Ernie Chambers, the 11th Legislative District, and the death penalty is a very gloomy, solemn subject. Ever since I've been in the Legislature I've done what I could to try to have the penalty abolished. In 1979, the Legislature voted to do so, but the Governor, who was Charles Thone at the time, vetoed the bill; we could not override. Since I have not been able to abolish the penalty in one fell swoop, I've nibbled at it to the extent that I could. I had first gotten a bill through the Legislature that required what is known as a proportionality review to determine whether or not similar crimes resulted in a similar sentence. If there were an atrocious crime and it did not carry the death penalty, if a similar crime were committed and a person were convicted of it the death penalty ought not be imposed. The Supreme Court chose to gut that bill, saying that if they construed it and applied it the way it was written, that would result in the elimination of the death penalty; they were not prepared to do that. So they said they would limit their review and comparison to cases where the death penalty had been imposed, which means no comparison whatsoever. The only way to determine proportionality is to compare those cases where death was imposed with the ones where death was not imposed. Then you could get a basis for a comparison. That having failed, I was able to work with the Legislature to end the death penalty for a person who committed the crime when he or she was under 18 years of age. The death penalty cannot be imposed on the mentally retarded, and that bill resulted in two mentally retarded men being taken off death row. And one incident that pleased me was the Supreme Court determining that it should reconsider its death sentence imposed on Carey Dean Moore. I had written them a letter, lengthy, but made three major arguments, each of which the court adopted, based its opinion upon without acknowledging that it was doing so. But prior to that matter being decided by the court, the Chief Justice admitted they've received the letter, that it would be shared with his colleagues. So everything that has been available for me to do to kill or cripple the death penalty, I have forthrightly done so. As I indicated to Ms. Casmer, this is the last time I will be attending a hearing of this kind in the role of a senator. This is my last, as they say in film parlance, my last hurrah. Some people have been very, very dedicatedly attending all of the hearings to support abolition of the penalty. When the whole tide in Nebraska seemed to be running in favor of retaining the penalty, they were here.

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They're here now. There have been families of murder victims who have spoken out against the death penalty. The most recent one occurred in Omaha and it's written about in this morning's...yesterday morning's paper where a man convicted of murdering two men, accused of murdering a third, resulted in this article which begins, and I'm not going to read the whole thing, Douglas County...this is in the World-Herald, December...no, it's today, February 1, on page 3B: "Douglas County prosecutors have changed their minds and now will not seek the death penalty against an Omaha man convicted of killing two men and accused of killing a third. As a result, Terry J. Sellers, 25, will spend the rest of his life in prison." Then jumping down, "The deputy prosecutor said he did so after consulting with relatives of the two murder victims. "The families did not want the state to seek the death penalty." The comments of the grandmother of one of the victims said...well, let me go ahead and read. It's quicker to read it. "None of the relatives who attended Sellers' three-week trial said they wanted Sellers to get the death penalty." After the trial, one of the victim's grandmother, Catherine Jones, said an execution would be too easy for Sellers: "If he dies, that's the end of it. He needs to sit in prison for the rest of his life and think about what he did." Various people have various reasons for being opposed to the death penalty. The families of some murder victims simply don't think that the state should kill anybody, and that's my view. No matter the nature of the murder, no matter the identity of the victim or the perpetrator, I don't want the state that I live in to kill anybody else, so I'm hoping that this bill would be advanced to the floor, that it will be enacted into law. What the Governor will do to it is something over which I have no control, but I would like the Legislature to do what it can do. As many people are aware, very recently a white guy murdered a young black woman in Omaha. The county attorney labeled it a hate crime based on comments from the perpetrator himself, and he is going to seek the death penalty. With the law being the way it is, I can understand what he's doing. He may have felt under the law he has no choice. I was infuriated when I read what happened, as I've been infuriated by other murders and other crimes that didn't involve the death of anybody; but I remain as opposed to the death penalty now as I ever have been. When Kenyatta Bush, a young black girl who attended North High, was raped and murdered, one of the perpetrators confessed on himself and his partner in crime, Jeremy Sheets; but he committed suicide prior to the time that Sheets could confront this testimony against him. So, although Sheets was convicted, sentenced to die and placed on death row, the Nebraska Supreme Court, under the law, I believe correctly, having nothing to do with my attitude toward the death penalty, ruled that that penalty must be overturned because a person has to be allowed to confront an accuser. Since there was no hearing of any kind prior to the death of Barnett, who is the one who confessed, Sheets was deprived of that constitutional right. Sometimes when the law is followed, a result occurs with which many people are disappointed; but the law, even in those circumstances, must be respected for its majesty and for its role in ensuring, to the extent that a law can, that the society follows civilized practices and procedures. So he was released from prison. The black community is outraged as a result of the latest information on this recent killing, and people wonder how I feel about the death penalty. Things like that are not

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going to change my attitude toward the death penalty. I know atrocious murders are committed. But under the way the law is administered in Nebraska, some of the most atrocious murderers are given a plea bargain and the vast majority of murders are in the general population in the prison and not...the majority of those don't have life sentences. So the arbitrariness with which the penalty is imposed, the arbitrariness with which it is carried out, the extreme difficulty of putting somebody on death row and even greater difficulty in putting them in the chair, militates against retaining this penalty. So in concluding my remarks...and, by the way, babies should be allowed to express themselves wherever and whenever (laughter) they are present. That has always been a humanizing element and it reminds us of things that we might otherwise not think about, even on an occasion such as this. I've explained to people that the family of Kenyatta Bush asked me to work with them, knowing that I'm against the death penalty and I always will be. I had a nephew who was murdered violently and viciously. The murderers will never be caught. We knew it at the time. The anger that any person might feel should not become the settle policy of a state. A person acts on the basis of emotion, and a lot of times it's the emotion of the moment. Maybe if I'd come across this guy who had shot that young black girl, or the white guy who the other day--and they caught him yesterday, I think; it was in the paper this morning--came into the black community, enticed a ten-year-old black girl into his car, took her home and raped her, maybe if I caught him I'd be facing, maybe not death, but me being who I am maybe I would be (laughter), but at any rate, the way I would respond to that should not be the state's policy. My emotions are involved. The state cannot act with or on the basis of emotion. I might know the victim, I might know the perpetrator, all of which add to my fury. The state doesn't know the victim. The state doesn't know the perpetrator. The state is an inanimate entity, and it is to act without fear or favor. But if you consider the way the death penalty has been imposed and carried out in this state, it is more arbitrary and random than an angry, temporarily insane individual. My final comment: The majority of people who have been sentenced to death in Nebraska and placed on death row have left, not by way of execution. Mistakes have been made and innocent people have wound up on death row. People who, because of violation of rights, constitutional or legal, were inappropriately placed on death row. It costs more to execute somebody if you get it to that point than to keep the person in prison for life. But, to me, the money cost is not a part of it. The state should not kill anybody. And in this world, among the so-called advanced industrialized nations, America sticks out like a sore thumb. That's all that I will say because most of the time should be left to those who want to testify, but I felt an obligation to give my rationale so that something will be in the record if ever reference is made to it. So if you have any questions of me, I will answer them forthrightly and succinctly. [LB1063]

SENATOR ASHFORD: Any questions of Senator Chambers? [LB1063]

SENATOR CHAMBERS: All right. [LB1063]

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SENATOR ASHFORD: Thank you, Senator Chambers. Proponent testifiers. Why don't we...those who are going to testify, why don't we try to get up in the front of the room. Maybe you're already there. How many proponent testifiers do we have? Okay. Well, you're...okay, why don't we go ahead. [LB1063]

JACK GOULD: (Exhibit 9) Senator Ashford, members of the committee, my name is Jack Gould, that's G-o-u-l-d, and I represent Common Cause Nebraska, and I may be one of the least qualified to speak on this subject, but we feel very strongly about the issue. Common Cause Nebraska stands in opposition to the death penalty. In recent years, the introduction of DNA evidence in courtrooms across the country has released death row inmates who have been proven to be innocent. This process has raised a serious question about the finality of the punishment. We believe it's wrong to execute anyone, but the possibility of executing an innocent man or woman is the ultimate tragedy. Common Cause Nebraska also offers its sincere thanks to Senator Chambers for the commitment and tireless work in support of this cause. Any questions? [LB1063]

SENATOR ASHFORD: Thanks, Jack. Any questions of Mr. Gould? Thank you for your work. [LB1063]

JACK GOULD: Okay. Thank you. [LB1063]

SENATOR ASHFORD: Okay, next proponent. Come on. I see the lady there in the fourth row. Do you want to come up? [LB1063]

AMY SADLE: Good afternoon. Amy Sadle, Syracuse, Nebraska. Jack and I are going to miss you. It's good that the under class and the middle class have such a tenacious supporter. I came because I think there are several points that I have enough expertise and experience with that I wanted to express them publicly. Number one is I did a large document while I was in college on the death penalty. I used this continent and Europe. There are no facts that it is any deterrent on any level for crime, and I think that is something I haven't heard discussed here. For 20 years, two of my sons acted in law enforcement. One now is a defense attorney who presents at the Nebraska State Court. They deal all the time with both victims and criminals, and knowing their expertise, I think the basis of criminal acts is something that the Nebraska public is woefully misinformed on. I have worked for...well, actually 45 years as a layperson counselor, and during that period I've been in and out of prisons, I've talked extensively with the families of victims, and I've talked extensively with criminals. They have been able to tell me exactly how the violent crimes they committed occurred. They have...about four of them were admitted murderers and they explained their purposes. And having a better understanding of the criminal mind and criminal activity is a very important issue in dealing with this project, because what our end purpose is should be carefully examined. Like Senator Chambers, I am sorely embarrassed that our state is continuing to use execution, and I think it's a real violation of the principles not only of the United

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States but of Nebraska. I will not even discuss saving money by executing convicted felons. It is so repugnant that it should not even be raised in any question. Murderers of...crimes are not the result of what happens in jurisprudence. There is usually psychological, drug/alcohol, violence involved, self-protection, just pure insanity in most cases, and what we decide here is not going to deter such crime. We also...I agree with the DNA subject. Even questions like the Ethel Rosenberg trial, which resulted in her execution, is a primary question within the legal program not yet solved. The refinement in DNA that can take a dust speck, or the changes of testimony, we simply as a state should not tolerate any chance that we might be making an error in the execution. As a mother of police officers, I think that asking our police and judiciary to murder somebody is totally, totally out of order with the overall expectations and goal of this state and this nation. The victims... [LB1063]

SENATOR ASHFORD: Amy, I'm going to ask you... [LB1063]

AMY SADLE: Uh-huh. [LB1063]

SENATOR ASHFORD: ...to sum up, just because we need to stay on course here. [LB1063]

AMY SADLE: Oh, there's my light. [LB1063]

SENATOR ASHFORD: There's your light. [LB1063]

AMY SADLE: I was looking for your light. (Laugh) [LB1063]

SENATOR ASHFORD: Oh. I have apparently a piece of gum here. I don't know how that...how that got here. (Laughter) But if you would just...you've certainly been here before and I know you...how deeply you care about this. So if you'd just sum up for us. [LB1063]

AMY SADLE: Uh-huh. The only summation would be that the violence that has occurred to families, I have never found that such an act as execution is any solace whatsoever. [LB1063]

SENATOR ASHFORD: Thank you. Before you get up, I want...could you give us your name into the record, because I don't think the record... [LB1063]

AMY SADLE: Amy, A-m-y, Sadle, S-a-d-l-e; Syracuse. [LB1063]

SENATOR ASHFORD: Okay. Any questions of Amy? Thank you. Thanks for being here. Next proponent. [LB1063]

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MIRIAM KELLE: (Exhibit 10) Good afternoon. I am Miriam Kelle, M-i-r-i-a-m K-e-l-l-e, and I'm here to promote LB1063 to oppose the death penalty. I'd like to introduce my son, Spencer Kelle. He's seated there with others in the white that are...that agree with what I have to say about the death penalty. To tell you how far this goes back, I was pregnant with Spencer when James Thimm, my brother, was drawn into the cult. Spencer was one when James was found tortured and dead. Spencer has grown up with the death penalty still being unsettled. I want to tell you a story about a Jurassic jawbreaker that developed a life of its own. Spencer was about seven when the dinosaur movie Jurassic Park was popular. Anyway, he wanted the jawbreaker the size of a baseball. We relented after he begged for it all afternoon on the way back from a particularly hot day of his sisters' softball games. It had a necklace and a plastic container. He licked it and licked it until he was able to put that big thing in his cheek. I thought he would choke. It's difficult to explain what all the appeals and legal proceedings are about to a seven-year-old. Well, we talked about the different colors of that jawbreaker, like the ones you have before you. We talked about how the layers of hurts built a mighty tough shell around Michael Ryan. Maybe that's how he got so mean. About halfway through that jawbreaker, Spencer lost his enthusiasm for the quest, and being a good mother, I took it on. We talked about the center of that jawbreaker and what was in the center. Well, we sucked on that jawbreaker and we finally got to the inside, and it was nothing. Would we feel better if Michael Ryan was dead or would his death be as empty as that jawbreaker? I loved my brother Jim more than humanly possible to tell. The hard things about his death are still hard to swallow, as that jawbreaker, but it is harder still to believe the best way to handle Michael's case is to use the death penalty. I sometimes wonder if the legislators in this state are as hard as a jawbreaker. People have brought up to me that the only way to stop gang killings from behind bars is to use the death penalty, but I say the lieutenants in the gang will only move up and the deaths will continue. The way to prevent gangs is to stop our youth from joining them in the first place. The death penalty is unfair, costs more, has taken Spencer's lifetime, and sometimes causes innocent people to be executed. Fingerprints were a radical scientific achievement in their time. DNA has exonerated some prisoners from death row, including just one last week in Colorado. What new technology might exonerate others in the next 20 years? Mostly, I urge wise spending of every dollar in this state. I want to save one more family the grief that our family has endured. In that light, let's remember that Michael Ryan's children and grandchildren...should they suffer for the actions of their father and grandfather? When can we end it for them? Can you imagine his grandchildren getting on a school bus and hearing, I heard they made your grandpa a crispy critter last night? Maybe we should throw out the death penalty just like we should have thrown out that old, sticky, germly jawbreaker we had. I welcome your questions. [LB1063]

