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Judiciary Committee  
February 10, 2016

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[LB843 LB980 LB984 LB1079 LB1106 LB1108]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 10, 2016, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB984, LB1106, LB1108, LB980, LB843, and LB1079. Senators present: Les Seiler, Chairperson; Colby Coash, Vice Chairperson; Ernie Chambers; Laura Ebke; Bob Krist; Adam Morfeld; Patty Pansing Brooks; and Matt Williams. Senators absent: None.

SENATOR SEILER: (Recorder malfunction)...bewitching hour is here. We will begin. Introductions on my right are: Senator Williams from Gothenburg; Senator Krist from Omaha; Senator Chambers from Omaha. Diane Amdor is our legal counsel. Oliver VanDervoort is our clerk. And Laura Ebke from Wilber or Crete,...

SENATOR EBKE: Crete, Crete.

SENATOR SEILER: ...all that area.

SENATOR EBKE: Yeah.

SENATOR SEILER: My name is Les Seiler. Most of you, I recognize your faces, have been here to testify many times, so remember to give your name and spell it for the record. And I've been warning people in the back, if you whisper too loud, the mikes are brand-new and they're very sensitive and they will pick it up and you will be part of the record, so make your slanderous comments very quietly. I think we're ready to go. Senator Schumacher, you're on deck. Senator Coash has joined us on the left here. LB984.

SENATOR SCHUMACHER: Thank you, Senator Seiler, members of the Judiciary Committee. I'm Paul Schumacher, S-c-h-u-m-a-c-h-e-r. I represent District 22 in the Legislature and I'm here today to introduce LB984. In our little system of government we have, we have three branches. We've got the Legislature and we make everything illegal and we pass laws. We have an executive branch that catches the people who break the laws and bring them to trial. And we have a judicial branch that makes sure the trial is fair and imposes sentence on the guilty. But in the political mood of the 1980s, '70s, it was a mood of "let's lock them up and throw away the key." And it was a mood that was hard to argue against and arguments against it for the most part were politically nonviable. And so there's a lot of "lock them up and throw away the key" legislation. In the process of adopting that legislation, what was overlooked was the keys get awful expensive. And some of this legislation tried to do the judge's job when it came to sentencing, two specific classes of it where the Legislature decided it wanted in on some of the

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action in sentencing. One was called a mandatory minimum in which there was a minimum sentence imposed and that sentence precluded such things as good time and really was a very stiff sentence that was intended to keep people behind bars very long. And even if the judge did not agree, he had very little discretion, no discretion. He had to impose a mandatory minimum sentence. Likewise, there's a provision which was borne out of frustration by law enforcement with some of the people who repeatedly came back before them and were convicted of felonies. One felony, other felony, another felony, and a neat phrase was "three strikes and you're out." And so there again the Legislature said, well, if they're out, they're out for a long time, and they provided the prosecutor charges that proves it, they go away for a bonus sentence which makes sure they're very old when they get out. So today's bill deals with the mandatory minimum and the habitual criminal provisions. Judges will tell you that they feel uncomfortable for the most part with these provisions because there are cases where the glove just doesn't fit and yet, because of the Legislature's action, they feel they have to impose a sentence which is fundamentally unjust. At the same time, these two tools are very, very useful to the prosecutors and in some cases to the defense attorneys. A prosecutor, even though in our theory of justice you're presumed innocent, in a lot of cases you're obviously guilty. I mean the evidence is so clear. But there's no penalty unless there's some bonus in it for you if you're a defendant from not just shooting the moon, making the prosecutor go through all the hoops of a trial, all the expense of a trial, just in case there's a misstep. And if there is a misstep, you may get off. Likewise, defense attorneys, if they can get in a plea bargain with the prosecutor, can convince a defendant who otherwise would not have any incentive to plead guilty to plead guilty because they say: Look, you stand the risk of one of these super sentences being imposed on you. Now, if you don't care, I don't care either. We'll go to trial. But we can get a deal. We can get this charge changed. We can get it amended to an attempt or any other flavor of a charge. Usually when somebody commits a felony there's three or four different options a prosecutor has and can stack the deck and shuffle the cards pretty much any way they want. But we can get a much better deal if you simply don't pursue the maximum rights you have. And we can get him to drop the charge that has a mandatory minimum, we can get him to drop the habitual criminal thing, so let's take a deal. When somebody pleads guilty, it pretty much eliminates charges that the defense attorney was incompetent, insufficient representation at trial, and it puts closure on the thing and everyone can go on with their life. So there is some incentive with these super penalties for negotiation and, quite frankly, I think they work. But what it does do is it causes injustice because there is no escape clause under the present rules for the judge if there isn't a plea bargain reached. And quite honestly, there are times where you want to lock up somebody and throw away the key. They're just genuinely bad people and everyone would agree that this is someone that you really don't ever want to walk the streets again, or at least until they have a really long, white beard and a cane. So what these bills try to do is try to preserve all those interests, the risk, and, if you contest a case and you're clearly guilty, that you're going to get bit. It doesn't remove any tool from the prosecutor, doesn't remove any tool from the defense attorney. But--and I've got them set both two different ways, committee can amend it or think about it a little bit--in one case

where a judge says, look, I don't think it fits, then he can summon two additional judges to review it. If two out of those three judges agree that the mandatory minimum does not fit, it does not have to be imposed. It's an escape clause. Now the defendant doesn't know ahead of time how the judges are going to rule, and so the risk is still there, the incentive to plead is still there, the efficiencies in justice are still there. And the habitual criminal, the way it's stacked in the bill, is the flip: If the judge believes that a habitual criminal penalty is a good thing and he can get two other judges that he asks for to agree it's a good thing, then it must be pretty clear that it's a good thing and this guy should go away for a long, long time. Otherwise, if there is no such judicial determination, the habitual criminal provisions can be discarded. Again, the risk is still there. The defendant facing the issue of should I shoot the moon and hope for a "Hail Mary" acquittal, still has that risk that, if he does, he's going to get hammered, because he can't predict those judges. And it then restores some ability in the judicial branch of government to do what they're supposed to do at sentencing, and that is impose a just sentence that analyzes the defendant, analyzes the circumstances of the crime, the gravity of the crime and, quite frankly, considers whether or not it's worth the economic investment of a long, long sentence for somebody that maybe we're not afraid of but just happened to meet the qualifications or happened to have a set of circumstances unique but not the kind of circumstance they should be hammered with. So that's the proposition here. It's a little different approach. It basically is an escape valve for both the mandatory minimum and the habitual criminal statutes that allows judges to say, look, at this time the Legislature's blanket judgment over this area does not fit the crime. That would be my introduction. [LB984]

SENATOR SEILER: Senator Ebke. [LB984]

SENATOR EBKE: Thank you. Senator Schumacher, I'm interested in this topic. One of the things that I'm...how would you envision judges, the extra judges, being selected or the panel being put together? [LB984]

SENATOR SCHUMACHER: The only thing the statute says is randomly, so it would maintain the uncertainty. The Supreme Court has a good way of making up its own procedures, its own rules, and a really good way of telling the Legislature to stay out of that area. What I would guess they would come up with is some type of a summary procedure where the judge would call for the panel and they would have some type of a hearing mechanism set up which would be fairly efficient. I don't even know if it's necessary and the Legislature doesn't call for them to necessarily even be personally present on some of these decisions. I think the courts can handle that. [LB984]

SENATOR EBKE: So it wouldn't be...the three judges in a district that would be getting together, it would probably be some sort of a random drawing... [LB984]

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SENATOR SCHUMACHER: Well, I think the... [LB984]

SENATOR EBKE: ...or some sort of...yeah. [LB984]

