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Judiciary Committee
February 02, 2011

[LB133 LB137 LB191 LB231 LB275]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 2, 2011, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB231, LB275, LB133, LB191, and LB137. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Colby Coash; Brenda Council; Burke Harr; Tyson Larson; Scott Lautenbaugh; and Amanda McGill. Senators absent: None.

SENATOR ASHFORD: Good afternoon, everyone. We're going to go ahead. I'm late; I apologize for that. The first bill we have is LB231. For those who have not been here before, we have in the Judiciary Committee a...we're asking that the testimony be limited to three minutes, not including questions obviously, other than the introducer. In this case, Senator Christensen will introduce LB231, and then those who wish to testify, if they would sign the sheet upon the desk in front of the chairs there that would be helpful. If you would give your name and spell it for us so that the transcriber can get the correct spelling, that would be helpful as well. We have five bills today, starting with LB231, so with that, Senator Christensen, why don't you go ahead with LB231. [LB231]

SENATOR CHRISTENSEN: (Exhibit 1) Thank you, Chairman Ashford and members of the Judiciary Committee. I'm Senator Mark Christensen, C-h-r-i-s-t-e-n-s-e-n. I represent the 44th Legislative District. I'm here to introduce LB231. LB231 would amend Section 28-611, which defines the offense of issuing a bad check so that all bad checks are treated the same. Currently, this section requires a person to obtain property, services, or other present value for the offense of issuing a bad check. This creates a situation where a person who issues a bad check at a later time after receiving the property, service, or any other present value is treated differently than if that person had paid at the time of receiving the property, services, or any other present value. To treat all bad checks equally, this bill would strike the requirement for present value. I decided to bring this bill for a constituent, Mr. Deaver, who has submitted testimony through a letter I've handed out to the committee. He was unable to attend in person today. Mr. Deaver is a small business owner in my district who believes the present value language in subsection (1) of Section 28-611 creates an unnecessary distinction between bad checks issued at the time property, services, and other present value was obtained, and a bad check issued at a later date to pay for property, services, or other present value obtained prior to issuing the bad check. In my examination of the issue, the present value language seems to address the intent to defraud by the issuing of a bad check which may be easier to prove if there is present value. However, the current subsection (4) seems to provide for the prosecution of any bad check, whether there is present value or not. I have not been able to determine with confidence why there appears to be a contradiction between subsection (1) and subsection (4). Not being an expert in this area, I agreed to introduce the bill to reexamine the present value language and the structure of Section 28-611 as to whether the current difference in

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how bad checks are handled is correct or needs to be changed. I would defer to the expertise of the committee on this issue and hope we can learn more regarding this issue. Thank you. [LB231]

SENATOR ASHFORD: Thank you. So whatever we put out is fine? (Laugh) Nevermind. That's an inside joke. (Laughter) Thank you, Senator Christensen. Any questions of Senator Christensen on this? And you have some testifiers here, so we'll go to the testifiers. Do you want to stick around, Mark, or? [LB231]

SENATOR CHRISTENSEN: Sure. [LB231]

SENATOR ASHFORD: Okay. How many proponents do we have of LB231, those in favor of the bill? Kathy. [LB231]

KATHY SIEFKEN: Senator Ashford and members of the committee, my name is Kathy Siefken, S-i-e-f-k-e-n, representing the Nebraska Grocery Industry Association. And we support this bill simply because it seems to clarify some of the reasons for...or the reason for being able to prosecute for a bad check, and anything that clarifies we're going to support. [LB231]

SENATOR ASHFORD: Okay. Any questions of Kathy? Seeing none. Okay, thanks, Kathy. [LB231]

KATHY SIEFKEN: Thanks. [LB231]

SENATOR ASHFORD: Any other proponents? Opponents? Yeah, come on up. [LB231]

THOMAS STRIGENZ: Thomas P. Strigenz, S-t-r-i-g-e-n-z. I'm here on behalf of the Nebraska Criminal Defense Attorneys Association here to speak in opposition to LB231. The bottom line is the NCDAA, we don't take positions of public policy; we take positions on where we think new legislation will be a hindrance to the administration of justice or, you know, be harmful to the public at large. We think that LB231 actually will be a hindrance to the administration of justice from the standpoint of there's a lot of law on this statute. And the present value, clearly the Legislature when it was developed, they wanted a distinction between receiving something tangible, something of present value, versus the payment of money, and that's why they set those two things out. And the present value statutes, again they then set the penalties based on the value of that. There's a lot of case law there. If this law...if the present value language gets taken out, that becomes voided. And that case law is well settled and value is an important element of the bad check statutes. We believe it will also be harmful to the public if this statute is written...is adopted as written, because it's going to criminalize basically everyday behavior. We use the example of a young couple going to look at an apartment, and they like the apartment and the landlord says, hey, I'll hold that

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apartment for you, but write me a check; I'm not going to cash it but write me a check. The way this language is written, that's going to criminalize that specific instance. You won't be able to hold an apartment for that. And I would...and my opinion would be that that would then make those two, that young couple, a felony because I can't imagine anything less than \$500 for an apartment, I mean, even though the landlord, even though the young couple agree to that. The bottom line is also it basically increases the penalty for bad checks. It basically increases the penalty for bad checks because, you know, subsection (4) was for the payment of funds and it was a standard Class II misdemeanor. If that is deleted, basically anything under...or over \$201, basically makes it a Class I misdemeanor. So we would ask that this matter...or we would be opposed to this. [LB231]

SENATOR ASHFORD: So I assume...oh, yeah, Senator Council. [LB231]

SENATOR COUNCIL: Thank you, Mr. Chairman. And thank you, Mr.--am I pronouncing it right--Stringenz? [LB231]

THOMAS STRIGENZ: Stringenz. Yes, Senator. [LB231]

SENATOR COUNCIL: Okay. I was trying to follow your example. And... [LB231]

THOMAS STRIGENZ: Of the young couple? [LB231]

SENATOR COUNCIL: Of the young couple. [LB231]

THOMAS STRIGENZ: Yes. [LB231]

SENATOR COUNCIL: So I go in and I want someone to hold something for me, and in order for them to hold it they are requiring a \$600 deposit. [LB231]

THOMAS STRIGENZ: Yes. [LB231]

SENATOR COUNCIL: So, knowing that I have \$4 in my checking account, I write them a check for \$600 with the understanding that they're not going to negotiate that check... [LB231]

THOMAS STRIGENZ: Cash it. Correct. [LB231]

SENATOR COUNCIL: ...unless and until I notify them that, yes indeed, I'm going to come and do whatever it takes to finalize the acquisition of this apartment. I guess I'm just thinking, enforceability-wise, the only way that would be criminal or would be criminalized is if somehow the person who I gave the check to hold could determine what was actually in my account. [LB231]

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THOMAS STRIGENZ: The way the language reads is whoever issues or passes. So issuing that check, we believe that the language of the statute criminalized that behavior when he or she, when that young couple writes that check. And it does happen when people surprisingly don't follow their word and they do cash that check. [LB231]

SENATOR COUNCIL: Okay. [LB231]

THOMAS STRIGENZ: And so from that standpoint...and now we have a \$600 check, and of course that's going to be a Class IV felony. [LB231]

SENATOR COUNCIL: Felony. Thank you. [LB231]

THOMAS STRIGENZ: Thank you. [LB231]

SENATOR ASHFORD: I think, I think you answered my question. [LB231]

THOMAS STRIGENZ: Okay. [LB231]

SENATOR ASHFORD: Essentially we're...if the intent is to cash the check at a later time, that's when the transaction becomes criminal if the money is not in the... [LB231]

THOMAS STRIGENZ: The money is not in the account. But again, I believe...we believe the way that this is written right now, it's that intent when it's issued, when the check is issued. [LB231]

SENATOR ASHFORD: Right, no...and I get your point. So what this gentleman in Senator Christensen's district must have been facing was a situation where at some...well, I guess we don't know exactly. There is a letter here that explains it, but I'm trying to figure out the remedy. Yes, Senator Council. [LB231]

SENATOR COUNCIL: And so, Mr. Strigenz, I guess you would also be of the opinion that postdating of a check would be criminalized. [LB231]

THOMAS STRIGENZ: It's not criminalized right now, but we think taking this language out will probably criminalize it. Yes, absolutely. [LB231]

SENATOR COUNCIL: Whoo. [LB231]

THOMAS STRIGENZ: So. [LB231]

SENATOR COUNCIL: I'll look at that very carefully. Thank you. [LB231]

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SENATOR ASHFORD: Thank you very much. [LB231]

THOMAS STRIGENZ: Thank you. [LB231]

SENATOR ASHFORD: Senator Christensen...is there neutral testifiers? Senator Christensen, do you wish to close? Explain to me what the situation was with your constituent. [LB231]

SENATOR CHRISTENSEN: Sure. What was happening was if he would get issued a bad check and the service was done immediate...you know, was issued at the time he had done the service, the county attorneys were prosecuting the check and he had no problem. But what happens quite often is it gets put on the account so that job is done; he gets paid 30 days later... [LB231]

SENATOR ASHFORD: And he thinks he's going to be paid because he gets a check even though it's not... [LB231]

SENATOR CHRISTENSEN: Right. The check comes, but since it's not presently been done it falls under the other category, and he is having trouble getting the county attorney to prosecute it. [LB231]

SENATOR ASHFORD: All right. Okay, I think I see it. Well, go ahead, Senator Council. [LB231]

SENATOR COUNCIL: So if there were a way that the bill could be...the current law could be drafted that if you received value at any time... [LB231]

SENATOR CHRISTENSEN: Correct. [LB231]

SENATOR COUNCIL: ...as opposed...as a way of addressing the concern that Mr. Strigenz has raised about issuance... [LB231]

SENATOR CHRISTENSEN: Right. [LB231]

SENATOR COUNCIL: ...being the triggering factor, that what you're trying to address is value has been received. [LB231]

SENATOR CHRISTENSEN: Correct. [LB231]

SENATOR COUNCIL: It may not have been received at the time the check was written, but value has been received. And that's what you're attempting to address... [LB231]

SENATOR CHRISTENSEN: Correct. [LB231]

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SENATOR COUNCIL: ...by saying issuing because it's an after-the-fact issuance. [LB231]

SENATOR CHRISTENSEN: Correct. Yes. [LB231]

SENATOR COUNCIL: Okay. Well, perhaps we can...knowing what the concern is, I think we can come up with something that may balance the interests of...because I think Mr. Strigenz raises a very valid concern, and I know a lot of businesses would not want to be in a position, because a lot of businesses readily accept postdated checks (laugh)... [LB231]