SENATOR ASHFORD: Thanks, Miriam. Senator Chambers. [LB1063]

SENATOR CHAMBERS: Without probing, how long did it take you to arrive at the point

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where you are now, where you see things the way that you do? [LB1063]

MIRIAM KELLE: I actually talked to Dave Andres (phonetic) while he was waiting in prison in Falls City and said that I didn't agree with the death penalty there. It's more a consideration of family members, that you let them have anger and that you wait, and I've waited this long and now I'm ready. And they seem to be ready, too. [LB1063]

SENATOR CHAMBERS: And I appreciate you coming. Thank you. That's all that I have. [LB1063]

MIRIAM KELLE: I just tried to put it in as much light as we could, and enjoy the jawbreakers. [LB1063]

SENATOR CHAMBERS: Okay. [LB1063]

SENATOR ASHFORD: Thank you, Miriam. Jim, do you want to... [LB1063]

JAMES MOWBRAY: Sure. [LB1063]

SENATOR ASHFORD: ...come next, or one of the Jims? [LB1063]

JAMES MOWBRAY: I guess there's two of us, right? [LB1063]

SENATOR ASHFORD: Yeah. [LB1063]

JAMES MOWBRAY: Senator Ashford, members of the committee, my name is Jim Mowbray, M-o-w-b-r-a-y. I'm chief counsel for the Nebraska Commission on Public Advocacy. We spend our...pretty much all of our time defending capital murder cases. Having done this for 26 years on both sides, it continues to amaze me that we continue to have this debate every year, because it doesn't change things. The death penalty has not decreased the numbers of murders, hasn't increased them. It costs more every year. It's astounding how much the costs have risen, where we're spending almost as much or more time on the sentencing phase than we do on the guilt and innocence. And then the bottom line is that the Department of Corrections does an adequate job of protecting society from someone who is convicted of first-degree murder and gets life or death. They might as well all get life. We are protected from them. They're not going to hurt anybody anymore. From a personal standpoint, as I thought about testifying today, is I was one of Harold Otey's attorneys back in 1984 (sic) when he was executed, and I didn't witness the execution, although in hindsight maybe it would have been less horrific to witness the execution than to witness what was going on outside the prison. I was outside of the prison and I watched probably one of the most difficult things that I've ever witnessed, and that is to see what happened to the citizens of this state in trying to deal with the issue of the death penalty and this execution. On one-half of the parking

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lot there were members from Nebraskans Against the Death Penalty, AMNESTY having a prayer vigil. On the other side of the parking lot there were people that were cheering, had signs--Nebraska's First Barbecue and things such as that, and cheering on the execution of Mr. Otey. In the middle were SWAT members from the Nebraska State Patrol and Lancaster County Sheriff's Office. And I never thought I would see law-abiding, decent, hardworking Nebraskans wrap themselves up in a frenzy as they were and the cheers that came when it was announced that Mr. Otey was dead. It's not worth it. It's not worth to see the citizens of this state behave like that or put them in a position to give them an opportunity to behave like that. We should do away with the death penalty. We're going to be safe and yet justice will prevail. Thank you. [LB1063]

SENATOR ASHFORD: Any questions of Jim? Jim, I just want to pick up just a couple of points, because you certainly are an expert on these matters; and I know the costs sometimes is subsumed in this debate and not necessarily the highest priority topic, but as the costs have risen...well, first of all, let me ask you this. The costs rise as the sentencing phases elongate, I would guess. [LB1063]

JAMES MOWBRAY: Correct. [LB1063]

SENATOR ASHFORD: And how can you...or can you quantify those costs and what they are today compared to what they were, let's say, five years ago, ten years ago? [LB1063]

JAMES MOWBRAY: Well, when I started in 1996 with the office, I looked across the state and looked at bills that had been submitted in prior capital cases, and the costs at that time was between \$50,000 to \$100,000 per case when it was an actual capital case. We're spending now around 3,500 to 5,000 hours per case, and at \$100 an hour, that's \$350,000 to \$500,000. In the case up on Madison County, I believe right now the costs that we've expended for experts and other things, travel, whatever it may be, those costs have exceeded a couple hundred thousand. So just my office, in that case alone, is around three-quarters of a million. So... [LB1063]

SENATOR ASHFORD: And that case isn't completed. [LB1063]

JAMES MOWBRAY: And that case is now still awaiting briefing in the Nebraska Supreme Court. [LB1063]

SENATOR ASHFORD: And it hasn't gone to any other appellate... [LB1063]

JAMES MOWBRAY: No. No, we haven't even had our direct appeal yet. And so that...you know, psychiatrists that ten years ago I was paying \$100 an hour, we're paying \$400 an hour. And I don't see that stopping. [LB1063]

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SENATOR ASHFORD: The...on another matter, what are the federal guidelines on incarceration for life for someone who is convicted of a federal murder in federal court and is...? You hear about the...what happens to these prisoners when they are doing a life sentence in federal prison. Do you know the difference between...is there a difference between that and how we treat life imprisonment in Nebraska? Do you know? [LB1063]

JAMES MOWBRAY: No, not directly. I do know... [LB1063]

SENATOR ASHFORD: Well, let me ask it this way. [LB1063]

JAMES MOWBRAY: Okay. [LB1063]

SENATOR ASHFORD: What is...what does life imprisonment without possibility of parole mean? [LB1063]

JAMES MOWBRAY: Right now in Nebraska, nothing; I mean, that we now still only have life. Life without the possibility of parole would simply mean that that individual will never get out. That requires a change in the constitution to take that power away from the Board of Pardons. But the bottom line is, if we change that and made it life without parole, it would mean life without parole. Practically speaking, since I believe it was Governor Orr's administration, no Pardons Board since then has commuted a life sentence on first-degree murder. So for the last 20 years, no one is having their sentence commuted. Until that happens, they will continue to spend the rest of their life in prison. So, from a practical aspect right now, Nebraska's life means life. [LB1063]

SENATOR ASHFORD: The only possibility of parole is commutation. [LB1063]

JAMES MOWBRAY: You have to have your sentence commuted by the Board of Pardons. [LB1063]

SENATOR ASHFORD: By the Governor, Secretary of State, and Attorney General? [LB1063]

JAMES MOWBRAY: Correct. [LB1063]

SENATOR ASHFORD: And those are the only three people, and it's a majority vote of the... [LB1063]

JAMES MOWBRAY: Yes, it would be a majority vote to commute the sentence. [LB1063]

SENATOR ASHFORD: Okay. And there's no other way, that you know of, legally that...

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[LB1063]

JAMES MOWBRAY: Absolutely not. There's no other way. [LB1063]

SENATOR ASHFORD: And when in the correctional facility, do you know how they are housed? How individuals are housed? [LB1063]

JAMES MOWBRAY: The individuals on death row, and I would imagine they would be treated the same way if they were...with life or life without parole, but again, most of the individuals on life or death row are pretty much housed in the same area at Tecumseh. Tecumseh was designed specifically with that purpose in mind when they built it, and that was to have a maximum security facility. It is much more secure than the Nebraska State Penitentiary because when that was designed, really the only true secure area was on...often what now is used as the adjustment center. But when Tecumseh was designed, they knew it was going to house death row and also house the inmates that are the true threat to not only the public but also to the guards that work there; and so it is designed for that purpose in mind and I think it works quite well, having visited. I've been on death row. You're not getting out of there. [LB1063]

SENATOR ASHFORD: Okay. The cases...I'll strike that. The cases that...where there have been exonerations of people on who have been convicted and sentenced to death around the country are a mixture, I assume, of different reasons for the exoneration or for the... [LB1063]

JAMES MOWBRAY: Most of the true exonerations have come from DNA, and they'll be in. Mister...be an individual here who will testify was on death row for 16 years and was exonerated with DNA. There have been some exonerations that have been based on other inmates confessing and then being able to corroborate their confession, but most of them have come through the DNA exoneration. So...but that is, and I think I'd said this before, I do believe DNA has been very helpful in identifying people who are innocent, but unfortunately DNA is not in every case. [LB1063]

SENATOR ASHFORD: DNA evidence is not admitted in all cases. [LB1063]

JAMES MOWBRAY: Well, it's not present. It's not... [LB1063]

SENATOR ASHFORD: There's not...doesn't exist in... [LB1063]

JAMES MOWBRAY: Just doesn't exist. And so...but by statistics and the law of averages, if you see the number of people that have been exonerated with DNA, we obviously know there's a number of people who are also innocent but can't prove their innocence through DNA. And so the other thing is, again, if we would speed up the process and carry out these executions as some people would, these individuals, and

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I'm sure such as the gentleman that's going to speak, would probably have been executed. In fact, that happened down in Florida, where apparently it took them longer to execute a woman than a man. They were husband and wife. They executed the man; later found out both he and his wife were innocent, and she was exonerated. [LB1063]

SENATOR ASHFORD: And that was fairly recent. When did that occur? Do you... [LB1063]

JAMES MOWBRAY: Just a couple years ago. [LB1063]

SENATOR ASHFORD: And that's just an amazing situation. [LB1063]

JAMES MOWBRAY: Right. So, because it was easier to kill a man than a woman, she lands up living and exonerated--he's executed. [LB1063]

SENATOR ASHFORD: You hear the argument often raised that why don't we just carry out the executions; you know, they've been convicted. And you've mentioned DNA evidence, but defendants in all criminal cases have certain rights that are guaranteed. Is that not correct? [LB1063]

JAMES MOWBRAY: It doesn't matter. Correct. However, we always use a term "death is different" when we're dealing with capital cases. Everybody is under a microscope in a capital case. That's why they take longer. That's why more money is spent. That's why the appellate courts spend more time with it. That's why they are so much more costly than simply someone being convicted of first degree and getting a life sentence, because all of that energy pretty much dissipates very quickly in terms of the appellate process. In capital cases, it goes on for a long time. [LB1063]

SENATOR ASHFORD: One last question, and I normally don't ask this many questions, but there's sort of a number of articles or a few articles I've read in the last year to two years about deterrence, and there's economists apparently have come up with a theory that somehow if the death penalty were carried out more frequently that the incentive would be clear not to commit a capital offense, and that, therefore, deterrence...and there's some data apparently. Are you familiar with some of those studies? [LB1063]

JAMES MOWBRAY: I guess... [LB1063]

SENATOR ASHFORD: Can you give me your thoughts, just very briefly, on those? [LB1063]

JAMES MOWBRAY: Having represented a number of people who have committed first-degree murder, I haven't found anyone who, one, didn't think they were going to get away with it, but secondly, had at any time in their mind what the consequences

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of...would be if they were to commit that murder. I've never had one of them say, well, I kind of thought about it, but I figured I'd get away with it or, you know, I'm not going to get the death penalty. That's never even part of the equation. They are... [LB1063]

SENATOR ASHFORD: How many of those cases have you handled, Jim, or are you familiar with? [LB1063]

JAMES MOWBRAY: Myself personally? [LB1063]

SENATOR ASHFORD: Yeah. [LB1063]

JAMES MOWBRAY: Oh, I've probably defended 30 first-degree murder cases or more. [LB1063]

SENATOR ASHFORD: That would be death eligible potentially? [LB1063]

JAMES MOWBRAY: Um, yeah, well, in fact at one time they were all death eligible until LB1, but... [LB1063]

SENATOR ASHFORD: Right, until the election, where you had to make an election. [LB1063]

JAMES MOWBRAY: You know, and even on second-degree manslaughter, what you find is, you know, there's drugs, there's alcohol, there's emotion involved. None of that is going to be stopped by a deterrent of a punishment. That is the farthest thing from their mind when the act is committed. And that's why I just...I don't believe it, I'll never believe it is a deterrent. And I don't think most of the penalties are a deterrent. Those of us who aren't inclined to commit a crime, we don't even have to have a penalty. I don't have to know that I could get fined if I drive 200 miles an hour down the interstate. I'm just not going to do that. And just because there's a penalty for that doesn't mean I'll, you know, that I'd stop, that it's going to stop me. [LB1063]

SENATOR ASHFORD: And you're going to be fined more possibly now... [LB1063]

JAMES MOWBRAY: I possibly would. [LB1063]

SENATOR ASHFORD: ...because of our new law. [LB1063]

JAMES MOWBRAY: (Laughter) The new bill. But I'm just saying is I, trust me, I get to talk to these people face to face. I get to see what they're thinking. I get to hear what they're thinking and that's the furthest thing from their mind, worrying about the deterrent. [LB1063]

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SENATOR ASHFORD: Well, and quite frankly, and I don't read all the materials on this topic and I'm sure you read much more than I, but that's sort of the new in vogue theory, isn't it, that somehow there's some kind of economic compulsion, economic theories that are applied to deterrence and that somehow that... [LB1063]

JAMES MOWBRAY: No, I know what you're talking about. I have no idea... [LB1063]

SENATOR ASHFORD: I'm not very precise in my question, but... [LB1063]

JAMES MOWBRAY: Well, no, but I don't know how they come to that conclusion, but I recognize that they do. I mean the idea of speeding up the process economically is going to somehow equal a deterrent, I don't...I don't see their thought process. [LB1063]

SENATOR ASHFORD: The last question: Senator Chambers brought up and he's mentioned before the idea of comparing, in death penalty cases, both cases where the death penalty has been assessed and compared to cases where it has not been. Is there a constitutional infirmity to making that kind of comparison to cases outside of death penalty...? [LB1063]

JAMES MOWBRAY: Well, that's one of the problems that we've had with the proportionality review, is that all we're reviewing is death versus death. We have 100 and...roughly, 150 first-degree murder convictions where we have the files, we have the facts of those cases, and having reviewed those, unless you...and these are people who got life, but yet we can't use those to compare to our client when it gets down to proportionality because right now in Nebraska it has to be death versus death. [LB1063]

SENATOR ASHFORD: But what I'm asking, is there some sort of overriding legal proscription that would not allow that to occur, I mean, or is that just the way we've written the law? [LB1063]

JAMES MOWBRAY: That's the way the law is. That's the way the Supreme Court has interpreted it, because all of those cases where people got life are not a part of the mix in comparing those cases to a case that we have that a three-judge panel is making a determination on. [LB1063]