SENATOR SCHUMACHER: The Court Administrator of the Supreme Court, the Chief would come up with some procedure for implementing it and I would guess it would be a fairly efficient proceeding. The three judges in the district would still get together but probably it would be down at the local tavern, wouldn't have anything to do with the case. [LB984]

SENATOR EBKE: Yeah. Right. Yeah. Okay. [LB984]

SENATOR SEILER: Senator Pansing Brooks. [LB984]

SENATOR PANSING BROOKS: Thank you, Chairman Seiler. Okay, I'm just looking at this language and it's very circuitous in my mind, so I'm trying to figure it out. If you look at page 3 and start with the sentence on line 23, it says, "If at least two of the three judges on the panel..." Did you find it? [LB984]

SENATOR SCHUMACHER: Line? Page? [LB984]

SENATOR PANSING BROOKS: Okay, page 3, line 23,... [LB984]

SENATOR SCHUMACHER: Okay. [LB984]

SENATOR PANSING BROOKS: ...at the end of that sentence, "If at least two of the three judges on the panel determine that a mandatory minimum sentence is not appropriate, then a mandatory minimum sentence shall not be imposed and the mandatory minimum sentence shall be minimum but not mandatory." But if it's already minimum, it becomes mandatory, doesn't it? [LB984]

SENATOR SCHUMACHER: I think this plays into eligibility for good time calculations. If it's just a minimum sentence, because a lot of things have got just a plain minimum sentence even though it's not a mandatory minimum sentence, then good time applies and they treat it differently over at Corrections for various things. But if it's a mandatory minimum, you don't get time against good time, as I understand it, until you've met that mandatory minimum. [LB984]

SENATOR PANSING BROOKS: So this is a Corrections term of art, not necessarily... [LB984]

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SENATOR SCHUMACHER: Yes. Yeah, the mandatory minimum has consequences in Corrections. [LB984]

SENATOR PANSING BROOKS: Okay. [LB984]

SENATOR SCHUMACHER: And it makes the judge impose. Once he imposes that, it has a consequence. That's my understanding of this. [LB984]

SENATOR PANSING BROOKS: Okay. You've looked at it pretty carefully. [LB984]

SENATOR SCHUMACHER: It was one of the things that came up in the Nikko Jenkins thing that...and where they were miscalculating and they were applying good time to the mandatory minimum people and they weren't supposed to and people were getting out early and part of that whole mess. [LB984]

SENATOR PANSING BROOKS: It sounds like a tongue twister in actuality, but okay. Thank you. [LB984]

SENATOR SEILER: Senator Coash. [LB984]

SENATOR COASH: Thank you, Chairman. Coming off of Senator Pansing Brooks's question, I hope this becomes clear to Corrections, because they need clarity apparently in their sentencing calculations. [LB984]

SENATOR SCHUMACHER: Well,... [LB984]

SENATOR COASH: Otherwise they might let a couple hundred people out when they weren't supposed to. But here's my question. You mentioned in your opening sometimes the mandatory minimum or habitual criminal doesn't fit. Can you give me an example of where it wouldn't fit? I'm trying to picture a situation where a bill like this would come into play, where it would be a smart thing for the defense attorney to say, hey, maybe we should ask three judges if they think this fits because they may see it the way that I see it. I'm just trying to think of an example where this would come into play. [LB984]

SENATOR SCHUMACHER: Well, the decision that it doesn't fit and to invoke this bill is the judge's, not the defense attorney's. Prosecutor's job is to get a guilty plea, get a conviction, and move on in as cheap and efficient way as they do. And so if you have a defendant that is insisting

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on going to trial and the line is drawn and they go to trial and he's convicted, the judge is locked in. And it may be a fact that there's a lot of mitigating circumstances. But this is his third strike or he was convicted of a crime that has the mandatory minimum provision. Prosecutor didn't amend it to something that didn't and so there it is. And the judge is saying, this sentence is too harsh; under the circumstance of this case, this case is...this defendant has had...didn't have proper mental treatment, there are other mechanisms that we should be addressing, this is too expensive, this is too harsh. But the judge today doesn't have an out. [LB984]

SENATOR COASH: Well, I'm just trying to picture a scenario where a judge would come to that conclusion, what those mitigating circumstances might be, what...I understand it would be case by case and the judge will make the decision that a judge--or in this case, three judges--makes. But I'm just trying to picture what kind of circumstances would be in place on a crime that a judge would say, you know what, this doesn't fit, the mandatory minimum doesn't fit in this case, so we're going to kick it back and sentence him to something less. [LB984]

SENATOR SCHUMACHER: May very well be youth. It may very well be that the judge feels that codefendants got plea bargains, there's no uniform application of justice. It may be mental illness. It may be any number of things that judges...well, when they do a presentence evaluation before they sentence a defendant, there's thick research done by the Probation Department to determine the defendant's circumstances, and that is what a judge often relies on to hammer them or not hammer them, give them probation or whatnot. And in this particular case, I would...there would be something in there that the judge says, you know, this guy is--or her, gal--has had enough, they...and there were extenuating circumstances and it just doesn't fit in my judgment. And in that case, for him to pull the emergency handle, he asks if he can...if somebody else sees it the same way. [LB984]

SENATOR COASH: Okay, last question, if you know: Are there...this be...will we be the first state to do something along these lines or is this something that's been replicated anywhere else that you're aware of? [LB984]

SENATOR SCHUMACHER: I think we'd probably be the first one to try something along this line. [LB984]

SENATOR COASH: Okay. [LB984]

SENATOR SCHUMACHER: And the notion of three judges, quite honestly, it kind of came from the idea of what we had in our death penalty law. [LB984]

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SENATOR COASH: I remember the discussion on that and the habitual criminal bills. [LB984]

SENATOR SCHUMACHER: Right, right. [LB984]

SENATOR COASH: Okay. Thank you, Senator. [LB984]

SENATOR SEILER: Senator Williams. [LB984]

SENATOR WILLIAMS: Thanks, Senator Seiler. And thank you, Senator Schumacher. Quick question, if I'm understanding this correctly, nothing changes under LB984 until the trial is concluded and the judge is looking at the presentencing investigation. Then the judge decides whether he implements one of the two procedures. And as you mentioned, you've got them different on the habitual criminal than the mandatory minimum. [LB984]

SENATOR SCHUMACHER: Right. [LB984]

SENATOR WILLIAMS: Correct on that so far? [LB984]

SENATOR SCHUMACHER: Right, correct. [LB984]

SENATOR WILLIAMS: Okay. What is your feeling? Was there a reason you did these differently on the habitual criminal and the mandatory minimum? Or you're just throwing it to us to decide? Is there a justification for them? Why wouldn't we do them the same? [LB984]

SENATOR SCHUMACHER: That's a good question. The habitual criminal is really mean. That's why they call it the "bitch." And for somebody to be packed away in a consecutive sentence to the sentence on the main offense, which probably is going to be very heavy to begin with, there should be, at least the theory is in the bill, three judges who agree this guy we don't want to see walking the streets for one heck of a long time. And if three judges can agree to that, then there should be some discretion given to the judges. It may be that the other way that it's set up for the mandatory minimum fits better, and that's a discussion that you all need to have. But there's two different approaches to it. The big thing is trying to get an escape hatch so the judge can interject some common sense at that particular point because, quite frankly, in a politically charged environment where people are running for reelection and everything else, our blanket determination that this is right, this fits the case, or giving a prosecutor who may just have it in for somebody the ability to say, I'm, you know, I can give you the...I can charge habitual criminal, wouldn't have to, but I can and I'm going to hammer this guy because I'm just sick of it. And actually maybe it's a thing where the prosecutor is just sick of him or the local police are