SENATOR CHRISTENSEN: I write them, understand. [LB231]

SENATOR COUNCIL: ...readily and regularly accept postdated checks. And, you know, if this issuance could be construed as narrowly as it appears that it can, you know, merchants would have, you know, some problem, because they would actually be encouraging people to violate the law... [LB231]

SENATOR CHRISTENSEN: Um-hum. Yes. [LB231]

SENATOR COUNCIL: ...by saying that they would accept a postdated check. [LB231]

SENATOR CHRISTENSEN: Correct. [LB231]

SENATOR COUNCIL: Okay. All right, thank you. [LB231]

SENATOR CHRISTENSEN: Thank you. [LB231]

SENATOR LATHROP: Very good. Thank you, Senator Christensen. Good to have you back. That closes our hearing on LB231 and brings us to Senator Fulton, and we will open our hearing on LB275 with Senator Fulton's opening. [LB231]

SENATOR FULTON: Okay. Good afternoon, Mr. Vice Chairman, members of the committee. For the record, my name is Tony Fulton, T-o-n-y F-u-l-t-o-n, and I represent District 29 in the Legislature. I bring to you LB275. Three years ago, a man left Barnes and Noble Bookstore in my south Lincoln district and walked to Hickman. That man was Jason Garrett. In 2004, Jason Garrett stabbed a man with a steak knife more than 45 times. He was found not guilty by reason of insanity for killing that man and ordered to the Lincoln Regional Center. In 2008, Mr. Garrett left that Barnes and Noble in my district while on an outing supervised by staff of the Lincoln Regional Center. As soon as I learned of this escape, I took action to make sure that my own family was safe on that day as did many citizens of Lincoln. I was shocked that something like this could

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happen and requested assurances from the department that appropriate measures would be employed such that the public would not be placed in similar danger again. Last summer, the safety of the citizens of Lincoln was again placed in similar jeopardy when a man named Shane Tilley ran away from his staff escort while walking along the Regional Center grounds. In 2006, Shane Tilley became voluntarily intoxicated and mortally stabbed his friend. Being found insane due to his intoxication, Tilley was committed to the Lincoln Regional Center for treatment. Tilley had enough wherewithal last July 21 to evade Lincoln police, Lancaster County sheriff's deputies, state troopers, a helicopter, and bloodhounds for eight hours until finally being discovered by a television news crew. I again took action to make sure that my wife and children were safe as did nervous citizens all across Lincoln, and I again implored the department to take action that protects the public safety. As I've worked on this issue, my concern grew with the remarks of our then Lancaster County Attorney Gary Lacey following this latest incident when he indicated that there were no means of prosecuting Tilley, Garrett, or any of the ten Regional Center patients that have escaped from that facility over the past five years. These events are what precipitated my introduction of LB275. LB275 amends Section 28-912 of the statute to define one who removes himself from the official detention of a regional center when committed to that regional center by a court order as having committed the crime of escape. Escape is typically prosecuted as a Class IV felony. Although these men and others who have escaped from the Lincoln Regional Center have not been found guilty of commission of these heinous crimes and are not in the custody of the Department of Corrections or a correctional facility, each displayed cognizance of his opportunity to escape from state officials and acted under his own volition to take advantage of this opportunity and evade law enforcement. Therefore, it appears necessary that county attorneys at least should be granted the ability to apply the law to those who escape from rightful authority, particularly when it is clear that the safety of Lincolnites was jeopardized and taxpayer resources were utilized to reapprehend these individuals. As a representative of Lincoln area citizens whose safety has been significantly and repeatedly jeopardized by the escapes of at least two dangerous killers in the past few years, I submit that LB275 is an important component of ensuring the public safety, and I look forward to working with the committee with the hopes that we can move this piece of legislation forward. Thank you. [LB275]

SENATOR LATHROP: Thank you, Senator Fulton. Are there any questions for Senator Fulton? I don't see any. Oh, I'm sorry, Senator Harr. [LB275]

SENATOR HARR: You mentioned something about five years. What was that, in the last five years, what? [LB275]

SENATOR FULTON: The number of regional center patients that have escaped that facility in the past five years--ten. [LB275]

SENATOR HARR: Okay. [LB275]

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SENATOR FULTON: Not all...I want to be clear that not all of those were individuals who were killers. [LB275]

SENATOR HARR: I mean, I like the purpose of this law, and I think there's something to be said for it. I guess my issue, though, is if you're in a court-ordered commitment to a regional center, aren't we wasting taxpayer dollars, because this person has already been found not to be competent? And so if they're there, I guess, I mean, it seems like a great idea, but then we go to prosecute them for this crime, and they just say, ha-ha, I'm crazy, and we're back to where we were...we're back to square one. [LB275]

SENATOR FULTON: Okay, to be clear, they haven't been found noncompetent. They were found not guilty by reason of insanity. In this particular case with Mr. Tilley, it should be known that he was cognizant enough to escape and evade authorities for some period of time. And in his particular case, he was in a creek bed, ostensibly, to avoid the scent-hunting bloodhounds which were on his trail, so there exists at least...there's a competence such that one could escape. And so, my point is that if the competence exists that one could escape and place the public in that kind of danger, then at a minimum, we should give the prosecutor the potentiality of pursuing that individual for having escaped. [LB275]

SENATOR HARR: But being competent to escape does not mean that you are not found not guilty by reason of insanity. [LB275]

SENATOR FULTON: I agree. [LB275]

SENATOR HARR: You could still be insane at that point even if he was competent enough to escape. I mean, he was competent enough to kill before, to grab a knife and to stab repeatedly. Just because you're able to perform an action doesn't mean you're incompetent or guilty or not guilty by insanity. You know, that's a primal (inaudible) to escape from wherever you are. So I don't know if that necessarily means he's sane just because he did that. Like I said, I think that's a very...on its face a very good bill. I just don't know in practice if we're just wasting more tax dollars chasing after, you know, specialists to say, yeah, he was not guilty by reason of insanity of this crime also. I guess I'd like to hear a little bit more from others about that, how would we avoid that situation? [LB275]

SENATOR FULTON: Yeah. As I understand the statute, and what I proposed here, this would give a prosecutor the opportunity to pursue. At this point, the prosecutor does not have that opportunity to pursue if someone has escaped. And, I mean, ultimately, these are taxpayer dollars period. But when children and families all across Lincoln have to respond to an all-points bulletin that a crazed killer is on the loose, then it's not just the public tax dollars that are being expended. Now we're talking about private citizens who

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fear for their safety. [LB275]

SENATOR HARR: And I agree with that, but the crazed killer being on the loose, whether it's a felony or not a felony, we're using the same manpower and the same to go after that person, I believe. This wouldn't change the number of manpower that would go after this person. [LB275]

SENATOR FULTON: I think it would if one who is repeatedly escaping and then no longer has the ability to escape. I mean, that's how I would respond to that. [LB275]

SENATOR HARR: Well, but how would you go from a regional center...okay, you're in a regional center because you're found not guilty by reason of insanity. Now you've escaped. You're guilty of this crime...does that mean you...where would you serve their time...in the regional center or would you go to prison? [LB275]

SENATOR FULTON: If the judge found cause such that this person was competent to escape and is competent such that he could be incarcerated, then I would leave that decision to a judge. But we don't have the ability to bring that forward now, lacking this particular bill, and that's why I'm bringing it forward. I understand, some individuals escape because primal...it's man's natural state to want to be free, and he might escape without having possession of his faculties such to know what he's doing. If that's the case, then a judge can make that determination. I'm pointing to these particular cases, and particularly Mr. Tilley's case, because this individual did not exhibit the symptoms of one who is non compos mentis. He most clearly had the wherewithal and the desire to have escaped and used some pretty creative means to evade authorities. This was an all-points deal. This was in the news; it was on the radio; it was in the newspapers. There were helicopters; there were bloodhounds. I mean, this was a scary thing. I was at a south Lincoln gym when this hit the news, and I immediately went to the phone to tell my family, lock the doors. And people were scurrying, and this individual, for eight hours, under that scenario, was still able to be at large. [LB275]

SENATOR HARR: Well, I guess my issue is, if he was not guilty because of the reason of insanity, fine. He's crazy then. Now he's not crazy, so how do we know he's going to do this again because this...he was crazy then? So he probably isn't that much of a danger now. [LB275]

SENATOR FULTON: He was a danger such that he escaped and placed a number...so you're saying that now he's no longer crazy, and he's not a danger therefore? [LB275]

SENATOR HARR: Well, I guess my issue...well, he's not crazy. He was not guilty by reason of insanity here, okay? Your issue is, on this date, whenever that was, let's pretend it was February 2, he escaped. February 2, you're saying he was sane, correct? [LB275]

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SENATOR FULTON: I don't know, but it appears to me that he is sane such that I think it should be brought forward, at least to a judicial authority. [LB275]

SENATOR HARR: Okay. But if he's...all right, I guess. But if he's sane, he's not the same level of danger as when he was crazy would be my argument. But, yeah. [LB275]

SENATOR FULTON: Yeah. I understand your argument. I just...I...we have a disagreement there. [LB275]

SENATOR HARR: Thank you. I guess I just wanted to make a point. Thank you. I appreciate it, Tony...or Senator Fulton. [LB275]

SENATOR FULTON: Okay. [LB275]

SENATOR LATHROP: Senator Council has a question for you. [LB275]

SENATOR COUNCIL: Okay. I'm going to be quick, because I had the same concerns that Senator Harr had, and...so I'll defer to him, because I think he addressed it. I mean, if the person is going to be found not guilty by reason of insanity, he's going to be found not guilty by reason of insanity on a Class III or IV felony escape charge unless his condition has changed to the point where now he's sane. And if he's sane, he's presumed no longer to be a risk, because this insanity that puts him in the position. But the point...the question I had, and... [LB275]

SENATOR HARR: You said that much more eloquently than I did (laugh). [LB275]

SENATOR COUNCIL: No, I didn't, Senator Harr. But, I mean, that's the concern. But there's also a concern that the bill, as written, and I think as placed, assumes a universal definition of regional center. And from listening to your testimony, I think you're talking...but your intent is, is to deal with the recognized State Regional Center. I mean, because we have some regional hospitals that deal with involuntarily committed people. So, is that your intent that we're just talking about the state regional facilities? Because we can have involuntary court-appointed commitment to regional hospitals. I mean, people, for example, people are regularly involuntarily committed to the Immanuel Mental Health Center. [LB275]