SENATOR ASHFORD: That's all I have. Thanks, Jim. Steve...Senator Lathrop. [LB1063]

SENATOR LATHROP: I do have a few questions. You've given us some testimony about some of the money that was spent in the Norfolk cases. It sounds like just to get to the trial it was around a half a million dollars? [LB1063]

JAMES MOWBRAY: Or more. [LB1063]

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SENATOR LATHROP: Or more. Is that typical if you are going to prosecute, if we see prosecuted death cases? [LB1063]

JAMES MOWBRAY: If we see? [LB1063]

SENATOR LATHROP: Yeah, in those instances. Is there anything unique about the Norfolk homicides that made that \$500,000 atypical or is that...? [LB1063]

JAMES MOWBRAY: No, the only thing that was atypical, I mean, that ran the price up a little on our client was because of the issue of mental retardation, which went back to the issue of punishment. I mean, you can get life and be mentally retarded; you just can't kill somebody who is. But other than that, no. I mean, granted, there were a number of people killed, tragically killed, there were a number of defendants. But in terms of it being some case that no one has ever seen or heard about or something unique, no. It was the same skills used in that as any other murder case. [LB1063]

SENATOR LATHROP: And the \$500,000 that's spent, that's just the defense side? [LB1063]

JAMES MOWBRAY: Correct. [LB1063]

SENATOR LATHROP: And then we have the prosecution and they're doing comparable? [LB1063]

JAMES MOWBRAY: They're doing as much or...yeah, they're doing as much or more. [LB1063]

SENATOR LATHROP: Okay. So does this cause problems in smaller counties? [LB1063]

JAMES MOWBRAY: Huge problems. [LB1063]

SENATOR LATHROP: What kind of problems does it cause in small counties? [LB1063]

JAMES MOWBRAY: Well, fortunately with my office, I mean, we are able to absorb some of those costs. But in, for example, Madison County, you had multiple defendants. Once you have that, and even though...my office, we can only represent one client. I'm not sure exactly how much Madison County has paid out to the other attorneys representing the other individual defendants, but again it's considerable. And as we all know, counties are limited on how much money they can raise through property taxes. So it has a huge economic impact and it also impacts from the prosecutor's standpoint. I

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mean, the county has to pay the prosecutor's budget, too. Now they get some help from the state through the State Patrol, which will be coming with General Funds, but they still have to pay for all the costs of flying witnesses in or whatever the county attorney needs to do to prosecute the case. So they have costs on both sides and it hurts them. [LB1063]

SENATOR LATHROP: And so you could be looking at literally millions because...a county could literally be looking at millions of dollars because of the decision to proceed with a death or a death penalty prosecution in a homicide case. [LB1063]

JAMES MOWBRAY: Absolutely. You can at least cut it in half. [LB1063]

SENATOR LATHROP: And, in fact, you have cases across the country where they've actually had to raise property taxes in order to proceed with the prosecution in a death case. [LB1063]

JAMES MOWBRAY: Correct. And again the one story years ago in Richardson County where they were actually borrowing money from a bank, putting their ambulance up as collateral to try to cover these costs, and the Legislature had to bail Richardson County out. [LB1063]

SENATOR LATHROP: All right. In the end, do we not have some prosecutors that exercise their prosecutorial discretion and elect not to pursue the death penalty in cases where it would otherwise be appropriate, because of the cost? [LB1063]

JAMES MOWBRAY: In my opinion, no one has told me this, but I do believe it does have an effect in some counties on whether they're going to seek the death penalty based on the dollar costs. [LB1063]

SENATOR LATHROP: And then as a consequence of that consideration we have, it's more likely in urban areas to see the death penalty brought into a prosecution than it is in a rural area. [LB1063]

JAMES MOWBRAY: Yeah, that issue is never on the table, as far as I'm concerned, in the urban areas, whether...how much it's going to cost isn't a determining factor. [LB1063]

SENATOR LATHROP: All right. So when we...and we apply that to Nebraska, once you get outside of Omaha and Lincoln, it gets less likely that a prosecutor will elect to go after the death penalty, because of the expense. [LB1063]

JAMES MOWBRAY: I believe that's true, even though, again, most people would say, you know, they don't intend to do that, but that is an underlying factor when you're

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talking about a capital case. And everyone knows that it's going to cost twice as much as it would if they'd just simply look for getting a conviction and seeking a life sentence. [LB1063]

SENATOR LATHROP: And then once they have a conviction--and Madison County is a recent example--they will continue to pay lawyers for the appeals that will go on, on average, 20 years. [LB1063]

JAMES MOWBRAY: Until, yeah, until it gets to federal court. [LB1063]

SENATOR LATHROP: At some point or another, I know you and I have had a conversation about this and we often hear people who are proponents of the death penalty say, just give us some laws to shorten the time for appeals. And I think you've told me in the past that that actually lengthens the time of appeals because now you have something else to appeal. [LB1063]

JAMES MOWBRAY: Any time...you're right. Any time you change it. Any time you tinker with the law, any time you try to expedite something, that provides another issue. And it's just like when we had to change the sentencing process here in Nebraska because of the Ring decision. That starts the clock all over again for us because we don't know what is and isn't constitutional, so we have to raise it. The law on death penalty in Nebraska was really, really well-settled until LB1, and now we're starting all over again. And we have to raise the issues at the time of trial because if we don't, those issues are waived later on, especially in federal court. "Wili" Otey I think today would be alive but for the fact that the issues that needed to be raised weren't; they were deemed waived, and therefore, he was executed. So knowing that, having represented him, I'm certainly a lot more careful about what I have to do to protect my client and raise the right issues now, not knowing what the law is going to be in 15 years. But if it changes, I better have done it right now and then hope that it works for them in 15 years. [LB1063]

SENATOR LATHROP: And perhaps the point of that is, is that as we look at the landscape of considerations in death penalty cases, it isn't abolish the death penalty or shorten the appeals. Twenty years is what it's going to take to get somebody, from the time of a conviction, through to execution. [LB1063]

JAMES MOWBRAY: Generally speaking that's true. And a lot of my clients are in their 40s to 50s, so if you give them a life sentence they're going to probably die of natural causes anyway by the time they get to an execution. Charlie Palmer died of natural causes. I represented Wes Peery; he died of natural causes. So, you know, the reality is also looking at just the age of the perpetrator. When it's all...and yet we still spent all that time. I mean look at Palmer, had three trials, his case had been to federal court numbers of times, he was back on a postconviction and then he dies. [LB1063]

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SENATOR LATHROP: What happens if we eliminate the death penalty and have a life without parole? Are we going to have fewer trials, less litigation and fewer appeals? How...give us your judgment about the effect this bill would have on the number of trials... [LB1063]

JAMES MOWBRAY: Well, I can tell you... [LB1063]

SENATOR LATHROP: ...and the length and... [LB1063]

JAMES MOWBRAY: ...if the death penalty is on the table, you're never going to have a plea, ever, period. I would never plead a client and then say, gee, I hope I do well on the sentencing side of it. So that's just...that's a given. You're not going to do that. There may be some first-degree murder cases that could result in a plea of guilty without the need of a trial and a life sentence, but it's never going to happen with the death penalty, ever. So...and I think also there are some cases where if it starts at first degree, we're not talking about the death penalty, in all...not all cases, but they're more likely to resolve without trial than when death is even a possibility. [LB1063]

SENATOR LATHROP: Are we going to spend all that money on appeals, in time? [LB1063]

JAMES MOWBRAY: If you have a plea, you don't spend any money on appeals, especially because on a first-degree murder with a plea to life, that's it. It's over, it's done. There aren't any appeals. There are no costs for that. You don't have a trial. You don't have any of those expenses. But you're never going to be pleading somebody looking at the death penalty. [LB1063]

SENATOR LATHROP: All right. Thank you, Jim. [LB1063]

SENATOR ASHFORD: May I follow up, Jim, just on one other? [LB1063]

JAMES MOWBRAY: Sure. [LB1063]

SENATOR ASHFORD: You...Miriam, do you have...would you like to... [LB1063]

MIRIAM KELLE: Yes, please. Thank you. [LB1063]

SENATOR ASHFORD: Go ahead. I...let me...the other thing you hear about, following up with Senator Lathrop's questions is, well, you know, if there's no death penalty then your defendants are going to roll the dice and go to trial because they know they're not going to...they're not going to get the death penalty. Is that a myth? Is that real? What's that all about? Or should that even be...should that even be an issue anyway? I mean, should prosecutors be using the death penalty in that way anyway? [LB1063]

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JAMES MOWBRAY: Well, it's harder for them to do that now because they've got to make a call kind of right out of the chute when they file the information. Now they can always dismiss the aggravators, but they've got to file them with the information. I think it causes the prosecutors to have a better...I mean, look at the case more thoroughly as to whether or not they really think they should or shouldn't seek the death penalty, where before they would use that as a threat, like you know, I'll give up on the death penalty if your client pleads. But now, as I said, I really don't think that should be a part of the whole discussion, is... [LB1063]

SENATOR ASHFORD: And does that even happen, Jim, really? [LB1063]

JAMES MOWBRAY: Well, yeah, when...before the aggravators were... [LB1063]

SENATOR ASHFORD: Now, I mean. I mean, is that really a big...is that a factor? [LB1063]

JAMES MOWBRAY: Of them threatening the death penalty for a plea? Sure, it happens. [LB1063]

SENATOR ASHFORD: Is that good public policy that... [LB1063]

JAMES MOWBRAY: No, I don't think it is, but it happens. I mean, it happens where we're put in that position, is to say, okay, you go forward on the guilt/innocence and have your day in court, and if you fail you're going to look at the death penalty, versus if you go in and plead... [LB1063]

SENATOR ASHFORD: Well, what I'm getting at, that, to me, seems like a...if that's why we have the death penalty, as it's a way to get a plea, that doesn't to me seem...it seems contra to justice and to getting your case heard. If it's something that if you believe you're innocent but you're going to plead guilty because of the threat of the death penalty, what does that do? [LB1063]

JAMES MOWBRAY: Well, but that's a reality. [LB1063]

SENATOR ASHFORD: Well, I know that's the reality, but what... [LB1063]

JAMES MOWBRAY: I mean, it's no different than when they threaten the habitual criminal, you know, I'll file the habitual criminal if your client doesn't plead. [LB1063]

SENATOR ASHFORD: Well, I have the same concerns about that. [LB1063]

JAMES MOWBRAY: And I do too. I don't think that that ought to be a determining factor

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of whether somebody exercises their right to trial, because they are presumed innocent last I looked. Correct, Senator Chambers? [LB1063]

SENATOR ASHFORD: Well, that's what I'm...that's sort of what I'm getting at, is if we're presuming...we're still a country that presumes someone is innocent. Deterrence really, except for a few theoretical constructs, is not a factor. We presume people to be innocent. If we use the death...if in society--and I'm not saying that it is or isn't done but I assume it is done--if we use a death penalty as a hammer, so to say, to encourage defendants not to have their case tried but to plead and then not have a trial, what does that do to the presumption of innocence? I mean, these things really worry me. Then you heap on the cost on this, and I know from my perspective...it's not about my perspective, but from my perspective of someone who did not vote to repeal the death penalty in the past but the more...until I got back here in the Legislature and started to look at the evidence of the DNA and to look at all these things and to have in-depth discussions about it with people, what really bothers me is the presumption of innocence and what we're doing to the presumption of innocence compared to, you know, what in the end is...what are we getting in the end. We're not getting any executions in any sort of expeditious way. I mean, what are we doing? But that's a rhetorical question. [LB1063]

JAMES MOWBRAY: I understand. [LB1063]

SENATOR ASHFORD: Thanks, Jim. Senator Chambers. [LB1063]

SENATOR CHAMBERS: Very briefly. Mr. Mowbray, there can be codefendants and in the race to the courthouse to turn state's evidence, the one more culpable, if he or she wins the race, will be the one to get the break, and the one who is less culpable may wind up with the death penalty if it's a capital case. That has happened before, hasn't it? [LB1063]

JAMES MOWBRAY: I can think of two cases. [LB1063]

SENATOR CHAMBERS: And I know of one and it's mentioned periodically, even by a guy who was a prosecutor at the time, where a man was out in a car, he was going to drive the car, his partner went and killed somebody, and the one in the car was shown not to have known, but he was equally guilty. As it turned out, because the shooter cooperated, he got a term of years; the driver was on death row. The shooter, who was out, pleaded for the man's life; the prosecutor, who got him convicted, pleaded for his life; none of that worked and that is the one who was executed. The shooter was out. So when you have... [LB1063]

JAMES MOWBRAY: Oh, it is a definite race. I mean, as I say, we had Roger Bjorklund's case, where the codefendant...and then John Lotter and Marvin Nissen, where Mr.