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just sick of him. So that's a lot of...and that's a decision at the prosecutorial level that there...if there is a conviction, then there is no wiggle room. And maybe for one reason or another the prosecutor won't plea bargain. But there needs to have at least the underlying philosophy of this: a judge be allowed to be a judge at some part of these proceedings when you're dealing with very long penalties and very expensive penalties. [LB984]

SENATOR WILLIAMS: Thank you. [LB984]

SENATOR SEILER: Senator Chambers. [LB984]

SENATOR CHAMBERS: Senator Schumacher, you served as a prosecutor one time in your life, is that correct? [LB984]

SENATOR SCHUMACHER: At one time, yeah. [LB984]

SENATOR CHAMBERS: So you're not unfamiliar with tactics that prosecutors use and can use under the law to pressure a person into not only pleading guilty for something he or she may have done, but pleading guilty for something he or she did not do. That has happened, hasn't it? [LB984]

SENATOR SCHUMACHER: It has happened. I don't know, at least in my neck of the woods, if it ever happens very much. Usually by the time you're charged with a crime you're guilty of something and they found out what it is. But basically, yes, pressure is brought to bear. More often the usual case is the person is caught. They're...you have a limited budget to operate with. You've got a whole bunch of cases, too few deputies. The courts have got some pressure on them and you want to move cases through. And so to move cases through, you hold out, you stack the deck, and then you plea bargain off of that. [LB984]

SENATOR CHAMBERS: I had handed out an article written in The New York Review of Books where a federal judge had seen so much of this corruption, and that's what he called it, by prosecutors that he thought something should be done about it at the federal level, that they knowingly charge people with crimes and will pressure them to plead guilty when they know the person is not guilty. They will even collaborate--I call it something else--with the defense attorney and they both know the person is not guilty but, for all these different considerations, get him to plead guilty, and people do. And there is nobody that the prosecutor is accountable to. They stack charges. They want to pretend that they are so objective, so fair, and I know that they are not. So when judges see this kind of thing and speak out against it...and I can get some of the articles for my colleagues, but they won't read them anyway, written by people I don't know who

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have had many years of experience. They are more intelligent, more learned in the law than these prosecutors running around here. And when you talk about a county attorney who is elected, then that's more incentive to not do the right thing. I don't trust prosecutors. I don't trust any prosecutor and I want them to be aware of that. But here is the question that I want to put to you: Is this bill brought because you want to be soft on crime, as prosecutors call it? [LB984]

SENATOR SCHUMACHER: I don't think it's soft on crime at all. I want justice in the system. And this bill has in its origins me talking to some district judges... [LB984]

SENATOR CHAMBERS: And... [LB984]

SENATOR SCHUMACHER: ...who were frustrated that they didn't have a safety belt. [LB984]

SENATOR CHAMBERS: You anticipated my next question because I know of some judges who are concerned about just the idea of mandatory minimums, period. And they don't want to see prosecutors with all this discretion. But it's taking away from the judge whose job it is to exercise discretion, and that is a part of the definition of being a judge. But if you have to go to these lengths to try to get something in the way of fairness, could it be summed up in the notion of "have the sentence fit the crime"? [LB984]

SENATOR SCHUMACHER: Right. That's correct. [LB984]

SENATOR CHAMBERS: And not everybody who might commit the same act does it for the same motive with the same degree of culpability. So even though objectively the same act was performed, essentially it might be a different act when you consider all of the factors at play. Otherwise, you could have a mandatory sentence for everybody who committed a robbery, anybody who committed any crime that is defined. But prosecutors can plea bargain down. Judges, where it's not a mandatory minimum, can have a range within which to sentence people. And the U.S. Supreme Court has said a mandatory death sentence is clearly unconstitutional. What you're really doing is just trying to bring a little space for judges to exercise the discretion that we hope judges have when they're ruling at the sentencing phase of a case. Or would that be a misstatement? [LB984]

SENATOR SCHUMACHER: That's a pretty accurate statement. The one thing that you did say that I might take some issue with, at least when I was county attorney and I believe across the state for the most part now, county attorneys did not go after people who were innocent, at least knowingly. And they're a pretty good bunch, even though they probably don't think I am from time to time, the way I vote. But at the same time, most of them are very conscientious. And I've

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never seen a case in this state, and I don't pretend to have practiced in Omaha or Lincoln, some of the bigger places, where a defense attorney and a county attorney conspire to put an innocent man behind bars. I just...I haven't seen that. [LB984]

SENATOR CHAMBERS: Where I see it is when judges appoint incompetent lawyers who just want some work and they'll do what the county attorney wants, they'll help run people through. But who would suffer the most if we would do away with plea bargaining, period, and every case had to go to trial? Who would be the worse off, society or the individuals who are going to be charged with crimes? [LB984]

SENATOR SCHUMACHER: I think probably, if you forced everybody to go to trial and there was no compromise or anything, the defendants would come out with longer sentences, because most of the time the county attorney has got the case. But the taxpayers come out with one heck of a big bill because a trial and the procedures and appeals that happen if you don't get a guilty plea are just very expensive things. And I think you'd have a tremendously gummed up and inefficient court system. [LB984]

SENATOR CHAMBERS: And what I think would happen, they'd stop charging some cases because nothing looks worse than a prosecutor who has a lot of cases backed up and they cannot move. In one state, and it's not far from Nebraska, the Attorney General has been allowed to hire private lawyers to help cut down the backlog. And in another state, there are so many cases--this is Louisiana, I'll just go ahead and mention it--that the public defenders are so overworked, the budgets are cut, that people are on a waiting list to be given representation. They don't even have a lawyer. They're just sitting and waiting for their number to come up before they can even get a lawyer. And maybe they will be found not guilty. But the time they spent in lockup waiting might be more time than they would have gotten had they been found guilty. So some of these people might look at that and say, hey, look, can I cop a plea and go ahead and, whatever they give me, get it served, because I see guys who have been in here however long it is. I think society would suffer. These prosecutors would be happy at first. But then when they have all these cases that cannot be processed, the judge cannot have a schedule because there are all these cases when there are some lawyers, defense lawyers, who'd know how to clog up the system even more. So before some of these prosecutors come up here and talk about how good they are, I want them to know that there are some people who look at the realities of the way this legal machinery in Nebraska and around this country works. And it wouldn't all be to the benefit of the lawyers, the judges, the courts, or society. But I think this bill is very reasonable and I'm curious to see what opposition the prosecutors will have. But you were kind of a sounding board, and I know you can take it so that's why I went on and did it. And I won't do this to everybody who comes up here unless it's a prosecutor. [LB984]

SENATOR SCHUMACHER: Thank you, Senator. [LB984]

SENATOR SEILER: Any further questions? I have one, two probably. On...turn to page 5, line 19. This is after the judge has set the matter for habitual criminal for a hearing. You have, "the judge, with the consent of the prosecuting attorney..." You don't have that in the first section. The question I have: Is that so that if the prosecutor has a plea bargain with the defendant, that it gives them a chance to explain the prosecution's plea bargain? That's why you want consent? [LB984]

SENATOR SCHUMACHER: That's correct. That's correct. And if the...this is where a judge says, look, it looks like the mean sentence may be appropriate, and if the county attorney agrees then we'll go ahead, and he's ready to present his case to the...his arguments to the other two judges, then they go ahead and do it. [LB984]

SENATOR SEILER: Okay. My next question is, and maybe it's for prosecutors, but I've been involved in a couple of these cases, and not as the prosecutor but as defense counsel, and I found that the prosecutor...it says at least three days prior to the hearing you give notice. My question is I don't think three days is enough time because you've got to get certified copies out of the other prisons to verify especially that he was committed to the...that he might have been convicted of crimes, but he has to prove that he's been committed to the prison. So you've got to get some kind of a record out of the prison that says he actually went to prison. And I don't think that three days is reasonable. [LB984]