SENATOR FULTON: Um-hum. [LB275]

SENATOR COUNCIL: It's not a state facility, and I just want to be sure what your intent is... [LB275]

SENATOR FULTON: Right. [LB275]

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SENATOR COUNCIL: ...so if we need...if the bill should go forward with the concerns that have been expressed, that it be limited in its application to this state operated... [LB275]

SENATOR FULTON: Yes, Senator, very good catch. That is my intention, and, yeah, that...I had not contemplated anything outside the state. I mean, part...just to be completely open here, I mean, this was my...Lincoln Regional Center is my immediate concern, because what's occurred. This could well have occurred in another state regional...other state regional centers. That's my intention. So I'm willing to work with the committee to put forward language which more clearly articulates that, but that is, indeed, my intention so. [LB275]

SENATOR COUNCIL: Okay. And just a point on the issue that Senator Harr was addressing, and that is the assumption that insane people can't be, you know, calculating and deliberate and intentional, that that somehow converts them from being insane to sane. I just commit to you the fact that as a regular viewer of the series, Criminal Minds (laugh), those insane people are some of the most calculating and deceptive people that you will find. So with that, thank you, Mr. Vice Chairman. [LB275]

SENATOR LATHROP: I do have a thought. I think people can be committed to the Regional Center for a lot of reasons. And you might be looking at one circumstance where the person that you're trying to...the circumstance that you're trying to fix involves the assumption that the guy is a murderer or a killer. It might be somebody that was suicidal, you know, he tried to take too many pills, and they put him in the Regional Center. Now, we're going to make him a criminal when he tries to leave there. And people are in the Regional Center for a lot of different reasons, and I appreciate if somebody is a...would otherwise be a criminal, and he goes to the Regional Center because he was an insane murderer. That's different than the person who's there on a suicide watch, and it's his daughter's birthday, and he tries to get out of there to go see her. And turning him into the very same criminal that we would one who is a murderer, I think is problematic. I appreciate what you're trying to do. And maybe if we limited the application to people who were found criminally insane then I think it would be easier to support, but it is problematic, I think. [LB275]

SENATOR FULTON: Understood. Let me ask this. You're the Judiciary Committee, so you understand a little bit better than...how these laws are structured. If, indeed, we were to relegate this to individuals who present a danger to society, and my argument would be, when you bring out police and sheriff and bloodhounds and whatnot, that's an individual who clearly presents a danger to society. Otherwise, we wouldn't have law enforcement engaged in such a way. If there's a way to relegate this bill to those individuals, I'll tell you, that is where I was coming from when I am coming up with ways to deal with this. I mean, there was an outcry. In fact, the first escape occurred when I

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was...well, when we were freshmen in the Legislature, and I started...my e-mail box started to fill up, and, you know, so I'm curious what this is. Well, it was being reported that this individual had escaped from SouthPointe mall which is right next to a couple of schools. And so my first reaction is my children, who are at the school. That individual is different than one who may have been committed to...or sent to the regional...ordered to the Regional Center, because he or she posed a danger to himself. So if there's a way to create with language a distinction between the two, I'd be pleased to work with the committee. This arose out of a concern for the public safety. [LB275]

SENATOR ASHFORD: Thanks, Senator Fulton. [LB275]

SENATOR FULTON: Thank you. [LB275]

SENATOR ASHFORD: Do we have proponents, those in favor of the bill? How about those opposed to the bill? Okay (laugh). Come on up and sign in. Good afternoon. [LB275]

WILLIAM SPAULDING: (Exhibit 2) Mr. Chairman, Senators, I'm Dr. William Spaulding. I'm the president of Nebraska Psychological Association, S-p-a-u-l-d-i-n-g. We strongly oppose this bill. Instead, we urge this committee to appeal to your colleagues on the Health and Human Services Committee and the Legislative Performance Audit Committees to address the very real problems that this bill reflects by exercising their crucial role in legislative oversight of executive branch responsibilities. You've already raised some points about problems of criminalizing behavior perpetrated by people who have already been adjudicated as incompetent to comport themselves to the requirements of the law. Therefore, our testimony focuses on the egregious circumstances that led to the mere consideration of such an ill-conceived proposal. For several years, we've witnessed the degradation of the regional centers, arguably an unintended consequence of LB1083, but very directly the result of naive policy at the level of NDHHS Behavioral Health administration and mismanagement at the level of Regional Center administration. In 2009, an interim study and hearing before the Health and Human Services Committee revealed that a key component of Regional Center operations, the Community Transition rehabilitation program, had been closed with no planning, no consideration of the consequences, no involvement of the Behavioral Health Services Chief Medical Officer, no replacement of services, and in violation of LB1083 planning and reporting requirements. A 2009 analysis by the Legislative Performance Audit Committee officially corroborated this finding. As a result of this policy blunder and related mismanagement, there are now between 50 and 100 patients in Lincoln Regional Center who have been there for many months, in some cases many years, who are not receiving the type of treatment and rehabilitation they need, and who are therefore stuck in the institution. The patient whose highly publicized escape attempt precipitated this proposal was one of many who have been in the program that was closed where he had been making incremental progress toward graduating to

community treatment and court records make this clear. His attempt was a futile, desperate response to his very rational perception that his prospects for recovery had evaporated. The Lincoln Journal Star reported that Senator Fulton was surprised that the Lincoln Regional Center's CEO had made promises about security that he had not kept. Had Senator Fulton looked a little further, he would have not been surprised. Since 2004, there has been an unfinished Legislative Performance Audit investigation whose initial report indicated serious problems in the administrative accountability of psychiatrist employees at Lincoln Regional Center. In that report, the Lincoln Regional Center CEO promised specific remedies that have never been implemented. In 2009, the State Auditor issued very similar findings. Today the Unicameral Audit Committee has before it additional reports from the Legislative Performance Office raising the same concerns. The Audit Committee also has a fiscal analysis from a credible expert showing the continuing cost of closing the rehabilitation program to be almost \$2 million per year, a very conservative estimate that does not include the costs passed on to the community services system, most especially the severe stress on emergency crisis and law enforcement services. [LB275]

SENATOR ASHFORD: Dr. Spaulding, could you...would you mind...I have your...we have your testimony. Could you summarize for us, please? [LB275]

WILLIAM SPAULDING: We need quality mental health services for high-risk patients in secure settings. It's a state level of responsibility that the private sector has not and will not pick up. Instead of finding ways to cover up the problem, the Unicameral needs to advocate for administrative accountability and appropriate treatment for people confined to the state institutions and other secure settings--in this case, Lincoln Regional Center. [LB275]

SENATOR ASHFORD: Thank you, Dr. Spaulding. Any questions of Dr. Spaulding? Seeing none, thank you. Next opponent. [LB275]

THOMAS STRIGENZ: Good afternoon. Thomas P. Strigenz, appearing on behalf of the Nebraska Criminal Defense Attorneys Association one more time. We are in opposition to this bill and, again, with all due respect to Senator Fulton, basically because of the way it is drafted, and it is too broad. And I know Senator Harr brought up some issues that we talked about, and Senator Lathrop also brought up some issues. Basically, there's three ways somebody can get down to the Regional Center. And the Regional Center is probably what we're all talking about. That's the language that's in the bill, but, you know, there are numerous agencies...there are numerous places individuals can go. Basically, somebody before trial can go have a competency hearing, and a judge can commit that person to a state hospital. But that hospital can be privately run with the permission of the judge. Does this apply there? There is Board of Mental Health commitments. Our Board of Mental Health commitments are going to come under this. I know it says court-ordered, but Board of Mental Health are judicial quasi...judicial

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(inaudible) boards. Do they qualify under this? And I think that's Senator Lathrop's issue. Bottom line is the (inaudible) by reason of a mental defect, I mean, there's two stages to that. If somebody is found not guilty by a mental defect, the initial evaluation is ordered by a judge within 90 days. That's an inpatient basis or an outpatient basis at the Regional Center, I think is what the statute says. But if it is an outpatient basis, if that person has said, you'll get down there on February 19, and that person doesn't show, is that the escape that we're going to...is that the conduct we're trying to disallow? And then, again, after...if somebody has been found still dangerous, the judge can order "any participation in appropriate plan" which can include the Regional Center, but that can be a private place, a public place, can be inpatient, can be residential, can be day, can be outpatient. The NCDAA does oppose this bill, again, as...just kind of trying to fix a problem, perhaps with adding a few words just probably does not work. So we would ask that this bill not be (inaudible) forward, and we would oppose it. [LB275]

SENATOR ASHFORD: Any questions of Tom? Seeing none, thank you. [LB275]

THOMAS STRIGENZ: Thank you. [LB275]

SENATOR ASHFORD: Next opponent. [LB275]

MARY SULLIVAN: (Exhibit 4) Hi. My name is Mary Sullivan, S-u-l-l-i-v-a-n. On behalf of the Nebraska Chapter of NASW, National Association of Social Workers, please accept this letter and testimony as opposing LB275 which would make attempting to escape from a Regional Center a Class IV felony. We strongly oppose this bill, and there's several reasons that we oppose this bill. We also think there's something the Legislature could do to attempt to resolve the problem that this bill seems to be attempting to resolve. First, the individuals at the regional centers are mentally ill. They're not criminals. People with mental illness go to regional centers to receive treatment for their mental illness, and while at the regional centers, they are to be kept safe. Many patients can benefit from treatment and return to live in the community. There's hundreds of people currently living in our community who were once patients at the regional centers. Secondly, individuals escape from regional centers for various reasons. Some are confused; some escape because they don't think that they need to be at the regional centers. Some lose hope that they'll ever get discharged. People escape for no well-thought-out reasons at all, some of them. In my 20 years as a program director at the Lincoln Regional Center, I'm aware that people escape because the lock on the door was broken, because protocols weren't followed. It then became necessary and the responsibility of the treatment team to work with the individual towards resolving the problems that led to the escape and eventually work with the person to get discharged. If the problem was a broken lock or protocols weren't followed, then steps were taken to ensure these problems would not happen again. The key point to be made is that patients escape because they can. Thirdly, this legislation moves the Nebraska Legislature further away from its responsibility for oversight of behavioral health system,