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Nissen is doing life; Mr. Lotter is on death row. It happens all the time where it is a race to the courthouse to get a deal. And again, when you look at it from a proportionality standpoint, if they're both culpably...both equally culpable, how can you end up dispensing death on one side and life on the other just because somebody agreed to cooperate? [LB1063]

SENATOR CHAMBERS: And if the argument is made, as it always is, that only the worst murderers get the death penalty, yet we see where the worst murderers have been allowed to plea bargain, it's clear that dangerousness is not on the minds of the prosecutor or society because they accept the idea that the ones who committed the worst murders are allowed to plea bargain. And some of them will not get life, so they come back out here. So those arguments are kind of based on myth and other notions that don't go to the critical issue of protecting society. If society was to be protected, you'd kill everybody who committed murder. But the U.S. Supreme Court has already said that you have to particularize it, look at the individual, the circumstances, and a mandatory death penalty is unconstitutional. So the things that people say ought to happen cannot happen under the constitution. And as you pointed out, in trying to hasten executions, the law operates in such a way that you produce more avenues for appeal, and you delay them. [LB1063]

JAMES MOWBRAY: I completely agree with, Senator. [LB1063]

SENATOR CHAMBERS: Okay. [LB1063]

SENATOR ASHFORD: And just to follow-up, even in Texas, which we always...everyone indicates is an example of an efficient death penalty state, those particular...in Texas even the number of death penalty cases are lessening, or the number of executions are lessening, and there has been a recent, I believe, exoneration in the last...or if not exoneration at least there was a case... [LB1063]

JAMES MOWBRAY: You know, there was an exoneration in Dallas County, which is probably one of the most notorious counties where the lab had had all sorts of problems. A number of individuals have been exonerated out of Dallas County. [LB1063]

SENATOR ASHFORD: I'm going to just...I'm going to have to ask this. I normally...let's not have our cell phones on, please, so we can listen. [LB1063]

JAMES MOWBRAY: So things are turning around even in Texas, yes, I mean in terms of their realization down there, through exonerations, that they have a problem and they are certainly not taking it lightly. They've changed. They've added a ton of money to the defense. They've changed their public defender systems down there. No longer can a lawyer sleep through a trial, you know, those kinds of things. So it has improved but I

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mean, again, they're doing it because the realization is that they were executing innocent people. [LB1063]

SENATOR ASHFORD: Well, the light has been cast upon them as well. I mean, you know, and we just had a...New Jersey just repealed the death penalty and I believe there are other states considering it. One house in...was it Kansas, well, that's not right, but there's a couple...one other state where one house had voted to repeal. [LB1063]

JAMES MOWBRAY: Yes, and I'm trying to remember the state. But, yeah, New Jersey just passed and the Governor signed that. I mean I am sympathetic to the victims. Not everybody knows, I mean, my brother was murdered 20 years ago so I'm not heartless to the fact that the victims suffer a lot when there's a murder. I completely understand that. But killing the perpetrator or trying to kill a perpetrator doesn't help the grief process. [LB1063]

SENATOR ASHFORD: Well, and I think this Legislature has recognized victims for many years and we were one of the first states to recognize some of the victims' rights, so we're not unmindful of victims, I don't think. [LB1063]

JAMES MOWBRAY: I think when you're considering the death penalty, it would be better for victims in the long run not to have the death penalty, because the cases will resolve themselves more quickly and then they can move on through the grief process. Keeping these cases alive, bringing them back year after year, court cases, that's really hard on victims' families. [LB1063]

SENATOR ASHFORD: I think we've kept you up here enough, Jim, thank you. [LB1063]

SENATOR CHAMBERS: But I have a question. [LB1063]

SENATOR ASHFORD: But not quite enough. (Laughter) [LB1063]

SENATOR CHAMBERS: Mr. Mowbray, sometimes people will say victims are entitled to an execution. Victims--it might sound cold, under the legal system in America and England, where it started, a crime is considered to have been committed against the state or the king. Is that true? [LB1063]

JAMES MOWBRAY: Correct. That is true. [LB1063]

SENATOR CHAMBERS: So the victim is not entitled to an execution, and for people to put that notion out there is to suggest that the desire of the victim's family is what should determine whether there is an execution. [LB1063]

JAMES MOWBRAY: It shouldn't have anything to do with it. [LB1063]

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SENATOR CHAMBERS: Exactly, because it's not done for them. So when we have...we've had people come here periodically and they may have been encouraged by the senator from their district to say we're entitled to an execution, but they're not. Nobody is. [LB1063]

JAMES MOWBRAY: Your example, and I completely agree with you, your personal emotional feelings about a case, you may yourself go out and commit an act of violence against...I understand that from a victim's standpoint, the type of anger and emotion that's involved. I do understand that. But the state is in a completely different, unemotional position and shouldn't be in that business of killing people. [LB1063]

SENATOR CHAMBERS: That's all I have, for real. [LB1063]

SENATOR ASHFORD: Just finally, I've been struck by, in talking to a number of district court judges whose names I won't repeat here, but there seems to be without question a majority, at least in our district court, who are...feel very much the same and have changed their opinion on the death penalty from a judge's perspective, and that seems to be somewhat of a new trend as well. So... [LB1063]

JAMES MOWBRAY: Absolutely. [LB1063]

SENATOR ASHFORD: ...thanks, Jim. [LB1063]

JAMES MOWBRAY: Thank you. Thank you. [LB1063]

SENATOR ASHFORD: Jim Cunningham. [LB1063]

JIM CUNNINGHAM: Senator, I would defer at this point, if you'd like to hear from the gentleman that was referred to in Mr. Mowbray's testimony. [LB1063]

SENATOR ASHFORD: That's fine. [LB1063]

CURTIS McCARTY: Good afternoon, Senators. My name is Curtis McCarty, C-u-r-t-i-s M-c-C-a-r-t-y. I'm from Oklahoma City, Oklahoma. Eight months ago, in May of 2007, I was released from prison, having served 22 years for a crime that I did not commit. Nineteen of those years I served on Oklahoma's death row. And I'm here today simply to demonstrate that we human beings are fallible, and therefore, our judiciary is fallible. We make mistakes. We do put innocent people in jail and we put them on death row. And I hope that my appearance here can provide some perspective on this matter. Thank you. [LB1063]

SENATOR ASHFORD: Any questions of Mr. McCarty? [LB1063]

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SENATOR PIRSCH: I just... [LB1063]

SENATOR ASHFORD: Yes, Senator Pirsch. [LB1063]

SENATOR PIRSCH: I appreciate your coming down today and testifying. Could you tell me a little bit about the details that were involved in your case? [LB1063]

CURTIS McCARTY: The murder happened in December of 1982 and I, along with a long list of other young men, were eliminated as suspects in the death of Pamela Willis, a police officer's daughter in Oklahoma City. Some three years after the crime the police heard a rumor that I might know who did commit the crime and came after me. I didn't know, I advised them that I didn't know. And had I known, I would have revealed that information. I wouldn't have concealed that kind of information from law enforcement, but I didn't know. And for whatever reasons, they had it in their head that I did know and that I was going to cooperate with them. But there was nothing that I could share, and I don't know at what point the decision was made to prosecute me for this supposed knowledge, because in Oklahoma they do have the felony murder rule. You don't have to kill anybody to go to death row. An example that was given a moment ago of the man in the automobile, the driver, who was unaware that a murder happened outside the car by the passenger, he still goes to death row. And I can only guess and assume that that's what was going through their minds--he knows; therefore, it's okay to do this to him. It was ultimately ruled that there was gross prosecutorial misconduct and misconduct within the police crime lab, which is what ultimately led to my release, though it took 22 years to do so. [LB1063]

SENATOR PIRSCH: So you believe in this instance there was a...you were essentially framed in that incident, correct? [LB1063]

CURTIS McCARTY: That's correct. [LB1063]

SENATOR PIRSCH: Okay. [LB1063]

SENATOR ASHFORD: Any other questions? Yes. [LB1063]

SENATOR McDONALD: And you say you were on death row. Was there a date of execution for you? [LB1063]

CURTIS McCARTY: No, ma'am, there wasn't. Because of the way that the case evolved, there were questions about the conviction from the very beginning and there were judges, who I believe were honorable men, who did what they could to question the prosecutors and my attorneys, to put them on the spot and asked them what's going on here. But because of the nature of the misconduct, there was simply no way to prove

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it. And as I observed to someone earlier today, the officers involved and the prosecutors involved, they have rights, too, and I have...it was simply improper for me or my attorneys to stand up and make direct accusations of misconduct without substantial proof. There was only strong suspicions at the time. So I was fortunate in that those same questions were present in my first appeals in the court. That court decided to err in my favor and ruled on the prosecutorial misconduct at that time and the police misconduct, and sent the case back for retrial. I was convicted again and sentenced to death row again. By the time my case made it back into the appeals, the court had changed, the membership had changed, and there was a change in the political climate in Oklahoma, and this time the court didn't overturn the case despite the same questions being present regarding misconduct and missing files and etcetera. But they did order a resentencing where at I was sent to death row for a third time. And it wasn't until 2001, when the FBI began an investigation into the police crime lab in Oklahoma City, that in the process of investigating another case they ran across evidence that was in the process of being destroyed by the police chemist. They caught her in the act of doing it and that led them to a more intensive examination of this case, after which they found quite a bit of newly discovered evidence, that's how it's referred to, that had been withheld from the defense all those years, not just evidence of innocence but proof of innocence; that it wasn't me and that when the prosecutors filed the charge they knew that the charge was false. [LB1063]

SENATOR PIRSCH: If you don't mind me asking,... [LB1063]

SENATOR ASHFORD: Yes. [LB1063]

SENATOR PIRSCH: ...what was the evidence that was found that proved your innocence? [LB1063]

CURTIS McCARTY: The first thing that was discovered was that the police chemist had falsified her records. There was a three-year gap between the commission of the crime and my arrest, and that was the principal reason that the courts and my attorneys raised questions: If this evidence that you present to the court today is proof of murder, why wasn't it proof of murder three years ago? Why was there a delay in the prosecution of this heinous crime? [LB1063]

SENATOR PIRSCH: Were there other types of evidence that were also...you said the police...I'm sorry, apparently the FBI, in doing this investigation, found that the chemist had falsified certain...was it lab results or lab testing or what was it exactly? [LB1063]

CURTIS McCARTY: That's correct. When I... [LB1063]

SENATOR PIRSCH: With respect to...what type of evidence was it? [LB1063]

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CURTIS McCARTY: Serological evidence--hair, blood, saliva, evidence that had been collected from me during the initial investigation. The records demonstrate that I had been eliminated as a suspect definitively, and that once a year for those three years those records, yearly status reports, had been sent to the district attorney's office. When they decided that they would prosecute me, they had to alter those records. And it was ruled by the FBI and their document examiners that that is precisely what the chemist did; that she had falsified those records in order to include me as a suspect, and those alterations were explained later as typographical errors. But the FBI didn't...they didn't buy that and so they wanted to conduct new DNA testing in the case or to conduct DNA testing, but they weren't able to do so because the federal court issued an injunction, saying that because of probable evidence tampering in this matter that DNA testing would be prohibited. But because of the larger investigation, they subsequently went through some 2,000 cases that this woman had been involved with because they realized that there would probably be injunctions filed for other inmates, prohibiting DNA testing. They conducted an extensive search for evidence that would pass muster, that they could demonstrate that this woman had no contact with, no access to, and they did find such evidence in a number of cases and mine that was stored at the medical examiner's office that had been collected at the time of the autopsy of the victim. So the federal judge allowed that evidence, the semen that was recovered, to be DNA tested as part of the state of Oklahoma's multiagency joint task force that was investigating this matter, and the purpose of that DNA test was to prove or disprove factual innocence. However, the state tarried. Despite the results, the investigation continued. More evidence was discovered, some that was suspected to be there, some that wasn't. They found, for example, they found fingernail clippings also from the medical examiner's office not too long after that that had biological material under the nails that was also subjected to DNA testing. Those tests were also negative. One of the most important pieces of evidence that was withheld from the defense and from the juries and from the courts was a footprint that the perpetrator... [LB1063]

SENATOR ASHFORD: Mr. McCarty, you don't...it's not necessary for you to talk about this any further if you don't wish to. I mean I think I... [LB1063]

SENATOR PIRSCH: Yeah, I appreciate giving me the general...just kind of the general nature of this. [LB1063]

SENATOR ASHFORD: Yeah, I think we have a basic understanding of this, and we do appreciate you coming up here. Thank you very much. [LB1063]

CURTIS McCARTY: Thank you. [LB1063]

SENATOR ASHFORD: How old are you, Mr. McCarty? [LB1063]

CURTIS McCARTY: I'm 45, sir. [LB1063]

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SENATOR ASHFORD: Okay. Well, good luck. [LB1063]

CURTIS McCARTY: Thank you very much. [LB1063]

SENATOR ASHFORD: Jim. [LB1063]

JIM CUNNINGHAM: (Exhibit 11) Senator Ashford and members of the committee, good afternoon. For your record, my name is Jim Cunningham, C-u-n-n-i-n-g-h-a-m. I appear today in my capacity as executive director of the Nebraska Catholic Bishops Conference testifying on its behalf in support of LB1063. I've submitted written testimony and if you review that painstakingly, which I'm not asking you to do, you would find that it is not substantively different from testimony that I've presented on several prior occasions before this committee on this issue, and that stands to reason given that the essence of the public policy issue has not changed over the years. Nevertheless, I sincerely wish that I could present to you today some brilliant, new, heretofore unaddressed argument as to why this legislation should be enacted--something compelling and ultimately persuasive. Unfortunately, it's not likely I can do that. You have been exposed to the arguments and a great deal of information. Heretofore, our approach has been to offer legislators a standard, a test if you will, for judging the legitimacy of the death penalty. Taken from the Modern Catechism of the Catholic Church, we presented the test of absolute necessity; that is, given the ultimate consequences, is the death penalty absolutely necessary as the state's recourse for its legitimate purposes of punishing the offender and its obligation to protect society from aggressors. We argued the conclusion that, no, of course not, there is no absolute necessity of resorting to the death penalty in this modern age. We still hold to that conclusion. The death penalty fails the test. But this emphasis on the test of absolute necessity, while a worthy attempt to address the issue in more practical terms, probably shortchanged another essential element of Catholic teaching regarding the death penalty. In fact, it is an element that in the presentation in the Modern Catechism actually precedes and introduces the posit of absolute necessity. It is this: Nonlethal means of punishment and deterrence better correspond to the concrete conditions of the common good and are more in conformity to the inherent dignity of the human person; in other words, an affront to the dignity that is shared and common by all humankind. To explain this, I would like to read for you a statement that was made on behalf of the church at the international...or at the World Congress Against the Death Penalty in Paris one year ago: Every instance of capital punishment occurs a number of risks--the danger of punishing innocent persons; the tendency to promote a violent form of revenge rather than a true sense of justice in society; a clear offense against the inviolability of human life, which promotes the culture of death and violence; and for Christians, contempt for the gospel teaching on forgiveness. The taking of life never attains the worthy objectives for which societies punish offenders, although it may temporarily assuage the appetite for vengeance. And I have just a closing statement,

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Mr. Chairman. [LB1063]

SENATOR ASHFORD: Yes, sir. [LB1063]

JIM CUNNINGHAM: Every time the state kills a human being, society moves in the direction of its lowest, most base urges. That's not the common good; far from it. As legislators, you are in a position to uphold basic human dignity and to promote the common good and that, I suggest, is another good reason why this legislation deserves your support and advancement to the full Legislature. Thank you. [LB1063]