SENATOR SCHUMACHER: Except I think they charge the habitual criminal in the complaint early on. [LB984]

SENATOR SEILER: Right. [LB984]

SENATOR SCHUMACHER: And before I think most prosecutors will charge someone as a habitual criminal, they've done that research ahead of time and they have those convictions in their files. That...and if three days is...if we hear... [LB984]

SENATOR SEILER: That's not been my experience but... [LB984]

SENATOR SCHUMACHER: Has it? Okay. If we hear from the prosecutors and defense attorneys that's... [LB984]

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SENATOR SEILER: Yeah, that's why I'm bringing it up with you so they'll know I'm going to ask that question. [LB984]

SENATOR SCHUMACHER: Okay. Okay. [LB984]

SENATOR SEILER: But back here on your mandatory minimum sentence you don't have the prosecutors working with the judge there on that one. [LB984]

SENATOR SCHUMACHER: No. [LB984]

SENATOR SEILER: Is there a reason? [LB984]

SENATOR SCHUMACHER: Basically because the habitual criminal is such an extreme measure and some leeway. And prosecutors don't have to charge habitual criminal--that's why they're involved in this--at that particular state. I don't have it in the mandatory minimum and part of that is because the mandatory minimum is reversed from the procedure in the habitual criminal statute as proposed to be amended here that in the mandatory minimum situation, if the judge says mandatory minimum is not a good deal here, then the three-judge panel is...can be invoked. In the habitual criminal version of this thing, the judge says it is a good thing to impose the habitual sentence and then proceed. So I think some of the difference is due to the presumption of which way it's going to go. It is structured differently in the bill for the two different things. [LB984]

SENATOR SEILER: I'll ask the prosecutors when they get up here. But if you had a presentence investigation, does it include--and I don't know the answer to this--does it include any plea bargains? [LB984]

SENATOR SCHUMACHER: Usually, at least in my day when I was prosecuting, the plea bargain is stated at sentencing...I mean at the time of the guilty plea. [LB984]

SENATOR SEILER: Okay. Okay. Yes, Senator. [LB984]

SENATOR CHAMBERS: I have some more direct questions now. A prosecutor has virtually unlimited discretion to determine whether or not to prosecute, isn't that true? [LB984]

SENATOR SCHUMACHER: Whether or not to prosecute and the flavor of crime to prosecute with--it's really broad power. [LB984]

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SENATOR CHAMBERS: And they can...all they have to do is say, I don't believe that I can get a conviction, and they don't have to give any accounting or explanation of why they don't prosecute. They don't have to explain to anybody, do they? [LB984]

SENATOR SCHUMACHER: Prosecutorial discretion is a powerful, powerful thing. [LB984]

SENATOR CHAMBERS: And... [LB984]

SENATOR SCHUMACHER: No, they don't. They can on the eve before a trial of a murder case say, I choose not to prosecute. And except for the fact that maybe the Attorney General can step in, because on...in some crimes we do have joint jurisdiction with the Attorney General's Office and the county attorneys, prosecutors are powerful people. [LB984]

SENATOR CHAMBERS: And there is an expression that everybody has heard: Power corrupts and absolute power corrupts absolutely. And that's what I feel about prosecutors. I've seen cases where, and I'm not one who goes for harsh punishments, I've seen cases where guys definitely should have been prosecuted for the safety of the community but, because he was a snitch, no charge was even filed. But hanging over his head was, if you don't do what we want you to do, then we're going to throw the book at you on every one of these. And when we know it in the community, we don't have confidence in the prosecutor, the police, the courts, or anything else. And people who don't live in a community like mine don't believe these things happen. But that's why I'm so harsh in my criticism. The prosecutors know that I'm telling the truth but they'll never acknowledge it. Courts know that police officers lie on the stand but they won't acknowledge it; some are forced to. But this is what I look at when I see favorites played and some people get the book thrown at them and some people get a pat on the back and some people are brought in and a deal is made, not so you won't serve a lot of time, but so you'll snitch. And because we know these guys do these things, all we need you to do is say that they did it and you don't need any evidence, and that's very corrupting. And as I said, I'm using you as a sounding board. But so that I can get a definite answer, to whom must a prosecutor account if that prosecutor decides even in the most egregious case that there won't be a prosecution because he or she says, I don't think I can get a conviction? [LB984]

SENATOR SCHUMACHER: The chief...if you're a deputy, you account to the chief prosecutor. A chief prosecutor has got discretion. [LB984]

SENATOR CHAMBERS: Say it again? [LB984]

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SENATOR SCHUMACHER: He's got discretion. And if he pulls a real dumb thing, he faces the voters every four years. [LB984]

SENATOR CHAMBERS: But it's only the voters. There's nobody, like the courts are not going to call him in and say, why didn't you prosecute? [LB984]

SENATOR SCHUMACHER: Unless they could show somebody was bribed or something like that, no. [LB984]

SENATOR CHAMBERS: Right. That's all that I have. Thank you. [LB984]

SENATOR SEILER: Any further questions? Thank you, Paul. You going to stick around for... [LB984]

SENATOR SCHUMACHER: I've got to go help cut taxes (laughter)... [LB984]

SENATOR SEILER: Okay. [LB984]

SENATOR WILLIAMS: Thank you. [LB984]

SENATOR SCHUMACHER: ...so we can pay for the courts. [LB984]

SENATOR SEILER: We're going to hold you to that promise. [LB984]

SENATOR WILLIAMS: Good luck. [LB984]

SENATOR SCHUMACHER: Well, you may be very old before we can deliver on it. Thank you. [LB984]

SENATOR SEILER: First proponent. [LB984]

SPIKE EICKHOLT: (Exhibit 1) Good afternoon, Chairman Seiler, members of the Judiciary Committee. Spike Eickholt, first name S-p-i-k-e, last name E-i-c-k-h-o-l-t, appearing on behalf of both the ACLU of Nebraska, and I'm having a statement distributed on behalf of that organization, and also the Criminal Defense Attorneys Association. We support this bill. We support the bill more basically for the reasons that have been discussed already during Senator

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Schumacher's opening statement, and that is both of our organizations are...have been and are working to reform mandatory minimum sentences. And this approach in this bill is really novel and it's a real unique way of looking at this problem. Mandatory minimums mean that; it means mandatory. If a person is found guilty of a crime, even if it is his or her first offense and it's a mandatory minimum sentence, the court has to impose that numerical sentence. Probation is not an option. And the court has to impose the mandatory minimum. For instance, if someone is found...someone is convicted of possession with intent to distribute methamphetamine, they have at least 28 grams of it--that's an ounce--if it's their first offense, if they're 19 years old, that's a mandatory minimum of 3 to 50 years' imprisonment. The court has to impose at least the three years. As Senator Schumacher indicated, as the committee likely knows, that mandatory sentence is actual time. An inmate does not get good time on that sentence. As Senator Schumacher indicated before, the other type of mandatory minimum is the habitual criminal, and that is a discretionary type charge and it's discretionary solely with the prosecutor. And I cite a case in the ACLU handout, State v. Johnson, which discusses the prosecutorial discretion at length. When I worked--particularly in the public defender's office--when I worked on the weekends, when I went and saw people in jail that I was going to represent, one of the first things I would ask them was, how many times have you been to prison? And if he or she said yes, I'd say, how many times? And if it was at least twice, because that's what it means to be a habitual criminal eligible--it's our version of the "three strikes" law, you have to be convicted of a felony and sent to prison for at least a year two times--then they are habitual criminal eligible. In the jurisdiction where I prosecuted it was rare that a prosecutor charged somebody right away with being a habitual criminal. It was always just there. I would, first, never mention it to the prosecutor ever for the hopes by some miracle they wouldn't realize the person has been in prison before. But almost always they did and that would affect every step of me representing that person: the decision as to whether to have a preliminary hearing; whether to file a motion to suppress; whether to pose witnesses. And it would influence significantly the plea because many times the only deal that we could get, if you could call it a deal, is plead to everything and we won't add the habitual criminal onto the charges that he's got now. And as Senator Chambers alluded to, that changes a defense attorney's role in many respects, not so much of an adversary or an advocate or even a legal practitioner as much as a personal attendant through the plea process in the court system. As Senator Schumacher says, there are perhaps instances where the habitual criminal, even mandatory minimums, are appropriate. We're not necessarily opposed to all of them in all cases, but reform certainly is needed and we would support at least the approach in this bill or any similar effort. [LB984]