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oversight that could have meaningful and immediate positive outcome for the regional centers. Unfortunately, this legislation helps support the myth that a new law will resolve more basic problems that could only be successfully addressed by the Legislature carrying out its oversight responsibility. Although it's the executive branch that hires the staff for Nebraska Department of Health and Human Services, the Nebraska Legislature has oversight. There's several things that can be done right now to carry out that would not cost the state any more money. The Nebraska Legislature can begin to hold NDHHS Behavioral Health responsible for the safety of the patients of Lincoln Regional Center. This would include accountability for escapes. The Legislature could request completion of audits that are before the Legislative Performance Audit Committee right now. In its oversight function, the Legislature could get and track important data which as stated in the letter, that would help the Legislature know what is going on there, and if it's meeting its mission. The regional centers play a vital role in Nebraska's mental health system. When regional centers are effective and effectively run, the patients and their families benefit, the state and counties save money, and our communities are safe. In summary, this legislation will not keep the community safer. The Nebraska Legislature can have significant impact on the problems by carrying out its oversight responsibility. Thank you. [LB275]

SENATOR ASHFORD: Any questions of Mary? Mary, did you have written comments as well? Did you? Okay. Thank you. [LB275]

MARY SULLIVAN: You're welcome. Thank you. [LB275]

SENATOR ASHFORD: Any other opponents? [LB275]

ALAN GREEN: Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Alan Green, A-I-a-n G-r-e-e-n, and I'm executive director of the Mental Health Association of Nebraska. We're a consumer-run organization that provides education, advocacy, and consumer-run programming to people living with mental health issues. Most of what I was going to say has already been said, so I won't go over it too much. I just want to thank Senator Lathrop and Senator Harr for highlighting the issue of the vagueness of the language. As been brought up, the majority of people that are at Lincoln Regional Center are not criminals. They were never found guilty of any crime. They're there looking for help. And this law would criminalize their behavior if they wandered off, let alone made a concerted effort to so-call escape. The other issue I think needs to be pointed out is one that is on a national level, and that is the public hysteria that equates mental illness with violence and danger. That even just some of the discussion here today is very, very disconcerting. As it's been noted, and all the data shows that individuals that are living with a mental illness are less likely or no more likely than the chronically normal to be violent. And it is very, very difficult, I know, to get beyond that public perception, the media campaigns, and the picture that is painted broadly over everybody that is living

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with a mental health issue. So I am, again, speaking in opposition of this bill. Thank you very much. [LB275]

SENATOR ASHFORD: Thank you, Alan. Any questions of Alan? Thank you. Any other opponents? [LB275]

TIMOTHY PICKREL: My name is Timothy Pickrel. I'm very sorry, I don't have copies for everybody. This is impromptu. And I'm a consumer... [LB275]

SENATOR ASHFORD: Timothy, would you spell your last name for us, please? [LB275]

TIMOTHY PICKREL: Yes, P-i-c-k-r-e-l. First name Timothy, T-i-m-o-t-h-y. I'm a consumer advocate for behavioral health inclusive of developmentally disabled and persons with mental illness. I suffer from a mental illness, but it's not so severe that I do need to be in the hospital. I was appalled when I sat back there and heard terms that my sister used, who said that because she saw all these mentally ill people kill other people who said they might have had a mental illness. They might be off their medications. She told me I couldn't come home for Easter dinner with her alone, because she couldn't trust me. She didn't want to be alone with me in the house, because she didn't know what I might do. And those are scare tactics that I think are being used not only by my sister but by a lot of people. And I'm sorry to say, Senator Fulton. Basically, I think that line 10-11, Section 1 is very flawed. It's nebulous. It says court-committed. There is a mental health board. Is that a court? Does that fall within the judicial system or the mental health system, or are you trying to marry the two systems together so you can criminalize everybody? Basically, there's only one-half of 1 percent of the people who are declared mentally ill that go out and commit these kinds of violent crimes. And because of this, you always see somebody who shot 13 people on TV, and they said, he might have had a mental illness. What does this do to the normal population? If I didn't have a mental illness, I'd probably be scared too. But when you get to know people, you get to realize they are just like you or I. We're not illiterate; we're not stupid. A lot of us are very bright people, and we fit in...we fit in. You can tell who is and who is not a mentally ill person, and with that, I'll end. [LB275]

SENATOR ASHFORD: Thank you, Timothy. Any questions of Timothy? Thank you for sharing your comments. Other opponents of the bill? Come on up. [LB275]

DANIEL SCHROEDER: Dr. Daniel Schroeder. I'm a member of the Lancaster County Mental Health Board. I did not come prepared to testify this afternoon, but I did want to say that when we have somebody come before the Mental Health Board, there are three things that we have to satisfy. Number one, is the person mentally ill? Number two, is the person a danger to themselves (sic) or others? And number three, what is the least restrictive form of treatment? That's the three-legged stool that we use when we have somebody come before us. One of the problems that we have is that the Mental

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Health Board, who operates under...with each judicial district, there's really no teeth in the laws. In other words, we make a commitment, and if there's no teeth in it, then it becomes no more than a polite suggestion. I don't think criminalizing is the way to go, but we still need to protect the person themselves--the client themselves, and the public in general. And if the door is wide open and they can come and go as they please, then it's no good either. But I don't think that criminalizing is necessarily the way that we need to go with something like this. [LB275]

SENATOR ASHFORD: Any questions of Dan? Thanks for all the work you do on the Mental Health Board. It's tough work. [LB275]

DANIEL SCHROEDER: Not an easy one. [LB275]

SENATOR ASHFORD: It's not an easy job, and thank you. Any other opponents? Neutral testifiers? Tony, do you wish to close? [LB275]

SENATOR FULTON: (Exhibit 3) Mr. Chairman, I forgot, this is a letter that I should have submitted early on from the Regional Center from Scot Adams, Division of Behavioral Health with respect to my bill, so I'd ask that to be put into the record. I'll close, very briefly. I know you have other bills to get to. One of the concerns I heard brought up is that of clarity in the language, first brought up by Senator Council very astutely and adroitly so. And my intention was to relegate this to state facilities, so if something as simple as saying, Lincoln, Hastings, and Norfolk could be added to the bill, then we would clarify my intention and make precise the bill. Something I'll close with to ask you to consider, when an individual is found not guilty by reason of insanity, it does not therefore mean that individual gets to walk scot-free. Those to whom I will apply, I would apply this bill, have been ordered to a certain place and ordered by the authority of the state in the person of a judge. And if that individual escapes from that place to which he was ordered, and does so continuously without any reprisal or any means by which the public could keep him there, then it is not an order of the judge. It seems to me that we are allowing the judge to make a simple suggestion, but, indeed, our structure is...it is by order of a judge that an individual should go to one of these regional centers, and there usually is good cause for it. So while I recognize an individual may have been found not guilty by reason of insanity, if we do nothing with my bill, then it remains true that the force of the state's authority keeps a person in a regional center. I am saying that we should reflect that force in the statute by saying that one shouldn't escape from where he has been placed by a judge. We have responsibility for public safety. It's one of the things that we do as state senators. This is how I have chosen to address this issue, because I'll tell you, the public safety was compromised in at least two times in a very real and dangerous way. So if there are other ideas as to how we can accomplish this, I would be glad to work with you. Thank you, Mr. Chairman. [LB275]

SENATOR ASHFORD: Thank you, Senator Fulton. I believe there are no other

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questions. Thank you, thanks for coming in. That concludes the hearing. We go to LB133 which is...it's my bill. [LB275]

SENATOR ASHFORD: Members of the Judiciary Committee, for the record, my name is Brad Ashford. I represent the 20th Legislative District in Omaha, and I am here to introduce LB133 for your consideration. LB133 is a bill that this committee agreed to include in our LR542 option list. It would require the probation administration to include in their presentence investigation reports provided to judges the cost to the state for the imposition of statutory maximum and minimum sentences or probation if probation is an option. This bill directs the probation administrator to adopt the necessary rules and regulations to collect and disseminate this information to judges. It is believed that by providing this information, judges will gain an additional tool to help them properly sentence an offender and potentially utilize sentencing alternatives that provide for public safety consideration and to utilize judicial resources more efficiently and potentially increase rehabilitation levels of offenders exiting our correctional facilities. If this bill is adopted, it would make Nebraska the second state along with Missouri that provides cost information to judges, although there is similar legislation pending in other legislatures. Presentence investigation reports can be ordered for Class III and higher misdemeanor offenses and for all felonies. They are treated as privileged information by statute which provides that these reports not be disclosed to individuals other than judges, probation officers, and parole officers. It is estimated by the probation administration, the implementation of this particular effort to address the issue of cost and overcrowding of our prisons, would be to update the existing technology with minimal cost going forward at approximately \$25,000. To offset the General Fund impact to the bill, we would provide that the costs for implementing this act come out of the Uniform Data Cash Fund administered by the probation administration. Again, this summer there was quite a bit of talk about the Missouri plan and judges having access to cost information prior to sentencing. It was, I think, of interest to this committee in the LR542 process. It's very interesting to me to...in that it addresses at the initiation of the sentencing process, cost as a factor, certainly not necessarily the overriding factor, but a factor. So with that, I would answer any questions that you may have, Mr. Cochair or Vice Chair...Cochair (laughter). [LB133]

SENATOR LATHROP: Can you comment on the fiscal note? It struck me that... [LB133]

SENATOR ASHFORD: Seems like... [LB133]

SENATOR LATHROP: ...it strikes me that we don't need another person. We just put up in the corner of it it's going to cost \$112 a day for every day you put them in jail. [LB133]

SENATOR ASHFORD: Right. Right. We don't make that calculation. [LB133]

SENATOR LATHROP: Well,... [LB133]

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SENATOR ASHFORD: Unfortunately. [LB133]

SENATOR LATHROP: ...but even in a presentence investigation, so what will they do? They'll take the recommendation and then say how much it's going to cost to incarcerate them for the recommended time? [LB133]

SENATOR ASHFORD: Correct. Right. [LB133]

SENATOR LATHROP: And isn't that readily available information? Do we really need another person in the program? [LB133]

SENATOR ASHFORD: It is readily, yeah. I think, though, that what this bill would do isn't readily available information in the record. It may be readily available, and we can think about it. What isn't available...well, what isn't in statute is the requirement that judges at least get this information. [LB133]

SENATOR LATHROP: Great idea. I couldn't agree more with the idea. I'm just struck that... [LB133]

SENATOR ASHFORD: But there may not be a fiscal note. [LB133]

SENATOR LATHROP: ...that somebody ought to be able to go well, it's...we can figure out what it costs to incarcerate somebody down in the penitentiary and already have. [LB133]