SENATOR ASHFORD: Any questions of Jim? Yes, Senator Chambers. [LB1063]

SENATOR CHAMBERS: Not really a question. Mr. Cunningham, you and I have been on this journey a long time together, haven't we? [LB1063]

JIM CUNNINGHAM: (Laugh) Yes, we have. [LB1063]

SENATOR CHAMBERS: If justice, true justice, were to be served, we would succeed in this effort which we and others have participated in for so long. Would you agree? [LB1063]

JIM CUNNINGHAM: I would agree. [LB1063]

SENATOR CHAMBERS: I'm counting on justice prevailing. Thank you. [LB1063]

JIM CUNNINGHAM: So am I. And I would say that I even go back so far as a time when the conference did not have a position in supporting repealing the death penalty, but we have been influenced by the teaching of the church and by other aspects of this issue. [LB1063]

SENATOR ASHFORD: By others. By others. (Laughter) And you don't have to name names. [LB1063]

JIM CUNNINGHAM: I was tempted...I was tempted to talk about... [LB1063]

SENATOR ASHFORD: You don't have to name names, Jim. [LB1063]

JIM CUNNINGHAM: I was tempted to talk about a dynamic duo, but I thought maybe I shouldn't. (Laughter) So thank you very much. [LB1063]

SENATOR ASHFORD: Any other proponents? How many other proponents do we have to testify? How about opponents? [LB1063]

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CURTIS BRYANT: (Exhibit 12) Chairman Ashford and members of the Judiciary Committee, my name is Curtis Bryant, C-u-r-t-i-s B-r-y-a-n-t. I'm a board member of the National Association of Social Workers, Nebraska Chapter. We would like to go formally on record in support of LB1063, believing as we do, as professional social workers, in the dignity and worth of all human beings, including those who have been convicted of serious crimes. And also, we believe in the need to protect the public from violent individuals. We have long supported replacing the death penalty with life imprisonment without parole. That's the longstanding policy of our national and state organization. [LB1063]

SENATOR ASHFORD: Thank you, Curtis. [LB1063]

CURTIS BRYANT: Thank you. [LB1063]

SENATOR ASHFORD: Any questions of Curtis? Thank you, sir. [LB1063]

SENATOR PEDERSEN: Thank you. [LB1063]

SENATOR ASHFORD: Next proponent. Yes, sir. [LB1063]

KURT MESNER: (Exhibit 13) I am Kurt Mesner of Central City. Almost 28 years ago my sister Janet and her friend Vickie were murdered here in Lincoln by am Kurt Mesner of Central City. Almost 28 years ago my sister Janet and her friend Vickie were murdered here in Lincoln by Randy Reeves. Randy was given the death penalty. My family and I were very disappointed. Why would Nebraska want to continue the cycle of violence and hatred? Why would Nebraska want vengeance when we wanted forgiveness? How are murder victims' families going to get closure if it takes 10, 15, 20 years or more before the killer is executed? The death penalty process puts murder victims' families through many extra years of grief. I have heard the statement many times over the years: We want to hear what murder victims have to say. When the Board of Pardons met to decide if they would hold a clemency hearing for Randy, they said no. They refused to hear what murder victims had to say. Does that sound like justice? When the Court of Appeals issued a stay of execution we were pleased, but we knew it wasn't over. When they ruled that Randy had to be resentenced, our hope was that Lancaster prosecutor would put an end to all this. He asked for the death penalty again. Why would he force my family and I to relive Janet's death all over again? The prosecutor withdrew his request for the death penalty a short time before the resentencing hearing was to begin. At the hearing, the prosecutor stated: If Randy was given the death penalty, it could come before my court for another 10, 15, 20 years or more; that would not be in the best interest of the victims' families involved. I am asking you today to abolish the death penalty now. I don't want any more murder victims' families to go through many years of pain like my family has experienced. Any questions? [LB1063]

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SENATOR ASHFORD: Any questions? Yes, Senator Lathrop. [LB1063]

SENATOR LATHROP: I would like to ask one. Oh. [LB1063]

SENATOR ASHFORD: Yes. I'm sorry. [LB1063]

SENATOR LATHROP: I would like to ask a couple questions because you've touched on something that I find a very interesting perspective, and that is what the death penalty does to the victims' families. You said it was your sister that was... [LB1063]

KURT MESNER: Yes. [LB1063]

SENATOR LATHROP: ...murdered by Mr. Reeves. Did you initially or right after he was sentenced, did you want to see him get the death penalty? I mean has your position evolved or... [LB1063]

KURT MESNER: When I heard he was given the death penalty, I knew that this was not right. We knew from the day that Janet died that we did not want Randy to die for Janet's death. [LB1063]

SENATOR LATHROP: All right. Could you just tell me in a nutshell or briefly how the appeals and the fact that Mr. Reeves's case was in the paper and brought up and there would be a hearing, and then two years would go by and then another hearing, how that affected the grieving process for you and your family? [LB1063]

KURT MESNER: Well, it just...the way I say it is it wouldn't let Janet die. It kept coming back, you know, and over the years I think there was 30-some appeals on his case. I don't remember most of them, but I'm aware that it caused a lot of ups and downs when they came. [LB1063]

SENATOR LATHROP: Did you have the sense that you were coming to accept your sister's death and then, every time this guy is in the newspaper or on the television, it sort of relit the whole thing up again? [LB1063]

KURT MESNER: Yes, it did. [LB1063]

SENATOR LATHROP: All right. That's what I was looking for, and thank you. [LB1063]

SENATOR ASHFORD: Thank you, Senator Lathrop. Thank you, sir. Any proponents for the bill? [LB1063]

ANNE SEVERES: Members of the Judiciary Committee, my name is Anne, A-n-n-e, Severes, S-e-v-e-r-e-s. I'm director of social ministry for the Archdiocese of Omaha, and

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I'm not going to read my entire statement because my esteemed colleague, Jim Cunningham, has said many times what the church has to teach us about this and how many Catholics in Nebraska feel about the death penalty. We're here in support of LB1063. My commission, which is made up of several professionals from the Catholic community in Omaha, worked together on this statement and sent me down with it, which I will share with the committee in a written form. But I just wanted to express my support for this bill. The death penalty diminishes our state incredibly with regard to human dignity and promotion of the common good. And the sense that we can somehow correct violence by inflicting more violence has never made sense and it will never make sense in the future. Thank you. [LB1063]

SENATOR ASHFORD: Thank you, Anne. Any questions of Anne? Thank you, ma'am. Loran. [LB1063]

LORAN SCHMIT: Good afternoon, Chairman Ashford, members of the Judiciary Committee. My name is Loran Schmit, L-o-r-a-n S-c-h-m-i-t. I'm speaking here this afternoon on my own behalf, in support of abolition of the death penalty. Want to point out that when I first came to the Legislature I was a firm believer in the death penalty. The longer I was here and the more I visited, I obviously saw the disparity in the sentencing for various crimes, all the way from minor crimes to capital crimes, the more obsessed I became with that inequity. And when I would drive down the highway, and it happened to me one time, it's kind of a simple thing but I was going down the highway, interstate highway, and I was following another car, and a car went around me and a trooper came up--they are good troopers and I don't think they're able to make mistakes, but I was given a ticket for speeding 66 miles an hour. At that time the speed limit was 65. And they didn't give the gentleman that went around me a ticket, and I was angry and I went to court and I argued that. And nonetheless, the conviction stood and the argument was, well, we can't get them all. And...but I felt I'd been wronged because someone went faster than I did and got away clean, and good old Loran, plodding along at 66 miles an hour, was convicted of speeding. How much greater must it be to the individual who is involved in a crime, and as said earlier, his compadre beats him to the courthouse and plea bargains; and that plea bargaining results in one person going free and another being convicted and sent to death row? I'm going to be here later on and testify in support of the other bill which will abolish life without parole, because I have an instance like that in my own backyard which is very inequitable. But I'm concerned mostly that people ought to believe in the sanctity of life. I believe life begins at conception and ends at death, natural death, not death imposed by anyone else. And so I ask the committee to advance the bill. And I want to say this: that in my district, which is not exactly a liberal district, I never received one complaint because I voted to abolish the death penalty. So if there are people who are afraid of the reaction, it never happened to me. Thank you very much, Mr. Chairman. [LB1063]

SENATOR ASHFORD: Any questions of Loran? You're a good man, Loran. (Recorder

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Malfunction--Some Testimony Lost)...we have. I keep thinking maybe we have had all the proponents, but then one more? Come on up. [LB1063]

SENATOR LATHROP: Oh, there's some more over here. [LB1063]

SENATOR ASHFORD: Oh, I'm sorry. More proponents over here. [LB1063]

LELA SHANKS: (Exhibit 2) Good afternoon. My name is Lela Shanks and I've testified many times before the committee. I have passed out a statement so I won't read it, but I do want to point out two reasons why I feel you should support the bill. And one is because it's morally indefensible, in view of America's stated values and declared respect for all life, to continue with the death penalty. But one issue that has not been raised here today, it's kind of like an elephant in the room, and one of the reasons we need to abolish the death penalty is because of the historic double standard of justice in America which is documented by many things; among them the practice of racial profiling from America's beginning, the U.S. Constitution under Article I, Section 2, and state constitutions meting out one law for whites and one for blacks, and of course, state laws discriminating against blacks, including in Nebraska. And I have listed some citations. So thank you. [LB1063]

SENATOR ASHFORD: Thank you, Ms. Shanks. Proponents? I'll ask one more time because my eyesight must be...how many more proponents? Behind the pillar, anybody? Okay. This is the last...you're the last one, sir, on the proponents' side. [LB1063]

JOHN KREJCI: (Exhibit 14) Good afternoon, and I'll be very brief. Senator Ashford, Senator Chambers, it seems like I've been coming here forever and ever, and we keep coming. And we've got a young proponent I know for this bill. I'm going to...my name is John Krejci, K-r-e-j-c-i. I'm testifying for Nebraskans for Peace, the oldest statewide peace and justice organization, and Nebraskans for Peace have been coming here forever and we'll keep coming. The only thing I'd like to say is the tide is turning, what I've seen. I've been watching in the other room in the overflow. The tide is turning. New Jersey, lethal injection, and Nebraska needs to go along with that. We really don't have a death penalty, the electric chair. And I'm still learning. I got some notes and I learned something and I appreciate the questions that were asked. And it's barbarism; most of the world is against it. It's time to step back and become more humane. And thank you very much, and I appreciate the opportunity. [LB1063]

SENATOR ASHFORD: Thank you, John. Any questions of John? Thank you, sir. Opponents of the bill? How many opponents do we have? Two, okay. Oh, we have one more proponent. (Laughter) I am having a very, very difficult time. I must speak...maybe I'm speaking Greek when I asked the question. Not that Greeks are....(Laughter) Okay. [LB1063]

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LEOLA BULLOCK: Okay, I'm a proponent. Actually, I've already given a statement to all of you from the National Association for the Advancement of Colored People, and I just wanted to emphasize that the NAACP and our membership is supporting this bill by Senator Chambers. And we hope that you'll read our statement. Thank you. [LB1063]

SENATOR ASHFORD: Can you give us your name, for the record? [LB1063]

LEOLA BULLOCK: Oh, I'm sorry. Leola J. Bullock from Lincoln, Nebraska. [LB1063]

SENATOR ASHFORD: Thank you, Ms. Bullock. Thank you. Okay. Opponents? [LB1063]

JOE KELLY: Mr. Chairman and members of the committee, my name is Joe Kelly, K-e-l-l-y. I'm here as a chief deputy of the Lancaster County attorney's office, but I'm here today representing the Nebraska County Attorneys Association. We're here in opposition to LB1063, but I should let you know this: Our association has in the past and does today maintain a neutral position on whether or not there should be a death penalty. We've taken that position for a good many years now. The association's opposition then is to those provisions of the bill beyond whether or not there should be a death penalty. Our primary objective is this, because no sooner than this bill would repeal and do away with the death penalty, it would transfer the entire death penalty sentencing apparatus and place it into the scheme that we use to sentence those for life without imprisonment (sic). And the battleground would become whether or not an individual charged and convicted of first-degree murder receives life or whether that person after a hearing with aggravators and mitigators and a weighing of the proportionality by the sentencing panel determines that it should be life without imprisonment (sic). I think another speaker, probably Mr. Young, will probably talk to you about the whole issue of what is and what would be the difference between life without imprisonment (sic) and life. I'll leave that. I'll just say as to that apparatus, aggravators and mitigators and the weighing, it's our opinion that that procedure really isn't justified if you no longer have a death penalty. The reason you have that...yes, sir? [LB1063]

SENATOR CHAMBERS: May I ask a question? [LB1063]

SENATOR ASHFORD: Yes. [LB1063]

SENATOR CHAMBERS: Because it's my bill. If that panoply went away, would you guys go away? (Laughter) [LB1063]

JOE KELLY: The association would still be neutral, Senator, and the neutrality is based on a difference of opinion of our members. [LB1063]

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SENATOR CHAMBERS: I don't mean the neutrality, but I mean the opposition. If we did away with that second layer, the second hearing and all of the things that you're mentioning that relate to sentencing because of the death penalty, if all of that went away, then would your opposition go away? [LB1063]

JOE KELLY: Almost. You'd be down to two little issues. And if you want, I'll jump right to them. [LB1063]

SENATOR CHAMBERS: Yeah, I'd like to hear those. [LB1063]

JOE KELLY: All right. One is this... [LB1063]

SENATOR ASHFORD: We'll start drafting. [LB1063]

JOE KELLY: I see the resentencing of those on death row today as perhaps problematic, especially those who are pre-Ring defendants, if you want to call them that. Because some of those people on death row--unlike, we all know, Norfolk or Mata--some of those folks were simply found guilty by judge or jury and sentenced after weighing aggravators and mitigators. But they didn't have the right to a jury. They didn't have a right to a jury to determine those mitigators and aggravators. Now the Nebraska Supreme Court has already spoken to the issue a little bit, but to me there is still that issue of whether this Legislature can automatically sentence someone to life without...life imprisonment without possibility of parole versus life, there having been no previous hearing where the person had the right to a jury to determine the aggravators and the mitigators. You know, a panel would still, even in those older cases, have made that proportionality review. But that person, it seems to me, we could hear some claims from those folks that they are entitled to an entire new sentencing process, that the Legislature can't in one fell swoop put them into that category of life in prison without the possibility of parole. And I, you know...and that gets us a little bit into the restitution issue. Because as we all know today, even if it's a burglary, if a person disputes the amount of restitution due or if the person wants to talk about his or her indigency, they're entitled to a hearing. In other words, even though enabling statutes may say a judge may order restitution, as this does, you may have some problems in that area. So those are the two problems beyond the main thrust of our objection, Senator. [LB1063]