SENATOR SEILER: Any questions? Seeing none, thank you. Next proponent. Next proponent. Seeing none, opponent. [LB984]

JIM MASTELLER: Good afternoon. My name is Jim Masteller, spelled J-i-m M-a-s-t-e-l-l-e-r. I'm a deputy Douglas County attorney. I'm also on the board of directors for the Nebraska

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County Attorneys Association and I'm here today to speak in opposition to LB984. I'm going to focus most of my comments regarding the proposed changes to the habitual criminal statute. I think a little background is necessary. The way that at least we do it in the Douglas County Attorney's Office when the state intends to file the habitual criminal on someone, on a defendant, we file it as a separate count in the information, the charging document. I believe we're required to do that under U.S. Supreme Court precedent. That puts the defendant on notice that the state is seeking enhanced penalties. That's the triggering mechanism for the habitual criminal currently. The triggering mechanism under the new proposed statute is the presentence investigation. The potential problem would be under this new regime or proposed regime is someone could come in, plead to a felony--which would be, let's say, a terroristic threat, which is an F-IV felony, a Class IV felony punishable by no more than two years in prison and now with a presumption of probation on it--and then once the presentence investigation is ordered, if the judge determines and makes a probable cause finding that I've been to prison twice before, now all of a sudden I may be exposed to the habitual criminal, which would sure be a surprise to the defendant. We would have a situation where it's probably a procedural due process concern and it's contrary to the current Supreme Court precedence in terms of Apprendi and Almendarez-Torres which requires any fact that would increase the maximum possible punishment be alleged in the information and, aside from prior convictions, also be found by reasonable doubt in front of a jury. So for example in my case is I filed the habitual criminal recently in two cases. Both defendants had already served the habitual criminal for previous offenses. And in terms of the notice was given, we just filed it and then we are getting a hearing after the convictions. In terms of the three-day notice requirement, that's typically not a problem, at least in our county, because at the time of the conviction and when a presentence investigation is ordered, right then and there the defendant is notified of the date of the habitual criminal hearing. And so even though they're required to give three days' written notice as a practical matter, it's going to be at least four weeks' notice at the time of the conviction. A second and related problem is, for both the panels proposed under this LB984, the triggering mechanism is a finding based upon a presentence investigation. Now a presentence investigation can be ordered in these felony cases. It is a right of the defendant to have a presentence investigation. That's a right that also can be waived. It would be an ineffective assistance of counsel if someone were to plead to a conviction, plead to a felony, and not waive his right to a presentence investigation, because thereby he would avoid even the possibility of the matter going to a three-judge panel and having a probable cause determination by a judge. I see I'm out of time but I'm happy to answer any questions. [LB984]

SENATOR SEILER: Go ahead if you've got something else to add. [LB984]

JIM MASTELLER: Oh, it's...that would be the main concern in terms of the PSI. So if I'm a defense attorney and I know my client is going to be found guilty of a felony, I can have him waive his right to a presentence investigation. I would do that because then it would never go to the judge who would then make a probable cause determination about whether I'm a habitual

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criminal, thereby I would...you would effectively eliminate the habitual criminal enhancement because you would not have any PSIs ordered at the request of the defense attorneys in those particular cases. [LB984]

SENATOR SEILER: Further comments? Senator Chambers. [LB984]

SENATOR CHAMBERS: I made a statement and I want to see if you agree that it's true. The U.S Supreme Court ruled that a mandatory death sentence in every murder would be unconstitutional. Is that true? [LB984]

JIM MASTELLER: I agree with that. [LB984]

SENATOR CHAMBERS: Was part of the rationale when the court was saying this that the sentence and these proceedings--and I don't want to stretch it out with all of the legalese--must be particularized to this specific individual? And when you do that and look at the circumstances, that mandatory death sentence would be inappropriate because it would not fit every situation where a murder even was committed. Generally is that...and if you want to flesh that out in your answer, you're free to do so. [LB984]

JIM MASTELLER: No, I agree with that. I think that everyone convicted of first-degree murder, it would be unconstitutional to automatically impose the death penalty. We do want the judges to consider mitigating factors and have an alternative punishment available. [LB984]

SENATOR CHAMBERS: Okay. If that is the case where murder is concerned, why not with every criminal conviction where there would be mitigating or circumstances that would differentiate one case from another? But when you have a mandatory sentence none of that is taken into consideration, is it--it can't be--by the judge? [LB984]

JIM MASTELLER: In a sense that's right. But I think that the reason why it's unconstitutional to automatically impose the death penalty on everyone convicted of first-degree murder is because death is different under that jurisprudence. We treat the capital punishment different than we do other types of punishment. [LB984]

SENATOR CHAMBERS: Okay. So you don't have to explain more than is necessary. But the rationale would apply in cases other than murder because, if you have to particularize it to the individual, the judge cannot do that no matter how egregious the judge may feel that this mandatory sentence is in this particular case. The judge, even if he or she feels that way, cannot

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consider anything other than what the Legislature said: You were convicted of this, you've got to get this mandatory sentence. That's the way it is with mandatory sentences, isn't it? [LB984]

JIM MASTELLER: Yes. If someone is convicted of a I-D, then the lowest possible sentence would be three years' imprisonment and you don't have the possibility of probation. [LB984]

SENATOR CHAMBERS: And that to you seems just? [LB984]

JIM MASTELLER: Well, that's the scheme that's been put in place by the Legislature, the... [LB984]

SENATOR CHAMBERS: But that's not what I asked you. I'm asking you, as a moral individual, do you deem that to be just? [LB984]

JIM MASTELLER: I do because I believe it provides uniformity to the system. If we are giving...if we're treating people differently, that can have the potential for abuse. When we have a mandatory minimum sentence, that promotes uniformity within the system and within sentencing and ensures fairness and everyone is treated in the same manner. [LB984]

SENATOR CHAMBERS: Procrustes was a giant in mythology who had a bed and he would allow visitors and travelers to come in and he'd feed them and show them a good time. But when time came to go to bed, if you were too short for that bed he stretched you until you fit it, if you were too long he'd cut your legs off, and that gave uniformity. So to give the argument that--and I'm not going to drag this out--that for the sake of uniformity you disregard equity, justice, and fairness, I think is totally inappropriate. And that fault is with the Legislature. Prosecutors can only deal with what they're given; the judges can only deal with what they're given. But I think prosecutors would have an obligation, if this system is what people say it is when they say it's the best in the world, should tell legislators who don't know anything that this is not creating a fair sentence. And to say that everybody who does this act has committed in all of its ramifications exactly the same act, therefore, exactly the same sentence should obtain, that's not right. You know it and I know it. But the prosecutors can get around it by not charging a person with a degree or with that particular offense that would carry a mandatory minimum. So the prosecutor is in a position to show either bias favoring somebody or prejudice disfavoring somebody. And those things happen. You probably haven't been in the game long enough to know it, but I've been in this world almost 80 years and I know that it does happen. Here is the question that I want to put to you. If this bill were enacted just as it is, could you not do your job as a prosecutor? [LB984]