SENATOR ASHFORD: Right, right. Certainly, yeah, I think most of our agencies do like to attach fiscal notes to just about everything (laugh) you ask them to do. But I logically do agree with you that it would seem it would be a very quick...that information would be readily available. [LB133]

SENATOR LATHROP: And that we can put it in front of the judge without hiring somebody. [LB133]

SENATOR ASHFORD: Somebody to do that. [LB133]

SENATOR LATHROP: Okay. Senator Lautenbaugh. [LB133]

SENATOR LAUTENBAUGH: Thank you, Vice Chairman Lathrop. Did you hear anything back from the probation office about the cost of this? [LB133]

SENATOR ASHFORD: I think we got the \$25,000 figure from them. That's... [LB133]

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SENATOR LAUTENBAUGH: I mean, but did you have any conversations with them? Are they fine with doing this? [LB133]

SENATOR ASHFORD: Yeah. I mean, I've talked to probation about this in the LR542 process, and prior to that, and Bob Houston from Corrections maybe will come up and talk about it, I don't know. Maybe he's here for another bill, but yeah, I did talk to probation, and I think they would be willing to do this. [LB133]

SENATOR LAUTENBAUGH: And by way of a follow-up, I'm going to ask you to do something that you usually don't have to be asked to do, and that is from the philosophical standpoint, is it proper for the judge to be considering stuff like this? Your thoughts. [LB133]

SENATOR ASHFORD: And great question, and my answer is this, that we...80 percent of our inmates in at least the state system, I believe it's around 80 percent, have sentences of less than three years. Again, Bob is here. He can correct me, but I believe it's close to that number. And many of these offenses are nonviolent in nature, and that there may be other options. There are other options available to incarceration that might turn this person around quicker without the necessity of incarceration. That's a judge's decision, but I think if those...philosophically, the weighing of the opposing view and reading the Missouri...reports on the Missouri law that was passed. You know, is cost really a factor in justice...administration of justice, sentencing being part of that? It's a great philosophical question. When we're dealing with at least some of these lower grade offenses where the incarceration is a substantially less amount of time, and there are other options available, I think, you know, I'm persuaded that it's worth taking a look at. [LB133]

SENATOR LAUTENBAUGH: Is there merit in providing cost information on the other options to this, so the judge knows all of the possible outcomes in dollars and cents? [LB133]

SENATOR ASHFORD: Sure. I think that's fair, absolutely fair. [LB133]

SENATOR LATHROP: Senator Harr. [LB133]

SENATOR HARR: I guess I have a problem, first of all, with the \$25,000 fiscal note in that the Class IV felony is zero to five years. [LB133]

SENATOR ASHFORD: Correct. [LB133]

SENATOR HARR: So I can do zero times zero, that comes up with zero. Five. They give the estimated dollar amount as \$28,773 times five. I just earned \$5,000 because there's a Class IV, Class III, Class II, IA, and I, so there are five classes. So I've just

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earned \$5,000. Now, I can do \$28,773 times 1 and I'm going to come up with \$28,773. I've earned another \$2,500. But this doesn't seem...this \$2,500 expenditure seems ridiculous, first off. Second off, well, second of all, is there anything currently that prevents a judge from figuring this out on their own? [LB133]

SENATOR ASHFORD: No. [LB133]

SENATOR HARR: So they can clearly do that. And I agree with Senator Lautenbaugh, the philosophical (inaudible) if cost should be a factor in sentencing. But finally, it says, or probation if probation is an option. How would you determine the cost of probation? [LB133]

SENATOR ASHFORD: I think that's possibly, Senator Harr, where the cost comes into this. I mean, there are probation options that have a cost to them, obviously, as you know. Certainly, I'm not telling you anything you don't know a lot better than I do. But that...being able to assess that cost versus the cost of incarceration is what they're getting... [LB133]

SENATOR HARR: I understand the concept, so it comes to this probation, if probation is an option. Okay, so...but if I...I mean, the... [LB133]

SENATOR ASHFORD: If probation is not an option, I assume there's no point. Yeah. [LB133]

SENATOR HARR: Perfect. I understand that, but I just don't understand how you determine the cost of probation, because I guess a lot would depend on what the PSI offered. I mean, probation could be anything from write a letter once a month for 30 days to AA treatment, or you could go to job training. There's innumerate things that they could recommend. So would you put everything that's possible for probation to offer, or would it be just what the PSI recommends for probation? I mean, it doesn't tell the judge the true cost, because... [LB133]

SENATOR ASHFORD: I think the... [LB133]

SENATOR HARR: ...there would be a PSI that comes through, and they would say, hey, here's where we recommend probation; (b) and here's the cost of that. But there are a thousand other options out there for probation that a judge has at their disposal. And that would...I mean, if you put all the possibilities of probation out there, probation would cost more than actually incarcerating an individual. [LB133]

SENATOR ASHFORD: Correct. [LB133]

SENATOR HARR: So I...while I appreciate that it does get at the issue that

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incarceration is very expensive, and to a certain degree, can be considered a waste of resources, I don't know if this really gets at that option. [LB133]

SENATOR ASHFORD: Well, I think that... [LB133]

SENATOR HARR: And I want my \$7,500. [LB133]

SENATOR ASHFORD: Yeah. I mean, if the PSI comes back with three or four different recommendations for different types of supervision, probation supervision, that...I think what we're doing here is asking probation to put a cost to those recommendations. And the judge would have that information, he or she could totally ignore that information and just impose a sentence. I think as part of the LR542 process, we're trying to look for things within the system that would alert systemically individuals who are working in the system, that there are cost alternatives, and what those costs are. And we don't know certainly whether the judges would even consider this or whether they already are, because I don't think we did that investigation particularly. But it seems like it's a logical step. Does it need to be in statute? Could it be by court rule? Possibly, it could be that, too, I don't know. But it seems...again, it apparently has had a significant savings in Missouri, and I'll get for the committee some of the outcomes that even though the Missouri law has only been in effect a short time, that there might be some outcomes we can bring to the committee. [LB133]

SENATOR HARR: Thank you. [LB133]

SENATOR ASHFORD: Whew (laughter). I don't know if there are any proponents or not. I guess Bob isn't going to be testifying on this one (laugh). [LB133]

SENATOR LATHROP: Yes, there is a proponent. [LB133]

SENATOR ASHFORD: He is a proponent? Oh, there is one. [LB133]

THOMAS STRIGENZ: We are. [LB133]

SENATOR LATHROP: Strigenz, Tom Strigenz. [LB133]

SENATOR HARR: Which is exactly why I'm against it. [LB133]

THOMAS STRIGENZ: Tom Strigenz, appearing on behalf of the Nebraska Criminal Defense Attorneys Association. We are in support of this bill, and we ask that this bill move forward. Basically, you know, it is information that a judge should have at his disposal. They look at a lot of different things, and a lot of different things come in that we as defense counsel shake our head at, and I know the County Attorney's Office shakes their heads, things that we bring in. So I just think it's another tool, another

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option, and, you know, again I'm just trying to check to see if there's information out there that is not readily available, and it's not. I mean, I had something from '07 I found, but putting it into numbers is...but I think it is something that is reasonable and should be looked at. And, with that, we'd put in support. Yes, Senator Harr. [LB133]

SENATOR LATHROP: Senator Harr. [LB133]

THOMAS STRIGENZ: Senator Harr. [LB133]

SENATOR LATHROP: I'll do that, Strigenz. That's my job. That's my job. [LB133]

SENATOR HARR: He's used to bossing me around. [LB133]

SENATOR LATHROP: Apparently, yeah. [LB133]

SENATOR HARR: I guess two questions. First of all, do you look at PSI's? [LB133]

THOMAS STRIGENZ: All the time, almost daily (laugh). [LB133]

SENATOR HARR: And are prosecutors allowed to look at them? [LB133]

THOMAS STRIGENZ: Well, again, I saw that you reacted, and I looked up, and it's paragraph 6, and it just...this was a big case that was out there about a year ago, and said, shall be disclosed directly or indirectly to anyone other than a judge, probation officer, to whom an offender's file is duly transferred, the administrator or others entitled by law. And maybe language does need to be added there. I tend to... [LB133]

SENATOR HARR: But, seriously, you know, this information...now that you have this information available since you've seen the fiscal note on this? [LB133]

THOMAS STRIGENZ: Yes. [LB133]

SENATOR HARR: Do you intend to add sentencing, bring this up as an issue? [LB133]

THOMAS STRIGENZ: Are you asking me on behalf of NCDAA or me personally? [LB133]

SENATOR HARR: You personally. [LB133]

THOMAS STRIGENZ: Well, you know, I think in today's budget and today's economy, absolutely it comes into play. But it goes into the correct sentence for a specific offender, and every sentence can be different, you know, but it...you know, it does come into play. So, yes, I think that it will be an argument at sentencing. [LB133]

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SENATOR HARR: So your group would go ahead and publish this and send it to all the judges then? [LB133]

THOMAS STRIGENZ: I think what would happen is, no, at individual sentencings, we would say that this, you know,... [LB133]

SENATOR HARR: Well, you could do that right now, your group could do that. [LB133]

THOMAS STRIGENZ: Only because I don't know if we can, because I don't think there's...we might get in a fight at sentencing of what the cost is. I mean, the county attorney's office might have a different value than we do. But if it's standardized, then I think...then everyone is on the same page, and that's probably my biggest issue on this so. [LB133]

SENATOR LATHROP: Very good. Oh, Senator Lautenbaugh. [LB133]

SENATOR LAUTENBAUGH: Thank you. Thank you for coming. I'm all in favor of voluntary associations of lawyers for coming and expressing themselves, and I appreciate your testimony today. And, similarly, this isn't even going to remotely be a question, so I'm not going to cast it as such. I appreciate...we all can appreciate the energetic and enthusiastic defense you bring to people in Sarpy County who can't otherwise afford it, so thank you for what you do. I'm trying to say something nice before you trash my bill in about 15 minutes (laughter). (Inaudible) so. [LB133]

THOMAS STRIGENZ: Thank you, Senator Lautenbaugh, appreciate that. [LB133]

SENATOR LATHROP: And for hiring family. [LB133]

THOMAS STRIGENZ: Thank you. [LB133]

SENATOR ASHFORD: Any other proponents? Mr. Houston, are you...? [LB133]

BOB HOUSTON: I'm on the next bill. [LB133]

SENATOR COUNCIL: He's for me. [LB133]

SENATOR ASHFORD: You're not for this one? [LB133]

BOB HOUSTON: Well... [LB133]

SENATOR COUNCIL: Hint, hint. [LB133]