SENATOR CHAMBERS: Is your organization or representatives willing to work with me and members of the committee to commit to writing or some form the issues that you're raising, so that we can appropriately address them and get the language necessary to achieve it? [LB1063]

JOE KELLY: Well, the answer is yes. We would be willing, certainly, to give our best legal opinion. Once the Legislature says this is what we want to do, we're willing to give

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you our best legal opinion about how to get there. [LB1063]

SENATOR CHAMBERS: Okay. And that wasn't to cut off your testimony but to make it unnecessary to feel you have a convincing job to do; a job of convincing, I mean. [LB1063]

JOE KELLY: That's fine, and that's all I had. [LB1063]

SENATOR ASHFORD: Well, I appreciate your candor and help. I think your help will be a help. So thank you, Joe. Yes, sir. Next opponent? [LB1063]

MARK YOUNG: Good afternoon. My name is Mark Young, M-a-r-k Y-o-u-n-g. I am the Hall County attorney. I'm here today on behalf of...in that position and on behalf of the Nebraska County Attorneys Association. Much of what I wanted to say or planned to say has now, I think, been addressed by the interchange between Senator Chambers and Joe. So I'm going to focus on some other issues that may have come up today during other testimony. One of the analogies used by one of the proponent witnesses here was about...or one of the examples was a gentleman named Charlie Palmer. Mr. Palmer died on death row based on a Hall County conviction in 2007. That murder took place while I was an undergraduate at the University of Nebraska. The day Mr. Palmer died, he had a postconviction motion pending in the district court of Hall County, Nebraska, and in fact had been appointed three different lawyers to assist him on that hearing. Senators, I've listened to a lot of very bright and thoughtful people make some very interesting and compelling arguments about the death penalty. But if the repeal of the death penalty is to be presented to the public as being a means of reducing costs and reducing delays and reducing complexity, it really needs to be coupled with some thoroughgoing reform of the postconviction process. If the death penalty had not been imposed after three trials on Mr. Palmer, what would have changed? Nothing. He would have still had the right to be there. And if he had been given the sentence of life without parole, I suspect he very well would have been there. Just very briefly, plea bargains are subject to postconviction attack more and more and I would ask the committee to consider that when they're looking into the issue of the death penalty. I would like to get back to neutral on this bill and on this subject, if not beyond that. You know, I'm a small-town prosecutor. There were some questions about how we go about it. You know, we're going to follow the law whatever you tell us the law is, whatever the expense may be. But I would ask you to give serious consideration to not overly complicating that law. I'd just like one last thought, and Joe touched on this a bit. Basically the way the restitution provision of the current statute is drafted, you're going to ask us to do a personal injury trial. We're going to have to bring in the kind of experts that you get in civil court to prove up pain and suffering, and that's an awful tough burden to prove up and I'd ask you to take a look at that. Thank you. I'd be happy to answer any questions. [LB1063]

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SENATOR LATHROP: I do. [LB1063]

SENATOR ASHFORD: Oh. [LB1063]

SENATOR LATHROP: I do have a question, if I may. [LB1063]

MARK YOUNG: Yeah. [LB1063]

SENATOR ASHFORD: Go ahead. [LB1063]

SENATOR LATHROP: Do you think that a...is there any impediment to simply having...leaving it up to the district court judge at the time of sentencing to impose, among other things, if he or she deems appropriate, life without parole? Do we need to have any special protections like we do with the death penalty before a judge can impose a sentence of life without parole? [LB1063]

MARK YOUNG: No, Senator... [LB1063]

SENATOR LATHROP: And I think that goes to the point that Mr. Kelly made, which is the aggravating/mitigating circumstances don't need to be there. We just have...give the judge authority to impose that sentence as part of his or her discretion. [LB1063]

MARK YOUNG: I would agree with that, Senator. And in fact, one of our concerns is that it's really tough to be able to look into the future and predict how courts and the board of prisons and other agencies are going to look at, you know, we now will have, if this bill were passed, we would have second-degree murder being a term of years up to life imprisonment. Then we'd have something called life imprisonment that's not defined. And then we'd a life imprisonment without parole. I don't know what the minimum sentence, if any, would be on life imprisonment. I'm afraid that the Supreme Court, in looking at it, would say our job is, of course, to give...effect every word in a statute. So life imprisonment must mean something other than life imprisonment without parole, and they could end up having a bottom end at zero since there isn't anything else in there and you're sort of ending up with that...if you have that with the aggravating/mitigating, you're getting sort of a supersized second-degree murder. And I'm not sure that's really where people want to go with it. [LB1063]

SENATOR LATHROP: So there is...your concern is, is that if we have a life without parole, that it implies that life, which is the next grade down, means something besides life without parole? [LB1063]

MARK YOUNG: Right. [LB1063]

SENATOR LATHROP: And is it your position then that we need to address what life

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means in that second tier if we create the life without parole as the first tier? [LB1063]

MARK YOUNG: My recommendation and belief is it's more appropriate to just have life without parole without...and not have the whole aggravating step. But if you're going to leave that in there, I think you need to explain clearly to all of us out there in the field that will be using this bill in the future what you meant when you had life for second-degree murder being, what is it, 20 to life, I think. And then life without parole, what's that middle step mean? [LB1063]

SENATOR LATHROP: I think I understand. Thank you. [LB1063]

MARK YOUNG: Thank you. [LB1063]

SENATOR ASHFORD: Yes, Senator Chambers. [LB1063]

SENATOR CHAMBERS: If there should be--and we're woolgathering here today all of us because we're looking at a problem that I think we're all agreeing we'll work together to resolve. If you have life without parole and we do away with that second penalty phase hearing that exists under the death penalty, I don't think it would be unreasonable to require the judge to articulate why and how this case justifies life without possibility of parole if life continues to be a part of that system. And I haven't resolved all that in my mind, but there has to be something somewhere along the line so that the Supreme Court, in reviewing a sentence, will have something in the record on which to base a review. [LB1063]

MARK YOUNG: Senator, I would agree with that. I think there needs to be something. I do have a real concern that if you have life and then you have life without parole, that you may end up being subject to constitutional challenge under Ring, if... [LB1063]

SENATOR CHAMBERS: That's why I'm willing to look at that issue and we'll... [LB1063]

MARK YOUNG: Yeah, so I...I think that's something we do need to address. [LB1063]

SENATOR ASHFORD: Senator Pirsch. [LB1063]

SENATOR PIRSCH: Just to go into a different direction and ask you, are you familiar with the...I wanted to bring up the concept of deterrence. [LB1063]

MARK YOUNG: Sure. [LB1063]

SENATOR PIRSCH: Are you familiar with any of the studies or empirical research with respect to the concept of the death penalty as a deterrence? [LB1063]

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MARK YOUNG: I am somewhat familiar with it. I certainly wouldn't hold myself out as being an expert or able to do any of the math involved. [LB1063]

SENATOR PIRSCH: I see. Do you know if anyone after you plans on testifying with respect to that aspect or facet? [LB1063]

MARK YOUNG: I don't believe so. I am...my own personal belief is, is that we ought to look at any kind of economic-based argument for or against the death penalty with a great deal of skepticism. I've just been doing some reading on statistics and unless you know all the numbers, having one number is pretty...it's much like unless you know how many murder convictions there were in a given year, having 3 or even 300 thrown out really doesn't mean much, because what's...that's a percentage of what? And so it's hard to say whether or not any of the economic theories are going to really address deterrence or be something that we can hang our hats on. [LB1063]

SENATOR PIRSCH: And when you say economic theories, in what sense do you mean that? [LB1063]

MARK YOUNG: Well, I think it's something Senator Ashford referred to, Senator. There are people who try and do a cost-benefit analysis for and against the death penalty. [LB1063]

SENATOR PIRSCH: I don't mean from that aspect moneywise, I mean from lives, general deterrence. [LB1063]

MARK YOUNG: Sure. I think it's based on some sort of theories coming out of the world of economics about people making rational decisions. And the argument is...and it's, on the surface, it seems pretty persuasive or attractive to me, that most people most of the time will make decisions that are in their best interest. And so if the penalty is harsh enough, it will moderate behavior, or if they believe there is actually a risk of the penalty being carried out. That's the basis of that argument, comes from... [LB1063]

SENATOR PIRSCH: But as far as the studies or anything or research, I...you know, in the past that has been some of the studies that have been talked about and debated. And so I wasn't sure if you had knowledge of some of those studies on either side. It seems that in the past there's been some studies put forward saying that it does lead to (inaudible) some studies behind it, but you don't have any personal knowledge of the research or... [LB1063]

MARK YOUNG: I don't. [LB1063]

SENATOR PIRSCH: ...anything you can shine a light on? [LB1063]

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MARK YOUNG: I'm not. Even if I did, I'm not sure I believe any of them. I'm not sure I believe any study that would say we can definitively say yes or no on that. [LB1063]

SENATOR PIRSCH: I see. [LB1063]

SENATOR ASHFORD: Thanks, Mark. That was very helpful and we look forward to working with you on the postconviction issues, because I do think that's an issue the public also has questions about. So thank you. Any other...I guess they're opponents. Any other opponents? Neutral? Yes, sir. How about neutral...come on up. Any other neutral testifiers? Okay. [LB1063]

ROBERT KLOTZ: I'm Robert Klotz from Lincoln and I'd just like to share some thoughts of just a citizen on some pluses and minuses of all of this. I looked at LB1063, particularly page 3, end of line 13, it says evidence does not establish that the death penalty effectively deters first-degree murder. By way of an interesting illustration, let's say you had a perfect law where the convicted would die the very next day when convicted and that they were the actual one who did the murder. Death penalty, in my estimation, would be at best 90 percent effective in deterring the first-degree murder because you always have those individuals who don't think, even to their own harm. And under today's law and judicial restraints and reviews, the death penalty may only be as little as 20 percent effective in deterring murder. Then if you'd eliminate the death penalty, the deterrence drops to zero, which would lend support to this bill's supposition that there is no real deterrent value in the death penalty. However, when you look at the deterrent value of the death penalty on those who are accused of first-degree murder, the deterrent factor seems to increase dramatically if you look how many will quickly plea bargain and confess so willingly to second-degree murder rather than have to face the possibility of a death sentence, and so will readily take a life sentence instead. Now what might happen if a first-degree murder charge begins with life in prison with no possibility of parole instead of the death penalty? What will the defendants plea bargain down to? At worst, they will probably be given life in prison. But now with no fear of any possibility of death, they may forgo the plea bargaining and start saying they're innocent and start going through lengthy trials. And the money saved by eliminating the death penalty is now ate up in pretrials and all the kinds of lengthy wranglings because they have nothing to lose at this point, which brings up a new reality: the elimination of the death penalty will then legalize murder. With nothing to lose, these life-sentenced murderers can, for example, threaten female security staff in prison to have sex with them or be killed. And why not? The one with a life sentence who kills someone in prison is now rewarded with an outing downtown so he can sneer at the judge who cannot dish out any punishment because an individual can only serve one life sentence. Now if the Unicameral chooses to go with life with no possibility of parole, you need to have a punishment for murder. Life, as this bill points out on page 3, line 2, is the most valuable possession of a human being and only another life reaches the level of value of life taken. That is why death has been the penalty for first-degree murder from time

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immortal. To change the penalty now to life with no possibility of parole is to devalue the life taken from the innocent. But if you so choose to change the penalty, at least have a somewhat meaningful punishment for those who murder while they are in prison. The only punishment I can think of is to have a punishment of life in segregation with no possibility of getting out of segregation, which is equivalent to today's death row. This way... [LB1063]

SENATOR ASHFORD: Robert, I'm going to ask you to sum up because we're... [LB1063]

ROBERT KLOTZ: I have one sentence left. [LB1063]

SENATOR ASHFORD: All right. [LB1063]

ROBERT KLOTZ: This way they will have very little opportunity of harming anyone else and they will know that there is still a punishment worse than the life sentence they now will be serving. [LB1063]

SENATOR ASHFORD: Thank you. Any questions of Robert? Thank you, sir. (See also Exhibits 3, 4, 5, 6, 7, and 8) Senator Chambers. [LB1063]