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JIM MASTELLER: I could do my job. I do think it's unconstitutional, at least as to the habitual criminal portion, so I'm not sure it would survive. The mandatory minimum, I don't see any constitutional difficulties just from my review of it. But it would just...it would...I could still do my job. It would require additional delays and drains on the judicial system, but I could certainly still do my job. [LB984]

SENATOR CHAMBERS: Well, let's say we get rid of the habitual criminal altogether, because you're not punishing the person for what he or she has been brought to book for, you're punishing that person for something that's not even before the court. It does not relate to the act that was committed. So if we did away with that altogether, could...are you telling me you couldn't do your job as a prosecutor if your job is simply to carry out the law that's in the statute books? [LB984]

JIM MASTELLER: It's... [LB984]

SENATOR CHAMBERS: Or do you consider your job to be something in addition to that? [LB984]

JIM MASTELLER: I think our job as a prosecutor is to do justice and part of that is to protect the community. On this last one where I just did a jury trial on a gentleman who had already served the habitual criminal, I put the habitual criminal on him again at the request of the victim. She said, I'm convinced he's going to kill me when he gets out, I need him in jail as long as possible. Serving ten calendar years in prison had done nothing to stop him from continuing to engage in violent acts. So I think that the habitual criminal is a very important tool that allows me to continue to do my job. [LB984]

SENATOR CHAMBERS: And in that case your job is to placate a victim? [LB984]

JIM MASTELLER: In my job it's to do justice. And if that requires the imposition of the habitual criminal, a sentence he's already served before and has not changed his ways, then that's exactly what I intend to do in that case as well. [LB984]

SENATOR CHAMBERS: You know that civil actions are brought in the name of the plaintiff, himself or herself, because damages are being sought. Criminal cases are brought in the name of the state. The state is the one sinned against and whatever victims say has nothing to do with the job that the prosecutor does. The prosecutor is not to promise the victim, I'm going to get you this or I'm going to get you that. And if you go back into history, then the king required that because they had blood feuds--if you did something to my family I did something to yours--and

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they didn't have as many people available for the king's army at that point. So when these blood feuds began to spread out, the king said no more of that. If somebody wrongs you, they don't wrong you, they wrong the king, they wrong the realm, and it's going to be the state versus this person because the crime is committed against the state. That's why when prosecutors bring this stuff in about a victim, they are perverting the law. And maybe they don't know the background on law or why these things happen and they wind up saying, what do you think I ought to do to this person? Now you don't even have to respond to that because I'm saying it. I don't want you to feel like you have to go far afield and rebut it or anything else. I just expressed my opinion. If you want to address it you can, but you don't have to. [LB984]

JIM MASTELLER: No, I appreciate your comments, Senator. The only thing I would say is that I agree the victims do not make the charging decisions or make sentencing decisions for the state. It would be inappropriate for them to do so. But I think it would be irresponsible of the prosecutor not to at least get the victim's input in trying to come up with his decisions on the case. [LB984]

SENATOR CHAMBERS: But, see, I'm talking about what prosecutors say: Well, it wouldn't be fair to the victim if we don't get a death sentence; it wouldn't be fair to the victim if we don't carry it out. The victim has no role to play in that. It's the state. But as a prosecutor you can answer this. To whom does a prosecutor have to explain...now I don't mean somebody who is a deputy, but the top prosecutor, if he or she decides not to prosecute a case, no matter what people in the community or anywhere else says, to whom does that prosecutor have to give an explanation? [LB984]

JIM MASTELLER: I don't know that the prosecutor has to give an explanation to anyone. I think that they do and should give explanations to the community. [LB984]

SENATOR CHAMBERS: But that's a "should." The prosecutor has total discretion as to whether or not to prosecute. [LB984]

JIM MASTELLER: True. [LB984]

SENATOR CHAMBERS: Okay. That's all. You were very cooperative. [LB984]

JIM MASTELLER: I try to be. [LB984]

SENATOR CHAMBERS: We don't agree on everything but I wanted you to know that I see you that way. [LB984]

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JIM MASTELLER: Thank you, Senator. [LB984]

SENATOR SEILER: Any further questions? I have one. Again, I...this sticks out like a sore thumb, on page 5, line 19 and 20, "with the consent of the prosecuting attorney." From the way you laid that out, why is that stuck in there? Do you have any idea? [LB984]

JIM MASTELLER: You know, the way I'd look at that is let's say we go to my example of let's say as a prosecutor I wasn't really thinking about habitual criminal for a particular defendant. They plead to terroristic threats but then the PSI shows they've been to prison, even in places I didn't even know about, and the judge makes a probable cause determination that they could be eligible for the habitual criminal. It looks like what they're saying is, hey, prosecutor, do you really want to try to get that habitual criminal on him? If so, then we can continue down that road; but if you don't, then we just impose just the regular sentence and not proceed toward the habitual criminal. [LB984]

SENATOR SEILER: And you're going to overrule a judge? [LB984]

JIM MASTELLER: Well, I think, yes, I think that if all the judge is saying is, if I had probable cause that he is eligible, and then the judge would say, do you want me to continue down the process, and I'd be happy to say yes or no. However, there is going to be an interesting interplay between the fact that we have two different types of panels, one for mandatory minimums and one for habitual. When you look at the mandatory minimum, that includes the habitual criminal. And so you would have two different panels with two different standards and two different burdens of proof. So it's a little bit muddled on how that would actually work. [LB984]

SENATOR SEILER: That's what I...I thought maybe it was in there just to...for your first opportunity to tell the court that you have a plea bargain or something like that. But you're saying that plea bargain comes in a lot earlier. [LB984]

JIM MASTELLER: Well, usually, at the time of the plea the judge will ask us is there... [LB984]

SENATOR SEILER: Yeah, right. [LB984]

JIM MASTELLER: ...please state for the plea bargain for the record, so it's actually in the record. [LB984]

SENATOR SEILER: Okay, thank you very much. [LB984]

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JIM MASTELLER: Thank you. [LB984]

SENATOR SEILER: Next proponent...or opponent, excuse me. [LB984]

COREY O'BRIEN: (Exhibit 2) Thank you, Chairman Seiler and members of Judiciary Committee. My name is Corey O'Brien; that's C-o-r-e-y O-'B-r-i-e-n, and I am the criminal prosecution division chief for the Nebraska Attorney General's Office. I appear today on behalf of the Nebraska Attorney General's Office in opposition of LB984. I'm handing out...I'm having handed out a copy of my remarks. I want to reiterate a couple of things that Mr. Masteller said. But first I want to observe that one of the problems that... [LB984]

SENATOR CHAMBERS: Excuse me one second. [LB984]

COREY O'BRIEN: Yes. [LB984]

SENATOR CHAMBERS: May I address the witness? [LB984]

COREY O'BRIEN: I'm sorry. [LB984]

SENATOR CHAMBERS: Fate is smiling on you today. I've got to go (laughter). [LB984]

COREY O'BRIEN: Am I going to get arrested (laughter)? May I continue? [LB984]

SENATOR SEILER: He's got another committee he has to go to. [LB984]

COREY O'BRIEN: Okay. May I continue though? [LB984]

SENATOR SEILER: Yes. Go ahead. [LB984]