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SENATOR ASHFORD: Any...(laugh). Okay, go ahead, I'm sorry, Mr.... [LB133]

SENATOR LATHROP: Are we on opponents? [LB133]

SENATOR ASHFORD: I think we're to opponents quickly. [LB133]

SENATOR LATHROP: Are we? Any opponents? [LB133]

SENATOR ASHFORD: We've moved off proponents. [LB133]

SENATOR LATHROP: Anybody here in the neutral capacity, like say the Director of Corrections? [LB133]

SENATOR ASHFORD: And I'll waive my... [LB133]

SENATOR LATHROP: Nobody here in the neutral capacity. [LB133]

SENATOR ASHFORD: Senator Council, LB191. [LB133]

SENATOR COUNCIL: Chairman Ashford, Vice Chairman Lathrop, Vice Vice Chair McGill, other members of the Judiciary Committee, I am Senator Brenda Council, and for the record, the last name is spelled C-o-u-n-c-i-l not C-o-u-n-s-e-l. I represent the 11th Legislative District, and I appear before you this afternoon to introduce LB191. And I am introducing LB191 on behalf of the Department of Corrections and the Nebraska Parole Board, and because it represents one of the components of an approach that I have been exploring with both the Corrections Department and the Parole Board for a number of years. And that approach is earned time as a means of not only reducing corrections costs, but better preparing inmates for reentry. As all of you know, Nebraska currently has a good time law that reduces an individual's sentence by one day for every day served. There are very limited circumstances under which an inmate can lose any good time. Conversely, there is no way to grant additional good time if inmates comply with disciplinary rules and/or complete all recommended programming. As a result of lack of capacity in funding, we are unable at this time to pursue a part of the approach that I've been discussing and I really support, and that is granting additional good time for program completion. But we're not in a financial position or a capacity position to provide that in a fair and equitable basis. And to give you an example, we have a substantial number of individuals who enter the Nebraska Department of Corrections without having earned a high school diploma. And as an incentive for them to obtain a GED or their high school diploma, because now the Department of Corrections is in a position to grant high school diplomas, to grant additional earned time, but there's only so much capacity, and we have inmates who are being released at different times. But what LB191 does and is able to capture is the ability to grant additional good time to inmates who comply with the Correctional Department's disciplinary rules, and it allows

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for parolees to earn reductions in their parole time if they conduct themselves in a manner and in conformity with all the conditions of their parole. So, essentially, LB191 provides that the Correctional Department shall reduce the term of a committed offender by three days per month, beginning on the first month after they've served a year. So after they've served a year, beginning on the first month after the completion of that year, they can earn three additional days of good time. For parolees, parolees could earn up to ten additional days of reduction of their parole term for each month that they conduct themselves in conformance with the conditions of their parole. I direct your attention to the fiscal note which shows a savings of \$108,000 a year upon the first full year of implementation of this...I'll call it earned time, but it's actually increasing good time that...and I think is a conservative figure. And it kind of relates to the discussion that just occurred on what figure do you give the court when you're determining the cost of incarceration. There's the daily per diem rate which is about \$15 per inmate per day which only includes the cost of food and clothing and basic incidentals. And then there is the actual cost per annum to incarcerate someone that includes all expenditures from General Fund, Cash Fund, and federal, and that approach is about \$28,000 per year. And I think the conservative estimate of the fiscal analyst is that conservatively the reduction in time would be the equivalent of 19 inmates. And if you multiply that 19 inmates by the per diem rate, that's where you get to \$108,000. If you multiplied it by the annual cost per inmate, that nearly doubles. So for those reasons, I would urge this committee's favorable consideration of advancing LB191. It serves two purposes, and that is to improve the safety and security of inmates and staff by encouraging inmates to conduct themselves in accordance with disciplinary rules, resulting in the increase in the number of good time that they could earn. And it will result in a cost savings to both the Corrections Department and the Probation Department, because as parolees, time on parole is reduced; it increases the number of individuals that can move into parole without having to increase parole officers. With that, I'd answer any questions that you may have. [LB191]

SENATOR ASHFORD: Thanks, Senator Council. And this also was, I think, one of our... [LB191]

SENATOR COUNCIL: LR542. [LB191]

SENATOR ASHFORD: ...but clearly, it's the work you've been doing... [LB191]

SENATOR COUNCIL: But it's an LR542 recommendation. [LB191]

SENATOR ASHFORD: ...but we did think about it, at least, in LR542. But I think Bob also had it on his modifications as well. [LB191]

SENATOR COUNCIL: As well, yes. And as I indicated, Mr. Houston, Ms. Casmer, and I have been discussing various ways of granting additional good time to parolees and

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inmates. [LB191]

SENATOR ASHFORD: Thank you very much. Okay, proponents of this measure? Bob Houston. [LB191]

SENATOR LAUTENBAUGH: Now he testifies. [LB191]

SENATOR ASHFORD: Yeah, yeah. Picking favorites, but we'll let it go (laughter). [LB191]

BOB HOUSTON: (Exhibit 5) Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Bob Houston, H-o-u-s-t-o-n. I'm Director of the Nebraska Department of Correctional Services. I'd like to thank Senator Council...thank you, Senator, for introducing the bill on behalf of the department. This bill was a department budget modification resulting in savings to the...and could result in the savings to the department of \$108,000 in the second year due to the population reduction. The savings have been incorporated into the Governor's recommended budget. As of December 2, 2010, 2,760 inmates have been incarcerated for more than a year. Of this number, 687 or approximately 25 percent, did not have a Class I or Class II, or more than three Class III misconduct reports. The current good time provision will remain the same. This legislative bill would add a component to the current good time law for those inmates who are incarcerated with the department after its effective date. Under this bill, inmates could earn an additional three days of good time following a 12-month period, during which he or she had not been found guilty of a Class I and II offense nor more than three Class III offenses under the department's disciplinary code. Examples of Class I and II offenses are assault, possession of a weapon, escape, refusing to submit to a search, disobeying a direct order, gang/security group activities, and false reporting. A Class III offense includes things as possession or receiving unauthorized articles, violations of sanctions, swearing, cursing, and use of abusive language or gestures. This provision has the potential to lower the prison population, and, therefore, reduce costs. It also rewards good behavior within the prison system. Inmates under this bill would have the ability to positively impact their release date by engaging in appropriate actions and refraining from negative ones. LB191 also changes the good time earned by offenders on parole. Currently, inmates on parole receive an additional two days of good time per month for compliance with their parole plan. This bill would change that amount of good time on parole from two days to ten days. The provision incentivizes compliance with the parole plan by offering offenders the opportunity to decrease the amount of time they spend on parole by exhibiting good citizenship. I believe this bill is a positive step in managing both the behavior and the size of the inmate population, and I'd be pleased to answer any questions. [LB191]

SENATOR ASHFORD: Any questions of Bob? Again, Bob, thank you and all of your team for the good work you've been able to do this last year in addressing the prison

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population, where we started from 18 months ago, 2 years ago, this is a dramatic effort, and thanks to Senator Council, of course, who takes a great interest in this. And so, with no other questions, thank you. [LB191]

BOB HOUSTON: Okay. [LB191]

SENATOR ASHFORD: Any other proponents? Opponents? Neutral? Okay. Senator Council, it doesn't seem as if you have a lot of...nothing to respond to. All right. That closes the hearing, and we'll go to Senator Lautenbaugh. LB137. [LB191]

SENATOR LAUTENBAUGH: Good afternoon, Mr. Chairman, members of the committee, my name is Scott Lautenbaugh, L-a-u-t-e-n-b-a-u-g-h. I'm here to introduce LB137. LB137 imposes a one-year limitation on the time to bring a motion for postconviction relief in criminal cases. Such a motion would have to be filed within one year of the date of a judgment of conviction becomes final. Currently, there is no time limitation. Postconviction relief pursuant to 29-3001 must be based upon a denial or infringement of a convicted person's constitutional rights to a degree which renders the judgment of conviction void or voidable. The information required to determine whether such claim exists immediately after the completion of the appellate process. A delay in filing which is currently allowed frustrates case finality and allows for abuses where postconviction motions are filed after important parties relevant to the issue raised are no longer available, especially when claims focus on ineffective assistance of counsel which means the state has to defend the actions of the convicted criminal's original defense counsel which gets more difficult to do as time goes on and memories fade and whatnot. This bill will align us with the federal system which also has a one-year limitation for postconviction challenges through habeas corpus motions. LB137 does not affect Nebraska's motion for new trial based upon newly discovered evidence or Nebraska's DNA Testing Act. LB137 also has a grandfather provision which allows any person whose conviction was final prior to the effective date of this bill to file a postconviction motion within one year of such date. I brought this because I believe Nebraskans should be able to depend on the finality of criminal convictions. This critical piece of legislation validates court decisions and brings closure to victims. I know...hope I'm being followed by people from the Attorney General's Office who will explain this better than I can as this is not my area. I would be happy to answer any questions, but more likely than not, I'm going to refer them on to the people who are the experts in this. [LB137]

SENATOR ASHFORD: Thank you, Senator Lautenbaugh. Yes, Senator Council. [LB137]

SENATOR COUNCIL: Yes, thank you, Chairman Ashford. Thank you, Senator Lautenbaugh. The current 29-3001, do you know how long that has been the law of the state of Nebraska? [LB137]

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SENATOR LAUTENBAUGH: I do not. [LB137]

SENATOR COUNCIL: Because the question I was going to ask, you made reference to federal habeas corpus, and the time limit there, trying to determine how long there has been that limitation at the federal level while at the state level, we've always had the opportunity to challenge these at various times by motion. [LB137]

SENATOR LAUTENBAUGH: I can surely have that found, but I don't know the answer as I sit here. [LB137]

SENATOR COUNCIL: Okay. And the second is, you made reference to, it doesn't affect an opportunity to bring a challenge to a conviction on the basis of newly discovered evidence. [LB137]

SENATOR LAUTENBAUGH: Yes. [LB137]

SENATOR COUNCIL: Okay. My concern is the definition or what constitutes newly discovered evidence. And it arises in the context, and I know others are going to testify to it, of the Kofoed case, where that may not have resulted in the discovery of new evidence with regard to convicted defendant A, but it certainly places into question that person's prosecution. Yet, under LB137, they would be deprived of the opportunity of challenging that. Am I correct in my analysis? [LB137]

SENATOR LAUTENBAUGH: I don't know if it would be an absolute bar. It would turn on the definition. You're correct. [LB137]