SENATOR CHAMBERS: Briefly. The denouement. I shall never be in a position to do this again in life. (Laughter) What some of the testifiers not only at this hearing but others don't seem to realize, and they could answer some of the questions that Senator Pirsch has about these studies that economists make about every execution prevents a certain number of murders, they have states where there is no death penalty, the perfect laboratory to test all of these theories. Where there are states with no death penalty, the murder rate often is a lot lower than in states that do. Iowa has no death penalty, they're right next door to Nebraska, the murder rate is not as high as in Nebraska. When this gentleman talked about life without parole being a free ride, he doesn't understand at all the nature of being in prison and deprived of your freedom. People who take that opinion and express it seem to be saying if you have no death penalty as a punishment for murder, the killer goes scot-free. Not true. What also has to be considered is that in Nebraska, the vast majority of murderers do not get sentenced to death, and the vast majority may not necessarily wind up dying in prison. So all these theories that people are bringing, such as those raised by Senator Pirsch, are designed to give them a feeling that there's a reason why you can't get rid of the death penalty. Economists, Senator Pirsch, cannot even make reliable predictions in the realm of economics and that's why they blunder into other areas. (Laughter) Since you're dealing in speculation, you should understand something about logic and philosophy. In philosophy, in logic, it is impossible to prove a negative. It is impossible to prove a negative. You can go to Aristotle, Thomas Aquinas, Kant, Descartes, anybody recognized as a logician, a philosopher, even if you're talking about what I hate, that

philosophy taught at Creighton--metaphysics. You cannot prove a negative. So when these people without any empirical evidence make these wild statements and draw these conclusions, it's like people sitting at the bar half drunk and saying this is the way it is. It's not that way at all. And when we're talking about life and it being taken by the state, we need something more than these crackbrained notions that make no sense and which are not even accepted by economists as an area where economic theory ought to be superimposed on a discipline about which they know nothing. I had a couple of things...oh, this talk of all of the appeals and so forth that will occur if you have no death penalty. The courts themselves have said because the death penalty has such enormity, is so final, and mistakes have to be avoided even though courts make them, they are going to use a microscope. They're going to review all of the evidence, even in some jurisdictions where they have hanging courts they're going to at least go through the steps of making it appear that every T is crossed and every I dotted. They don't do that with life sentences now, whether they're in a state where they have a death penalty or don't have a death penalty. The issues are not the same. As long as a person is alive, a correction of an error can be made. If a person is killed, there is no way to correct it in this world or the next, if there is one. As a matter of fact, former Governor Bob Kerrey posthumously pardoned a man who had been executed in Nebraska in the late 1800s for murder when the man allegedly murdered turned up alive in Kansas. All of the facts were there and the man was executed and Governor Kerrey pardoned him. With all of the innocent people--actually innocent--being released from death row, we know that innocent people have been executed. When DNA evidence has excluded a person as a possible participant, when there can be an ironclad alibi and prosecutors are unwilling to allow the person to be released they will object to it, they will fight it, and some judges have chastised them because in view of the actual innocence the prosecutor should not try to hold those people in jail. And judges have said there will be no more hearings, there will be no new trial, this man is released today. This man walks out of this courtroom now. Prosecutors have a certain turn of mind. They're not interested, some of them, in justice. They're not interested in guilt or innocence. They're interested in winning. They cannot acknowledge that they made a mistake. And I think that we as policymakers must get above all of that and let them continue doing those things because that's what they know how to do, that's what they're trained to do. They're in a little box and can't get out of it, some of them. But we are the ones who have a higher responsibility. We know the reality. We know that race plays a factor. We know that gender plays a factor. No woman has ever been sentenced to die in Nebraska. And I know a young woman whose throat was cut 13 times and she was murdered in the presence of her little children and the murderer got life. It was a black woman. There are others who have been involved in decapitating people, mutilating, raping, cutting off parts of the body, who got life. I'm not arguing for a death penalty for everybody. I'm arguing for a death penalty for nobody. And it is impossible under the law, no matter how emotional people are, how deranged they may be made by their ignorance, their anger, their hurt, their zealotry, or anything else, a person cannot under the Constitution of the United States and Nebraska be executed the day after being

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convicted. We shouldn't even want that. And if people would read history, they would find out that the death penalty did not deter murders in England where they killed people for stealing shillings, for defacing money, for running through somebody's turnip field. They executed children for breaking windows, for stealing ink from a printer. They executed everybody. There were even descriptions of little girls who were so young they did not know that they were being taken on this cart to be executed. So they were just chattering and doing like little children do. And they mention how when they were hanging, their bodies were so light that they were swinging in the breeze like so many flowers suspended in midair. These are documented cases that people in this country don't know about because they won't read history. When people were executed for commercial crimes, stealing money, embezzling, guess who were the ones who fought against that death penalty? The bankers and the ones victimized, because juries felt that that is such a harsh penalty that nobody should die. So when the only punishment was death, the embezzler got away with no punishment. So the bankers said, we have to have a different method of punishing because they will not be punished at all. So the ones for whose benefit the death penalty supposedly was in place were the ones who got it thrown out. People need to read. But if they won't read, if they refuse to be informed, it's like talking to a wall. But we nevertheless must put forth the effort. One of the dynamic duos would have been me and the former Pope, the last Pope. We both felt that the death penalty ought not be here. And had I been a senator in Rome (laughter) and had I had the effectiveness that sometimes I can have here, there may not be a Christian religion because an innocent man would not have suffered the death penalty in the first place. That's all that I have in my final presentation on this issue before a committee of the Legislature. If you have any questions, though, I would answer them. Thank you. (Applause) [LB1063]

SENATOR ASHFORD: Senator Pedersen, do you wish to... [LB839]

SENATOR PEDERSEN: Do I have to do that? (Laughter) [LB839]

SENATOR LATHROP: Well, it was an honor to be here for the last go-round. [LB839]

SENATOR PEDERSEN: Senator Ashford and colleagues on the Judiciary Committee, for the record I'm Senator Dwite Pedersen, representing the 39th Legislative District, and I'm here today to introduce to you LB839, a bill that was brought to me by the State Fire Marshal. Current state statutes contain a partial list of permissible fireworks by name. Examples listed in law are sparklers, spray fountains, color fire cones, and Ladyfingers, among others. A much more comprehensive list of permissible fireworks is maintained in Title 157, Chapter 8, of the Nebraska Administrative Code. Having LB839 become law would eliminate the need to change the law every year as new types of fireworks are developed and approved for sale. Further, the bill calls for the development of a published list of nonpermissible fireworks. The bill also changes the law governing which fireworks are approved for sale in Nebraska by saying that if such

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fireworks have been tested and approved by a nationally recognized testing facility or by the State Fire Marshal, they can be put on the permissible list. If they are not approved, they will be placed on the nonpermissible list by the State Fire Marshal. Finally, LB839 increases the period of license revocation for any licensed distributor or jobber who violates the law governing the sale of fireworks in the state of Nebraska from the current one-year revocation to three years, in order to make it a more meaningful penalty. The State Fire Marshal is here today, and the deputy, and they're willing to testify. I'm sure that they will have much more knowledge about fireworks than I do, and I would ask that you direct any technical questions to them. But if there is anything I can answer, I'd be more than glad to try to do that now. Thank you. [LB839]

SENATOR ASHFORD: Thank you, Senator. Yes. [LB839]

SENATOR CHAMBERS: Senator Pedersen, who drafted the language? [LB839]

SENATOR PEDERSEN: Bill Drafters. [LB839]

SENATOR CHAMBERS: I mean, did this come from you or from the Fire Marshal's Office? [LB839]

SENATOR PEDERSEN: This came from the Fire Marshal's Office. [LB839]

SENATOR CHAMBERS: Then I'll hold my questions for them. Thank you. [LB839]

SENATOR ASHFORD: Thank you, Senator Pedersen. How many testifiers do we have today? Okay, a couple. Good afternoon. [LB839]

JOHN E. FALGIONE: Good afternoon. Shall I begin? [LB839]

SENATOR ASHFORD: You shall. Or you may. [LB839]

JOHN E. FALGIONE: (Exhibits 16, 17) Okay. Senator Ashford, members of the Judiciary Committee, for the record I am State Fire Marshal John Falgione, J-o-h-n F-a-l-g-i-o-n-e, and I'm here to testify in support of LB839. I want to thank Senator Pedersen for sponsoring this bill. The fireworks industry is highly regulated. There are stringent national and international standards governing the manufacturing, importing, and transportation of fireworks. Consumer fireworks are tested by numerous national organizations such as the Consumer Product Safety Commission, the National Transportation Safety Board, the American Fireworks Standards Laboratory, Intertech, and others. Currently, the Nebraska State Fire Marshal agency spends a considerable amount of time and manpower in testing consumer fireworks, even though nearly all these fireworks have already been tested under current procedures. Under current procedures each distributor is allowed to bring 20 new items a year to our office to be

tested. In 2007 there were 49 different distributors who requested to have items tested. Due to the large number of items to be tested and the constraints on manpower, only one item of its kind is shot to determine if it can be placed on the permissible list. National testing organizations shoot off multiple items to achieve a more standardized test. Since the approval list changes yearly, the agency must change the regulation on a yearly basis. LB839 would allow the State Fire Marshal's agency to utilize a list of items that have already been tested by other nationally recognized organizations. Further, the agency will develop and publish a list of nonpermissible fireworks such as bottle rockets and Roman candles without an attached spike. Currently, there is not a published nonpermissible list, even though items have been disapproved during the testing process. As such, the creation of a published nonpermissible list will benefit distributors, as they will have clear guidance on which items cannot be sold in Nebraska. Additionally, this nonpermissible list will ensure that the items that have been deemed unsafe will not be sold in our state, even though they are allowed in other states. Another benefit of adopting the provisions of LB839 is that it will allow our inspection deputies to focus more on the life safety code issues when they are inspecting fireworks stands. In 2007 there were 804 stand permits issued by our department. I have provided this committee with copies of a handout that is given to all fireworks stand operators, which details some of the major life safety issues our deputies are charged with monitoring. By having a published nonapproved list that is easily accessible, our deputies will have increased time to spend on ensuring the life safety codes are being addressed. The other aspect of LB839 deals with the revocation of a distributor or jobber's license. At present if a distributor or jobber violates the law by selling nonapproved fireworks, his or her license is only revoked for one year. LB839 will increase this revocation period to three years. Selling fireworks is a very profitable enterprise but one that can also be dangerous if the laws are not followed. The increased revocation period will help stress the importance of adhering to the rules. LB839 will benefit all affected parties. The industry will have a wider variety of products that can be sold in the state, consumers will be afforded more choices when purchasing fireworks, and the State Fire Marshal's agency will not have to devote time to testing products that have already been tested. However, should there be a concern about a product arise, LB839 still allows the agency to conduct its own testing of a product to determine if it should be placed on the nonpermissible list. Finally, the increased penalties for distributors and jobbers will ensure compliance with the law, creating a safer environment for the citizenry. Thank you for the time and the opportunity to testify in support of LB839. I'll be happy to answer any of your questions that you might have. [LB839]

SENATOR LATHROP: Senator Chambers. [LB839]

SENATOR CHAMBERS: I just have one question, and I might have to have a follow-up or two, just to be clear. If the permissible list tells you which items are allowable, then anything not on that list is nonpermissible, so why would you have to have two lists?

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[LB839]

JOHN E. FALGIONE: Because many times in the industries there are such a closeness in the naming of some of these products that there is confusion as to what is not on the list. In other words, there may be an item called the ground flower bloom that we fail. But maybe there will be a product out there called the ultra ground flower bloom that may be permissible. And when we go to a stand and an operator will say, well, I didn't understand. I didn't know that wasn't allowed, where if we have it published on a list that says the ground flower bloom is not permissible... [LB839]

SENATOR CHAMBERS: But here's what you're going to look at, since you have a nonpermissible list. Anything not on the nonpermissible list must be permissible. It cannot be both permissible and nonpermissible at the same time. So if it's on the permissible list, it's all right. But if it's not on the permissible list, it's not permissible. Now let's say you have two lists. You list 1,000 items by name on the permissible list. You have any number on the nonpermissible list. I just can't see the sense of it, the logic of it--maybe that's the word I ought to use. [LB839]

JOHN E. FALGIONE: Okay. Let me...maybe I can clarify that a little bit more, Senator. If we adopt some of these lists, what we call consumer Class C fireworks,... [LB839]

SENATOR CHAMBERS: Um-hum. [LB839]

JOHN E. FALGIONE: ...for the state of Nebraska...now the consumer Class C fireworks may include some display fireworks that nearly...that are much larger than what our statutes allow in powder content, size, and such as that. [LB839]

SENATOR CHAMBERS: Um-hum. [LB839]

JOHN E. FALGIONE: But they may be still allowed in other communities and they'll be...or other states, and we'll have that list, and if we adopt that list, then we'll have to go through and take out the items on that list that are not permissible. For instance, we have...we allow consumer fireworks with mortars that have to be an inch and three-quarter in diameter--no larger. Well, there are what they call a consumer fireworks in mortars that go two inch or larger, but they stay within the limits of staying out of the explosive act. [LB839]

SENATOR CHAMBERS: But there are things, then, that are permissible, but they won't necessarily be on the permissible list. [LB839]

JOHN E. FALGIONE: They may be permissible in other states but not meet the rest of our regulations as far as powder content and such as that, yes, sir. So there could conceivably be a number of items...if we adopt these national standards, as I said, they

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may have items that are allowable as consumer products in other states... [LB839]

SENATOR CHAMBERS: But you're going to have to name...you're going to have to put them on the nonpermissible list by name? [LB839]

JOHN E. FALGIONE: Yes, sir. [LB839]

SENATOR CHAMBERS: So to use your example without the name, because I don't remember that, a super x. Under that name it's nonpermissible. X is not on the nonpermissible list, but it's not on the permissible list, so it's nonpermissible, even though it's not on either list. Let me...I don't get it. [LB839]

JOHN E. FALGIONE: Well, in my understanding, if we have to adopt...we adopt a whole list, we'll have to adopt the whole list and then make exceptions from that list of items. That's the reason for the nonpermissible. [LB839]

SENATOR CHAMBERS: But then every time that list changes, you have to change your list also, right? [LB839]

JOHN E. FALGIONE: We would. [LB839]

SENATOR CHAMBERS: So you're still at a...in the situation where each year, you may have to change your list. And now you've got two of them that you'll have to change; isn't that correct? [LB839]

JOHN E. FALGIONE: It's quite possible. It's quite possible. [LB839]

SENATOR CHAMBERS: So if you have two that you have to deal with instead of one, that nevertheless is more efficient than what is happening now, is what I think you're saying. [LB839]

JOHN E. FALGIONE: It will be more efficient on the other end of it, as far as doing the inspection time with my deputies in the field doing the inspections. [LB839]

SENATOR CHAMBERS: But forget that for right now, so that I won't get confused. [LB839]

JOHN E. FALGIONE: Okay. [LB839]

SENATOR CHAMBERS: See, you understand all this, so you have all these things in your mind that you understand clearly right away. I have to take it a step at a time. This list which is permissible and the list which is nonpermissible, to my way of thinking, should not just be for the benefit of the inspectors, but to notify the public of what they

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legally can do and what they cannot legally do, in terms of dealing with these fireworks. [LB839]

JOHN E. FALGIONE: And that will play into the distributors and jobbers. If they have that list, then they know that those are the products that they can order in to sell, and not get products in that we won't allow to sell. [LB839]

SENATOR CHAMBERS: Would these be the same kind of things...would I be limited to what I can bring into the state from someplace else, to what is on the permissible list? [LB839]