COREY O'BRIEN: Okay. The first observation I would make is that we have trouble understanding why, the justification or reason to employ three judges to do a job that's done competently and consistently by a single judge and has been done so for decades without any problems. Second, I would reiterate some of the issues that Mr. Masteller brought up. He was particularly focusing on the habitual criminal. I think that both the mandatory minimum portion as well as the habitual criminal portion suffers from some procedural due process issues. In particular, on the mandatory minimums basically it's saying, well, the judge finds that the sentence is inappropriate. Well, what makes it inappropriate? There should be some standard set

in the legislation itself that makes it so--what must the judge consider, what must he consider in order to employ a three-judge panel--because it is discretionary with respect to the mandatory minimums. On the habitual criminal we would reiterate again what Mr. Masteller said and that is that we think that it's important and constitutionally necessary for us to specifically plead for an enhanced sentence in our information and to do so I think we are committing procedural due process violation. I have an obligation to prove the facts pled in my information to show that he is eligible for that enhanced sentence. That's not being done under what's proposed in LB984 because essentially that determination is being made solely by the judge based upon information in the PSI. And so I'm being relieved of my burden of proof and I believe that that's unconstitutional. Finally, some issues that I would address with respect to the habitual criminal and mandatory minimums is that we believe that mandatory minimums and the habitual criminal provide consistency in the application of the law. We also believe that it provides a deterrent effect because there is certainty with respect to what the minimum sentence is that's going to be imposed. A mandatory minimum does not mean that they're going to get a mandatory 50-year sentence. They're going to get a mandatory minimum of a 3-year sentence and then the judge is going to have the discretion to decide whether or not he gets an additional 40, 50 years, or if he gets anything more than that. So all the mandatory minimum does is set the benchmark based upon the reprehensibility of the crime. And then the judge has the discretion to decide how reprehensible that crime is and how reprehensible this offender has been based upon his history in order to determine whether or not he's worthy of more of a sentence beyond the mandatory minimum. And so there is that discretion available to him. Members of Judiciary, those are my comments. You have my comments that I've handed out that explain our objections to the bill. The bill does not curtail our ability to seek mandatory minimums or habitual criminal. We would still continue to do so but we think that some of these issues need to be resolved. Thank you. [LB984]

SENATOR SEILER: Questions? Senator Williams. [LB984]

SENATOR WILLIAMS: Thank you, Senator Seiler. And thank you, Corey, for being here. Can you take me through the process, because I'm just...I'm unclear on when it's decided that the prosecutor is going to attempt to use the habitual criminal enhancement and then when that happens in the process. [LB984]

COREY O'BRIEN: It can vary. You start thinking about it probably at the very beginning when you get a copy of the police reports that come to you and you're going to get a copy of the criminal history of the defendant. And you're going to go through it and you're going to see that this individual has committed a crime in this particular case. So first you have to make a charging decision with this particular case. Then you go through his criminal history and you see, okay, here is one prior felony conviction where he received a one-year sentence and he went to the penitentiary, or a five-year sentence, and here's his second where he went to the

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penitentiary and he began and got another five-year sentence. They have to be two separate felonies and they have to go to the penitentiary for at least a minimum of a year. So at that point in time you're going to begin to do an additional investigation if you believe that it's appropriate to seek the habitual criminal. And prosecutors do that on a constant basis. Is this really worth going forward with the habitual criminal? One thing that's interesting under LB984 is I think you could end up with a lot more people being held responsible for habitual criminal because that decision is made by the judge and the judge is looking at the PSI and he's looking at the same record I get to look at on a daily basis. I get to go forward and make public statements and say this is why I decided not to seek the habitual criminal against this offender. The judge doesn't have that opportunity. He's not going to get the opportunity to defend himself. And if I'm the judge sitting there, under LB984 I'm thinking, wow, I'd be afraid not to go forward with the habitual criminal on this guy because, if he does something bad and I could have sought habitual criminal against him, now I'm on the line, as opposed to the prosecutor is on the line now. So to answer your question and get back to your question, you can decide right there at the beginning or you can decide once the evidence comes in. A lot of times we have to get certified copies of the case that they were originally convicted of, because one of the things we have to prove is, is this the same defendant that we have before us that was convicted and sentenced to that crime? So we get certified copies of the entire case file. We get certified copies of what's called a "pen pack" from the Department of Corrections which contains a photograph and fingerprints of the defendant. And then a lot of times we submit that pen pack and those fingerprints to the State Crime Lab to compare with the fingerprints that were generated in this particular case. So it's not an easy process to put together and determine whether or not somebody is actually eligible. You could decide it right up-front and rely upon just the record you see, but most prosecutors, they'll wait and see if they've got verification and the proper copies, either through the pen pack or the criminal case, before they decide to file the habitual criminal. [LB984]

SENATOR WILLIAMS: Once a prosecutor is to that point where there...all those, you know, i's are dotted and the t's are crossed, then the prosecutor makes a determination that we're going to seek the habitual criminal. [LB984]

COREY O'BRIEN: That's correct. [LB984]

SENATOR WILLIAMS: Okay. Then you go through the trial and... [LB984]

COREY O'BRIEN: Or a plea. [LB984]

SENATOR WILLIAMS: Or the plea. Let's say it's not the plea. You're going through the trial. The trial is over. Defendant is found guilty. Then it's in the hands of the judge with the presentence investigation. Correct? [LB984]

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COREY O'BRIEN: Under LB984 that would be the case. Under...if we... [LB984]

SENATOR WILLIAMS: Okay. Under current law... [LB984]

COREY O'BRIEN: If we've specifically alleged habitual criminal in our pleadings, then after he's found guilty there is a separate hearing that takes place and it's called an enhancement hearing. And that's where we prove up the facts that we have alleged in our pleading: that he has been once convicted of a felony before, sent to the penitentiary for a period of a year. [LB984]

SENATOR WILLIAMS: And if you're able to prove that up, the judge's hands are tied. It's then he's...the enhancement takes place. [LB984]

COREY O'BRIEN: The enhancement takes place and he's eligible for 10 to 60 years, mandatory minimum of 10 years. [LB984]

SENATOR WILLIAMS: Right. [LB984]

COREY O'BRIEN: Right. [LB984]

SENATOR WILLIAMS: And on...thank you. [LB984]

COREY O'BRIEN: Okay. [LB984]

SENATOR SEILER: Further questions? Pansing Brooks. [LB984]

SENATOR PANSING BROOKS: Thank you, Senator Seiler. Thank you for coming, Attorney General O'Brien. I was just trying to...could you speak to a little bit about judicial...I mean I believe in judges and what they can do and what they see. And so I don't know. County Attorney Masteller talked about justice versus uniformity. And could you just speak to me why it is that the judges can't make these decisions well enough, once presented the evidence, on their own? [LB984]

COREY O'BRIEN: Well, I think that we...the mandatory minimums have been painted as completely taking away the discretion of the judges. And while... [LB984]

SENATOR PANSING BROOKS: And can you explain to me how they do have discretion with them. [LB984]

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COREY O'BRIEN: They do have discretion because, again, for most of the mandatory minimums...let's say it's a felon in possession of a firearm, which is a Class I-C felony. The penalty for that is a mandatory minimum of 5 years and a maximum of 50 years. The Legislature has established that mandatory minimum of five years and basically set out and said, look, this crime is so reprehensible that you're not going to be eligible for probation; or sex offenders, they do that for crimes involving children. However, you know, so the benchmark has been set at five years, he's got to do a minimum of five years. From that point forward though the judge has endless discretion with respect to whether or not he wants to give him any more time than that 5 years or he's going to give him up to 50 years. So he does have discretion beyond the five years. It doesn't completely get rid of the judge's discretion. [LB984]

SENATOR PANSING BROOKS: So a felony IV jury...and somebody has a gun that's a felon that's already been convicted of forgery is so reprehensible that we have to put them away for five years and not let the judge have any kind of say over whether or not... [LB984]

COREY O'BRIEN: Felony forgery is not a mandatory minimum. [LB984]