SENATOR COUNCIL: Okay. And I'll just tell you, being very candid and up-front, that's my objection to LB137, and particularly, when we have such a recent and vivid example of that potentiality, so thank you. [LB137]

SENATOR LAUTENBAUGH: And I would, you know,...one of the advantages of not actually authoring a bill is that you don't have any pride of authorship... [LB137]

SENATOR COUNCIL: Exactly. [LB137]

SENATOR LAUTENBAUGH: Yeah, I'd be happy to discuss that with you and work on it if it can be addressed in some way, because I do think this is important. [LB137]

SENATOR ASHFORD: Thanks, Senator Council. Thanks, Senator Lautenbaugh. By the looks of the room, I see we have some experts on this topic, so... First proponent. Mark. [LB137]

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JOHN FREUDENBERG: Good afternoon. My name is John Freudenberg, F-r-e-u-d-e-n-b-e-r-g. I'm the Criminal Bureau Chief of the Attorney General's Office. I'm also the president of the Nebraska County Attorneys Association. On behalf of both organizations, I'm here to testify in support of LB137. As Senator Lautenbaugh has informed you, the two changes made by LB137 are pretty simple and straightforward. First is the establishment of the one-year limitation on filing of motions for postconviction relief pursuant to 29-3001. Currently, there is no limitation except that the motion must be brought by the person while he or she is still in custody. The second change is the inclusion of a grandfather clause which allows a person previously incarcerated upon a final judgment of conviction prior to the enactment of this bill to have one year to bring a motion for postconviction relief, so otherwise, this isn't going to preclude people who haven't brought it yet. They still have one year from whenever this bill is enacted. In our criminal system, following the entry of a guilty verdict at trial, a person has the right to appeal his or her conviction to the Court of Appeals and the Supreme Court. If the conviction is upheld, the person's conviction becomes final. However, there are still several postconviction proceedings available to that person such as the DNA Testing Act which was used in the Beatrice Six matter or motions for the new trial which addresses the Kofoed issues, and is being used in the Henk matter right now. The postconviction proceedings are what we're discussing today. Under Section 29-3001, motion for postconviction relief can be brought to address constitutional infringements of rights that would make convictions void or voidable. So it has to be a constitutional challenge, not just any challenge that you can come up with. That's why the Kofoed matters don't fall under this. Those fall under the motion for new trial. However, these allegations cannot be of the nature that could have been addressed during a direct appeal. The vast majority of these motions are based upon complaints against defense attorneys, technically called ineffective assistance of counsel claims. Such claims assert that defense counsel was so bad that their representation was actually constitutionally ineffective. A convicted person knows immediately upon the following lengthy trial of the appeal process whether they are unhappy with their attorney. There is no reason to allow these claims to be brought years later. Such delays frustrate case finality for the entire system including the victims and allow for abuses such as local filings for people who file this time after time after time after time, or the intentionally delaying of a filing where postconviction motions are filed after (inaudible) parties relative to the issues raised are no longer available such as attorneys, judges, victims, witnesses, and officers. We have examples where they were filed 32 years later. And a proposed limitation will bring us in alignment with federal habeas challenge limitations. Federal habeas challenges are a person's next step following state postconviction proceedings. The person only has one year from the date of final conviction to bring a federal habeas claim. There is an attorney here from Hall County. I anticipate he'll address specific instances of abuse of the current system since I'm nearly out of time. I'm happy to try to answer any questions, and I want you all to see that exactly three minutes. How's that? (Laughter) [LB137]

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SENATOR ASHFORD: Okay. Any questions of John? Senator Council. [LB137]

SENATOR COUNCIL: Thank you. Thank you, Mr. Freudenberg. I'm going to begin with a comment and with all due respect, your statement that a defendant knows whether they're happy with their defense counsel the day after or day of the conviction. I would agree they would be unhappy, but they would not necessarily know whether their defense counsel failed to do something that could have been done that it could have changed the outcome. Sometimes they don't find that out until months later, sometimes years later, but with that said, 29-3001, according to my quick review with the assistance of LaMont here, has been in effect and not been amended since 1965. [LB137]

JOHN FREUDENBERG: Correct. [LB137]

SENATOR COUNCIL: How long has the federal habeas corpus limitation been at one year? [LB137]

JOHN FREUDENBERG: I do not know. [LB137]

SENATOR COUNCIL: Thank you. [LB137]

JOHN FREUDENBERG: Can I respond to the first part of what you said? [LB137]

SENATOR COUNCIL: Yes. [LB137]

JOHN FREUDENBERG: With regard to...actually, I've even lost the first part of what you said in my mind here. [LB137]

SENATOR ASHFORD: Well, he was talking... [LB137]

SENATOR COUNCIL: You said that a defendant would know whether they were happy or not happy with their defense counsel. [LB137]

JOHN FREUDENBERG: Thank you, Senator. This is also...this is after they go through their entire appeals process. This isn't the day after the verdict comes down. This is after they go through the Court of Appeals appeal and their Supreme Court appeal. If you don't go through both of those, or at least try to make an effort, you're going to be precluded from these type of challenges anyway. So this is going to be a significant time after the guilty verdict ever came down. So, thank you for refreshing my recollection. [LB137]

SENATOR ASHFORD: Thank you, John. Any other questions of John? Seeing none, thanks. [LB137]

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JOHN FREUDENBERG: Thank you. [LB137]

SENATOR ASHFORD: Mark is next. Welcome back. [LB137]

MARK YOUNG: Thank you. Good afternoon. My name is Mark Young, Y-o-u-n-g. I'm the Hall County Attorney and am here on behalf of the Hall County Attorney's Office as well as the County Attorneys Association. And my comment, I was also a defense lawyer for a while and was the subject of a couple of postconviction relief, so I've seen it a bit from both sides. As Mr. Freudenberg mentioned, I'm here on behalf of the counties and the county attorneys for people who have to talk to victims and to explain to victims why it is that after years have gone by, these cases are still coming back to haunt them. There was a murder committed in Grand Island in March 1979 when I was probably skipping criminal law class at the University of Nebraska Law School. Mr. Palmer was the subject of three trials...three convictions, had a postconviction relief motion filed in 1999, was unsuccessful, filed federal litigation, and then refiled with a postconviction motion. The day he died in 2006, I was facing another postconviction hearing with him with three attorneys working on his behalf, and was the person who had to talk to his widow, overall, the last few years there to explain why this case came back to haunt her at that point. Recently, I...last week I received a favorable ruling on a postconviction relief hearing motion that had been filed based in 2005, based on the conviction of a case I prosecuted as a young prosecutor in 1993. In that case, it was a gentleman who had videotaped children committing sexual acts with each other and with him, so we had videotape evidence at least. But if that postconviction motion had been successful, where would I find those girls, let alone putting them and their families back through it? This also has a significant fiscal cost to the counties, and I said in prior testimony over the years that this is...postconviction is an area that absolutely cries out for reform. I think this is an important first step, and I urge you to adopt this measure. I'd be happy to answer any questions. [LB137]

SENATOR ASHFORD: And Mark, what...are there other steps other than this time frame thing? Are there other ways of addressing abuse as this elongated process? Is there...or is the time...is the one year the only way to do it, or is there other...are there other standards that could be applied constitutionally? [LB137]

MARK YOUNG: I think it's the best way. There may be some other ways to do it... [LB137]

SENATOR ASHFORD: Is there anything in addition to this or is this it or? [LB137]

MARK YOUNG: It is possible that you could address some of the issues by...frankly, I think much of the problem is, district judges feel like it's safer to go ahead and appoint an attorney no matter how long or how many petitions have been filed, and that will

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protect him. And I don't...I can't think of another way to do it, but if you have a statute of limitations on it, that's pretty clear cut. And really, after a year, you know, you should be able to get it sorted out. [LB137]

SENATOR ASHFORD: All right. Thanks, Mark. [LB137]

MARK YOUNG: Thank you. [LB137]

SENATOR ASHFORD: Any other proponents? Opposition testimony? Tom, and then Al is here, probably, on this, aren't you? Okay. [LB137]

THOMAS STRIGENZ: (Exhibit 6) Good afternoon. Thomas P. Strigenz, S-t-r-i-g-e-n-z, appearing on behalf, again, of the Nebraska Criminal Defense Attorneys Association. I've written a letter on behalf of NCDAA, and I'm not going to read it verbatim. I'll basically highlight this. Again, with all due respect to Senator Lautenbaugh, NCDAA has taken a position on this bill, because, again, of the way it's drafted as opposed to the actual maybe meat of the time limits. And I will tell you, basically, the federal limitations started in 1996, and that is included in my letter. Time limits seems to be where things are going to, and seems to be where, you know, it does limit a person's access. But, you know, the legal system's job is to do justice, and that is the key. And if justice takes some time, then, by God, then justice takes some time. Now, there's a doctrine of finality. We understand that. And there is victims' rights, and they have a right to get some finalization on this stuff. That being said, the way this legislation is drafted, you know, the way other states have done it, is basically look at first, what constitutional right is being challenged? And, again, is it ineffective assistance? That is absolutely the vast majority of these postconviction deals, and the vast majority come pursuant to a plea. And my letter sets out basically in those situations, states have set a time limit, usually about two years, you know, where if there has been a plea because of bad advice, and that's really what it comes down to. You know, you're going to get X amount of sentence or you'll get probation, and whammo, the judge hammers you, so they do set it (inaudible). But if there are a massive litigation case, and I'm going to say massive litigation just doesn't mean trial, it means pretrial litigation. You know, we have two cases, one which was brought up by the proponent, you know, the Beatrice Six case, but we have the Murdock case, and that would have been massive litigation. And those things, they do set time limits. Bottom line is, all time limits have to have exceptions. And, you know, federal government even has an exception for newly discovered evidence that couldn't have been known to the movant or his attorney. Bottom line is, because of counsel's neglect or mistake, that things can be tolled. So, again, I don't know if one year is a, as my letter states, an end-all, be-all for Senator Lautenbaugh, or if he just wishes to get the discussion going, and I believe it's probably the latter. But, as just a one-year time frame is absolutely, I think, unconscionable without allowing some sort of exception...without the discussion of exceptions to be in. So I think the argument this committee needs to have is, whether time limits, say, even need to be had, and, if

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so, under what circumstances? And then if time limits are going to be issued, then what exceptions apply? Again, three minutes. That was pretty good. [LB137]

SENATOR ASHFORD: That was good. Any questions of Tom? Senator Council. [LB137]