JOHN E. FALGIONE: For resale, yes, sir. [LB839]

SENATOR CHAMBERS: No, if I just want to have it. Is this only dealing with what's available for resale? [LB839]

JOHN E. FALGIONE: This is what's for...that's available to buy in the state of Nebraska. Yes, sir. [LB839]

SENATOR CHAMBERS: But if I buy something in Missouri, would it have to comply with the permissible list in Nebraska, or is there some other standard used to determine what I can bring into the state from someplace else? [LB839]

JOHN E. FALGIONE: Yes sir, there is. There's a statute that if that item is brought across state line into Nebraska, that is not permissible. You have to have a jobber's license or a distributor's license to bring that product across the state into Nebraska. So any items purchased in Missouri, they may be on the permissible list in Nebraska, but if you buy them in Missouri or South Dakota or Kansas and bring them into Nebraska, that's an illegal contraband. [LB839]

SENATOR CHAMBERS: So what they're doing, then, is saying that the only ones you can buy fireworks from of this variety are those in Nebraska who are selling them. [LB839]

JOHN E. FALGIONE: Yes, sir. That has always been that way. [LB839]

SENATOR CHAMBERS: Why should that be? If I...I can't bring liquor...I won't complicate it. If the item is legal for use in Nebraska, unless I'm trying to protect and give a monopoly to certain businesses in Nebraska, why will a product which is legal in Nebraska be illegal for me to bring it into Nebraska? We're not talking about liquor now, but a firework. Can you explain why that would be? Because that's what I'm not understanding. [LB839]

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JOHN E. FALGIONE: Because there is a licensing procedure to be able to handle those products. Now as well, you go to Missouri and you can buy bottle rockets, or South Dakota, and transport those into the state. Those are not legal, either. But they're legal in the other states, but they're not legal to have here. [LB839]

SENATOR CHAMBERS: Can I bring sparklers into Nebraska from another state? Or I can't bring any firework into Nebraska from another state? [LB839]

JOHN E. FALGIONE: No fireworks are allowed into this state from another state, Senator. [LB839]

SENATOR CHAMBERS: None are? [LB839]

JOHN E. FALGIONE: None. [LB839]

SENATOR CHAMBERS: Of any kind? [LB839]

JOHN E. FALGIONE: None. [LB839]

SENATOR CHAMBERS: So if they caught me with a sparkler, I'm in violation of Nebraska's law? [LB839]

JOHN E. FALGIONE: Yes, sir. You would be. [LB839]

SENATOR CHAMBERS: What about a match? (Laughter) [LB839]

JOHN E. FALGIONE: Matches are not on the fireworks list, sir. [LB839]

SENATOR CHAMBERS: I'm starting to see what is the situation, but it's not making a lot of sense to me. So that's all I'll ask you, because I think you've been as clear as the matter can be explained. I'm just not agreeing with what is being done. I think I understand your explanation, though, so thank you. [LB839]

SENATOR ASHFORD: There are a lot of law violators out there, aren't there, like most everybody I know. (Laughter) [LB839]

JOHN E. FALGIONE: Yes sir, there are. [LB839]

SENATOR ASHFORD: Thank you. Thank you very much. [LB839]

JOHN E. FALGIONE: Okay, thank you. [LB839]

MIKE KRATVILLE: (Exhibit 18) Good afternoon, everybody. I appreciate the opportunity

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to be here. I am Mike Kratville. I'm here on behalf of the Nebraska Fireworks Association, which represents about three-quarters of the retail outlets in the state of Nebraska. Senator Chambers, I want to thank you for coming up with some of the questions that I would have asked him if I had that opportunity. I also, though, want to praise the Fire Marshal for having done actually an excellent job in the year or so that he's been here. I think the Fireworks Association feels like he's been very helpful to work with over the year, and I think he's done a really good job. So our opposition to the bill is certainly no opposition to the State Fire Marshal. [LB839]

SENATOR ASHFORD: Oh, you're opposed? [LB839]

MIKE KRATVILLE: I'm opposed. I'm sorry. [LB839]

SENATOR ASHFORD: Do we have any proponents? All right. We're into the opponents. (Laughter) Go ahead. [LB839]

MIKE KRATVILLE: Perhaps I should have been more clear. [LB839]

SENATOR ASHFORD: Well, I should have been more clear, Mike. Thanks. [LB839]

MIKE KRATVILLE: Okay. But our major objection, again, is not to the Fire Marshal, because again, he's done a great job, but to the authority that he is attempting to confer upon himself in this. And this is primarily a constitutional argument, just to begin with, which is essentially that he's attempting to give to himself the ability to put items on permissible and nonpermissible lists, and if you don't fall under one of those, you can be criminally prosecuted. And I think it's a real problem for anybody who is in the state of Nebraska, or for you guys to delegate that type of authority to a state agency. It's certainly permissible for you guys to come up with a list of permissible or impermissible or whatever you want to, but I've got a real problem with saying the Fire Marshal gets to decide, on an annual basis, here's this list, here's that list, and if you're not part of it, you're in criminal violation. So we've got certain improper delegational issues at the constitutional level. Senator Chambers, I think you hit on the due process question pretty well, and I don't belabor that point. The one thing the Fire Marshal said that I definitely agree with is we have a lot of opportunities here to have a really good bill, but probably...maybe not this year. We'd like to sit down, and I've handed out some of the suggestions that we've got for what we would want to put on an expanded permissibility list, which would specifically define certain items that would be permissible, that would also include things that the Fire Marshal would put on his permissible list. It would include things that the Consumer Product Safety Commission had approved, Department of Transportation had approved, or meet certain agency standards. And so what we're trying to do is get around your question and your objection by putting together a very expansive permissibility list so that everybody would know that this is what is permissible, and our preference would be that there not be a nonpermissible list;

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and certainly, and most importantly, that a Fire Marshal doesn't get to say what's nonpermissible and create criminal conduct. And so the suggestions and comments that I've handed out to you, again, is hopefully to start a dialogue between us and the Fire Marshal's Office, so that hopefully, maybe in 2009, we can come back with a bill that has some more support than what it has now. But as presently situated, the improper delegation of authority to the State Fire Marshal, not only to put together these two lists, but also we're strongly opposed to the 28-1247 question on page 4, where he's also given further discretion for even things that have been tested and approved, to even still say that something is off the permissible list. And we think that a better approach is just to have a very large permissibility list that has been approved and tested in other places, that simply would be considered approved as a matter of law. [LB839]

SENATOR ASHFORD: Thanks, Mike. Senator Chambers. [LB839]

SENATOR CHAMBERS: Thank you. And I'm not expressing an opinion overall of what the bill is attempting to do, but Nebraska, as the Supreme Court has said, is not a common law state. There are no common law crimes. The only thing that can be a crime is that which the Legislature declares to be a crime. So by you having presented it the way you did, it might be less technical and clearer than if I had said it. But I don't think that a person or an agency, anybody other than the Legislature, can create a crime. Even the Supreme Court cannot make conduct criminal which the Legislature has not declared to be criminal, so that is an important issue. And I think everybody might understand it from the way you presented, even if after my comments they're not so clear any more. Just back up to where he was, because he was right, in my opinion. [LB839]

MIKE KRATVILLE: Thank you, everybody, appreciate it. [LB839]

SENATOR ASHFORD: That's good. And I would agree with you about the Fire Marshal. I did have some dealings with him and he is terrific to deal with. So I would think you would be able to work with him. Thank you, Mike. Yes, sir. [LB839]

MARVIN KOHLER: Senator Ashford, members of the Judiciary Committee, my name is Marvin Kohler, M-a-r-v-i-n K-o-h-l-e-r. I live in Grand Island. First of all, appreciate the opportunity to speak with you today. I represent the Nebraska Fireworks Retailers Association. As Mr. Kratville had indicated, we actually represent 665 retail locations in the state of Nebraska, our association does. I too want to extend to you our gratitude for Mr. Falgione as being our Fire Marshal. We have had in the past some difficult times with that agency. I'm here to tell you today that in the past year those issues have changed, and we have very much appreciated John and his staff and their willingness to work with us. We appreciate their concern and willingness to introduce this bill. As Mike has just indicated, the problem that we have is obviously one of legality. We also have a problem with...in terms of some modernized wording that should be in the bill. The bill

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refers to fireworks as common fireworks. Common fireworks is an old term used now...we describe them as consumer fireworks. Another issue, another example of that would have been the issue of describing display fireworks as any item that had over 1.3 milligrams of composition and it was called a firecracker. In terms of display fireworks, it's not a firecracker, it's a salute, which we can't sell in our retail locations. But anyway, in conclusion, that's our concern. We would like to be able to sit down and work up a compromise on this, in which we would be able to have a bill that we feel would not jeopardize us. If in fact someone who became Fire Marshal and was totally opposed to fireworks, as we see it, this bill would allow that individual to abolish almost anything that we have and/or that we have to sell. I've been in the fireworks business in Nebraska and a resident of Nebraska my whole life, and been in the business for 46 years. And as I said, I look forward to the opportunity of seeing a better law that we might have here. I would entertain any questions. [LB839]

SENATOR ASHFORD: Thank you, Marvin. Any questions? [LB839]

SENATOR CHAMBERS: Not a question, just a warning to the Fire Marshal. (Laughter) When a person hears these kind of things, he needs to pinch himself to see if he's still alive, because usually these things are said so nice only when you're a corpse in a box. (Laughter) It's good he can hear it said. [LB839]

MARVIN KOHLER: Senator, I can tell you that Mr. Falgione is a ray of light. [LB839]

SENATOR ASHFORD: That's enough! That's enough! (Laughter) [LB839]

MARVIN KOHLER: And if I may possibly. You had asked some questions of Mr. Falgione regarding the items, and I guess that... [LB839]

SENATOR CHAMBERS: Oh, but that's okay, because it's going to be worked on, so I'm satisfied where it is. Thank you. [LB839]

MARVIN KOHLER: Okay. All right. [LB839]

SENATOR ASHFORD: We'll work on it. Okay. Thanks. Thanks, Marvin, for your testimony. [LB839]

MARVIN KOHLER: Thank you. [LB839]

SENATOR ASHFORD: Anyone else wish to testify? [LB839]

RICH LUDVIK: Good afternoon, everyone. My name is Rich Ludvik. I'm from Wahoo, Nebraska. I've also...I've been in the firework business for a few years. I've been selling fireworks for 28 years. We have approximately 100 stands across Nebraska. And I want

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to...I'm a simple man with a simple statement, and that's just the fact that I want to also express what Marv Kohler said about the State Fire Marshal. He has gone out of his way actually to help us reorganize the way we have been testing, selling, retailing our fireworks. His staff has helped us a lot this year. The main thing that is the overall consensus of our organization is when someday when John is no longer in this office. It's wide open for someone to come in that may be anti-fireworks, anti-pyrotechnics, and put them all on the nonpermissible list, the two lists that you're talking about. So that's the main area that we really want to have cleared up to just protect future firework retailing in Nebraska. Thank you very much. [LB839]

SENATOR ASHFORD: Thank you. [LB839]

RICK LUDVIK: Any questions? [LB839]

SENATOR CHAMBERS: Well, one thing. Could you spell your name for the record? [LB839]

RICK LUDVIK: Certainly. It's L-u-d-v-i-k. [LB839]

SENATOR CHAMBERS: Okay, thank you. [LB839]

RICK LUDVIK: Thank you very much. [LB839]

SENATOR ASHFORD: We got it. Now we got it. Now we have it. Thank you. Any other, I guess, opponents? [LB839]

SENATOR CHAMBERS: This bill is producing a few fireworks of its own. (Laughter) [LB839]

SENATOR ASHFORD: Yes, sir. Good afternoon. [LB839]

RUSSELL BARELMANN: Mr. Chairman, members of the committee, thank you for the opportunity to be here this afternoon. I am Russell B-a-r-e-l-m-a-n-n. I own a single fireworks stand in a town of 300 people, so you can see I'm a small, small micro business, if you will. [LB839]

SENATOR ASHFORD: Which town is that? Which town? [LB839]

RUSSELL BARELMANN: Chambers, Nebraska. [LB839]

SENATOR CHAMBERS: Ah! (Laughter) [LB839]

RUSSELL BARELMANN: Great little town! [LB839]

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SENATOR CHAMBERS: I believe you! [LB839]

RUSSELL BARELMANN: We have some wonderful, great white mothers there that are continually hounding me about the noise over the Fourth of July. But nevertheless,... [LB839]

SENATOR ASHFORD: (Laugh) I'm not sure. [LB839]

RUSSELL BARELMANN: ...they enjoy seeing the kids enjoy themselves. [LB839]

SENATOR ASHFORD: Okay. Oh, boy. [LB839]

RUSSELL BARELMANN: But there are two things I'd like to point out to you. Number one, of course, is what has already been said, is our relationship with the Fire Marshal. I've been in this business for over 20 years. This was a breath of fresh air, to be able to work with John and his staff in the past year. The other thing I want to emphasize is safety. Irrespective of what might be approved in other states or by other people, I would not sell bottle rockets or any other rocket on a stick, for example, whether they were legal or not. They're just not safe, in my estimation. And being in Chambers, we're just a short hour's drive from South Dakota. You get 50 yards into South Dakota, there's a huge retail fireworks stand. They sell year round. They sell at probably three times the normal markup. There's a lot of tax money goes to South Dakota. There's a lot of illegal fireworks come in, a lot of dangerous fireworks come in. I do everything I can to put a stop to that, for safety's sake. I don't want anybody hurt. Fireworks are a lot of fun, but you have to be careful. And I'm here to propose that we clean up this bill, take out the antiquated language, and it can be workable for everybody, and it can be a win/win/win situation. Thank you. [LB839]

SENATOR ASHFORD: Thank you. Thank you, sir. Any other in the Fire Marshal's fan club over there? (Laughter) Any neutral testifiers? That concludes the hearing...not yet. Senator Pedersen, do you wish to close? Senator Pedersen waives closing. Thank you all very much, and that concludes the hearings. (See also Exhibit 15) [LB839]

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Disposition of Bills:

LB839 - Indefinitely postponed.

LB1063 - Advanced to General File, as amended.

Chairperson

Committee Clerk