SENATOR COUNCIL: Yeah, just quick. Tom, and I just have had an opportunity to scan your letter, but I note that there is a statement to the effect that even the federal government's one-year limit on postconviction relief motions has certain exceptions from that... [LB137]

THOMAS STRIGENZ: Yes, yes,... [LB137]

SENATOR COUNCIL: ...and you're indicating that we...as presented, LB137 doesn't. [LB137]

THOMAS STRIGENZ: I did not see any in the language. I did not see LB137. I did not see any. [LB137]

SENATOR COUNCIL: Okay. Thank you. [LB137]

SENATOR ASHFORD: Thanks, Tom. AI? [LB137]

ALAN PETERSON: (Exhibit 7) Thank you. [LB137]

SENATOR ASHFORD: And John Krejci is here. [LB137]

JOHN KREJCI: I'm actually here in opposition. [LB137]

SENATOR ASHFORD: Okay. And AI is going to be...you can come up after AI. [LB137]

ALAN PETERSON: Good afternoon, Chairman Ashford, members of the Judiciary Committee. I'm Alan Peterson, A-l-a-n P-e-t-e-r-s-o-n. I appear both as an occasional defense counsel in capital litigation, not a lot of experience in ordinary criminal litigation. But also as the registered lobbyist for the ACLU Nebraska, an assignment I've just taken on, and I hope to see all of you a few times. [LB137]

SENATOR ASHFORD: Alan, four years ago you told me you were retiring, literally retiring. [LB137]

ALAN PETERSON: I've been told by several that I flunked retirement (laughter). [LB137]

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SENATOR ASHFORD: Now, you're not only not retiring, you're taking on new matters. [LB137]

ALAN PETERSON: I've opened a new office. I went from one of the largest firms in the state to the smallest, my own, across the street. I'm still trying cases and some lobbying. Thanks. You took some of my time (laughter). [LB137]

SENATOR ASHFORD: That was...that's why I did it. [LB137]

ALAN PETERSON: Number one, the Postconviction Act is a fail-safe. It's when a lot of other stuff went wrong in the criminal justice system, and constitutional problems don't show up right away. There aren't a lot of cases where late filed postconviction remedies are successful, but there are some. My experience includes litigating now for 21 years and just one capital case. And I have worked on each of the other capital cases over the last few decades as a volunteer or as appointed counsel in some. The law has changed, and I'm just talking about the capital area right now. It's not the only area where the law changes, and a new constitutional argument may arise. That's what's happened in the capital area. And the way it changes, as some of you know, the rule is that under the Eighth Amendment, which is part of the Constitution, and there's a similar Nebraska one, the evolution of decency in our society moves the standard for the constitutional argument. And that has happened in the case of Palmer that was mentioned a little while ago. There were some very strange proceedings in how he was convicted, and the law changed afterwards by statute as to allowing testimony by his wife against him, and so forth. And I can think of at least three cases, Hochstein, Anderson, and Reeves, people now serving in the general population...they got off death row...changes in the law years after their conviction resulted in them not being killed. This is an area too important to move too quickly in. Some states...all states that I know of have exceptions, a whole list of exceptions to these statutes of limitations. This proposal in LB137 doesn't have a single one. The main idea is, in all of those exceptions, if the facts were law, become available after the time of the normal statute of limitations, then it's king's X. Some states do not even allow the statute to apply to capital cases. That would be a nice exception if somebody gets around to writing them. It's too important not to make a mistake. Finality is important, yeah, but justice and doing the right thing and not killing somebody unconstitutionally is far more important. Thank you. [LB137]

SENATOR ASHFORD: Thanks, Alan. Any questions? Yes, Senator Harr. [LB137]

SENATOR HARR: Just quickly. Thank you, Mr. Chairman. I've done very few of these postconviction cases, and I hated them. And I think it's a very important...it seems like a lot of these are frivolously (inaudible), and as the County Attorney from Hall County stated, it seems as though judges don't want to deal with it and don't understand it, so they just say, here's an attorney. How would you go about dealing with...I mean that's

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the problem is, there are a bunch of cases being filed that probably shouldn't be, and they're being assigned attorneys,... [LB137]

ALAN PETERSON: Sure. [LB137]

SENATOR HARR: ...because district judges honestly don't understand it is my interpretation. What would you recommend to change that? [LB137]

ALAN PETERSON: What's done in Douglas County and I believe in Lancaster County and some of the others, is allowed by statute, specifically says, and I think it's about two statutes after the one this one is changing. It says, if the judge on an initial review of the file finds that there is no plausible or indications that there was a constitutional error bad enough to get a new trial, he doesn't have to do anything more but get rid of it. [LB137]

SENATOR HARR: And I think that really varies by judge in Douglas County. [LB137]

ALAN PETERSON: Yeah. [LB137]

SENATOR HARR: And that's the problem. I think that a lot of resources are being wasted on a lot of bad cases that are just being relitigated. And I can give you...Governor Morrison literally spent his dying days doing depositions on a case from 30-plus years before. And I think there has to be something in the law that makes for finality. And while, and I think one year may be too short. I'm not sure on that...just...I'd have to think about it a little bit. I think there has to be something out there, and I'm not hearing another proposal that would satisfy me. [LB137]

ALAN PETERSON: I think most states' answer has been to list the exceptions to avoid injustice. And then I have to admit, quite a few of them do have a statute of limitations, but it's always got the exceptions to avoid the injustice, the main principle being, if the facts or law change to create the constitutional issue that ought to reduce or eliminate the sentence or free the person like the Beatrice Seven (sic), for example, you don't want that one-year statute to be the result of Lady Justice saying, sorry, too late, you're done. That's... [LB137]

SENATOR HARR: And under this, if there's new evidence, that wouldn't be allowed for a new trial? [LB137]

ALAN PETERSON: Well, with postconviction, we're only talking about constitutional, so new evidence...a motion for new trial takes care of some of that stuff. [LB137]

SENATOR HARR: Okay. That's a separate... [LB137]

ALAN PETERSON: But if it's constitutional error, this is the remedy that we're talking

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about. [LB137]

SENATOR HARR: Okay. [LB137]

ALAN PETERSON: Yeah. Thank you. [LB137]

SENATOR ASHFORD: Thank you, Alan. [LB137]

ALAN PETERSON: Thank you, Senator. [LB137]

SENATOR ASHFORD: Thank you. So you'll be back more times probably. John. [LB137]

JOHN KREJCI: (Exhibit 8) My name is John Krejci, J-o-h-n K-r-e-j-c-i. Good afternoon, Senator Ashford. I'm back, and I'll be very polite today (laugh). [LB137]

SENATOR ASHFORD: I don't remember a time when you haven't been polite, John. Maybe you weren't one time, but I can't remember it. [LB137]

JOHN KREJCI: I'm speaking against this legislation, and I'm passing out a letter from an inmate who was convicted at age 16. I visit him...visiting for a couple of years. He just now has a postconviction hearing nine years later. This law won't affect him, but he's saying, you know, he wouldn't have had a chance. A 16-year-old poor kid does something bad, gets a long sentence. Before he's got his head together, his one year way, way too short. I'm just going to read his letter because... [LB137]

SENATOR ASHFORD: Well, I tell you what we're going to...we have a...John, we have a rule on that that says, we don't read other witness's... [LB137]

JOHN KREJCI: Okay, I'll speak... [LB137]

SENATOR ASHFORD: ...but we have it and... [LB137]

JOHN KREJCI: Yeah, I'll speak...can I speak extemporaneously a little...? [LB137]

SENATOR ASHFORD: Speak extemporaneously. [LB137]

JOHN KREJCI: Okay. It really... [LB137]

SENATOR ASHFORD: You can paraphrase it. You just can't read it. [LB137]

JOHN KREJCI: (Laugh) He's quite eloquent. He's only had a ninth-grade education, so he's learned something in prison. He's a good artist. He's a...we hope that his

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postconviction, he gets out. Because what it's based on, and Senator Council would be aware of this, his lawyer said, you know, apply for a postconviction for inadequate representation, because in the last ten years, the evidence of, you know, culpability of youth, we realize that that is a major factor. Senator Council's LB202 and LB203 address that. In his case, that is also true. Also, he had a bench trial. He should have got manslaughter, but they gave him second degree...and he was a bad boy, you know, he was 16 years old, and he got 30 to 60. So I'm saying is this law, as Senator Harr said, it's just too short a time. And he says that, you know, I was 16 years old, and now he knows. Actually, he's quite good. One of your colleagues took one of his cases to Supreme Court and won on freedom of speech. Anyway, read the letter, and... [LB137]

SENATOR ASHFORD: Oh, this is the freedom of speech case. [LB137]

JOHN KREJCI: This, yes, same young man, yeah. He's very good. These guys know their law...he could be a good law clerk if he gets out, you know (laughter). [LB137]

SENATOR ASHFORD: Thank you, John. [LB137]

JOHN KREJCI: Okay. [LB137]

SENATOR ASHFORD: Any questions of John? Seeing none, thank you, sir. [LB137]

JOHN KREJCI: Okay. Thank you, Senators. Thank you. [LB137]

SENATOR ASHFORD: Any other opponents? Neutral? Senator Lautenbaugh. [LB137]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman and members of the committee, for the discussion today. With all due respect to Public Defender Strigenz, I didn't bring this discussion...we can do that for free. I brought this, because I think we need to do something. I...one thought occurred to me as I was sitting there, and this really doesn't have much to do with this bill, but it was back on a concern I raised on a prior bill. Maybe when inmates apply for postconviction relief, judges should be advised of the cost of those proceedings. And we all kind of shrink from that, I mean, because that doesn't seem right, and that's...I was going to suggest it halfway facetiously, but this is a serious matter. But that troubles me when we have the judges considering that kind of thing, and it would be inappropriate in this circumstance to do that. That said, we have to acknowledge there is a substantial cost here to these things if, to the extent they proceed and happen to be frivolous, and there is a value in finality. As I indicated, I'm not close-minded on this topic, so I'd be happy to...I think everyone agrees something must be done. I think a lot of the exceptions people talked about are contained in the motion for a new trial, just not in this particular act or bill. So, there is definitely work to be done, hopefully, to address some concerns. But I would like to see this go forward in some form. And I'd be happy to fail at answering any more questions you have, Senator

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Council (laugh). [LB137]

SENATOR ASHFORD: Thank you, Senator Lautenbaugh. [LB137]

SENATOR LAUTENBAUGH: Thank you. [LB137]

SENATOR ASHFORD: That concludes the hearing and concludes the hearings for the day. [LB137]