SENATOR PANSING BROOKS: Okay. You...okay, then a felon with a gun. So I'm trying to think of a felony that they had prior. [LB984]

COREY O'BRIEN: Okay. [LB984]

SENATOR PANSING BROOKS: So I don't know what you...I'm not saying that that was the...you said that the felon with the gun was the mandatory minimum. [LB984]

COREY O'BRIEN: Right. [LB984]

SENATOR PANSING BROOKS: So I'm saying somebody... [LB984]

COREY O'BRIEN: If they got convicted of a felony before... [LB984]

SENATOR PANSING BROOKS: ...that got convicted of felony forgery and then later be found with a gun, that's so hideous that we have to put them away for five years? [LB984]

COREY O'BRIEN: Well, I mean, if you...I guess I don't really know how to answer the question. In my opinion, yes, we need to have at least some consistent treatment. And, you know, one of the messages that has resounded, especially with all the gun play in Omaha, is some surety that if

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you commit a gun crime you're not going to be eligible for probation, you're going to get jail time. And I believe very strongly that that does have a deterrent effect and prevents people from picking up that gun, knowing that they're not going to be able to get probation and knowing that they're going to at least face five years and maybe more than that. So in my opinion it does serve some purpose. [LB984]

SENATOR PANSING BROOKS: Okay. But if somebody was convicted of something like forgery, which is not a violent crime, and then was later found with a gun, that isn't what we're trying to protect the community against. So I just...I'm just interested why it is that a judge couldn't say, well, really, you know, this is not the level of what we were trying to do to protect our community. And to me it seems like all the facts of a case may be different. I know of a young man who graduated with distinction from a university and got...was picked up for dealing, for various reasons, to a police officer and tried to handle it all on his own and ended up with a mandatory minimum, ended up in prison. And, you know, I just think that a judge looking at that--and later the judge did communicate to us that that was a very difficult situation because he was an upstanding kid--that his...this judge's hands were tied by these laws. And there are extenuating circumstances of what's going on. So anyway...but really judicial discretion is not what the county attorneys or the prosecution believes in supporting. Right? This is a discussion of judiciary discretion and trusting the judges to do what's right versus the prosecutors knowing what's right and mandating how to charge people. That's how I see it. Do you see it differently? [LB984]

COREY O'BRIEN: I do. I mean I think that we carry on the same function that judges carry on, and a lot of times we know more information than the judge is capable of knowing. [LB984]

SENATOR PANSING BROOKS: But that's the worry because you're representing one side and the public defenders are representing another side. So to say that you know more and that you have the same information and knowledge and ability as the judge is exactly what we're worrying about is keeping that balance between the defendant's rights, justice, and somewhere uniformity is on that scale. [LB984]

COREY O'BRIEN: But we're also trying to...you know, and the case in point that I always talk about is there are certain absurd results that have occurred. And I don't believe that it does justice for the same person to commit molestation of a five-year-old in Sidney and receive probation for that offense when the person that commits molestation of a five-year-old in Lincoln or Omaha is getting 25 years. And so at least with the mandatory minimums, it does provide at least some minimal level of consistency with respect to whether or not somebody is going to be eligible for probation based upon where the crime occurred and who the sentencing judge is. [LB984]

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SENATOR PANSING BROOKS: I would totally agree with you on that scenario. Thank you. [LB984]

COREY O'BRIEN: Thank you. [LB984]

SENATOR SEILER: Excuse me. [LB984]

COREY O'BRIEN: Yes, sir. [LB984]

SENATOR SEILER: I have a...again, I'm trying to work through the process. We've turned out bills here that, oh, we'll fix it at General or we'll fix it at Select, and then we end up in a brouhaha up on the floor. And maybe if we asked these questions and...one of the questions I had is it says after the judge has heard the case, and say a jury comes back or he pleads guilty, then the judge shall look at this situation and see if there is probable cause. [LB984]

COREY O'BRIEN: Is that on the habitual criminal portion? [LB984]

SENATOR SEILER: Yes. My question is, is there a hearing at that point or is it a judge on his own? How do you do that now? You just have one hearing? [LB984]

COREY O'BRIEN: I mean we have specifically pled. [LB984]

SENATOR SEILER: Right, it's in the pleadings, but that's not... [LB984]

COREY O'BRIEN: And I don't think it is in the pleadings under LB984. I think it's basically... [LB984]

SENATOR SEILER: It doesn't say it's in the pleadings? It says there shall be probable cause. [LB984]

COREY O'BRIEN: And I think that's some of the concerns that I have about the procedural due process here because, again, we have to put the defendant on notice that he's eligible for an enhanced penalty. And here under LB984 it looks like sua sponte--on his own--the judge... [LB984]

SENATOR SEILER: Absolutely. [LB984]

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COREY O'BRIEN: ...can basically say, hey, I was reviewing your record and, guess what, you're eligible for the habitual criminal. [LB984]

SENATOR SEILER: Well, after he gets the presentence investigation. [LB984]

COREY O'BRIEN: After he gets the presentence investigation. [LB984]

SENATOR SEILER: Right. [LB984]

COREY O'BRIEN: And that's why I say you could end up with potentially a lot more offenders under habitual criminal than if... [LB984]

SENATOR SEILER: Well,... [LB984]

COREY O'BRIEN: ...the prosecutor, if I was deciding it. [LB984]

SENATOR SEILER: What I'm looking at is page 5, line 9... [LB984]

COREY O'BRIEN: Right. [LB984]

SENATOR SEILER: ...says, "there is probable cause to believe that the person convicted is a habitual criminal..." [LB984]

COREY O'BRIEN: And I think... [LB984]

SENATOR SEILER: But is probable cause...most probable cause you have a hearing or you at least have to waive a hearing. [LB984]

COREY O'BRIEN: Well, and again that's another one of my procedural due process concerns is because in order for somebody to ultimately receive an enhanced sentence, not only must I plead that in the information, but then I have the obligation to prove those allegations beyond a reasonable doubt, or at least I have an obligation to present evidence on those. Here I'm not presenting any evidence. The evidence is coming from the judge just reviewing the PSI. [LB984]

SENATOR SEILER: And what... [LB984]

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COREY O'BRIEN: And so I've been relieved of my obligation to present evidence and I think that's unconstitutional. [LB984]

SENATOR SEILER: And what you're telling me is the pleading of the habitual at the beginning is universal across Nebraska? [LB984]

COREY O'BRIEN: It varies a little bit. I mean I travel the entire state. [LB984]

SENATOR SEILER: That's why I'm asking. [LB984]

COREY O'BRIEN: It does vary a little bit. Some people charge it as a separate count. [LB984]

SENATOR SEILER: Okay. [LB984]

COREY O'BRIEN: Some people charge it... [LB984]

SENATOR SEILER: So it's in the pleadings (inaudible). [LB984]

COREY O'BRIEN: It's always in the information... [LB984]

SENATOR SEILER: Okay. [LB984]

COREY O'BRIEN: ...somewhere, somehow. [LB984]

SENATOR SEILER: Any further questions? Thank you very much, Mr. O'Brien. [LB984]

COREY O'BRIEN: Thank you, Senator. [LB984]

SENATOR SEILER: Next opponent. Next opponent. In the neutral? Anyone testifying in the neutral? Seeing none, thank you for your cooperation and your testimony today. I don't see the senator around, so I assume he waived closing. Is it...you're not...okay, you waive closing. Didn't know if she was going to take a sharp right or not. Thank you very much. Okay, next bill is Senator Garrett. He's on his way? Okay. It will be LB1106. You're burning daylight. [LB1106]

SENATOR GARRETT: Am I up? Oh. [LB1106]

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SENATOR SEILER: You're up. [LB1106]

SENATOR GARRETT: I'm up. [LB1106]

SENATOR SEILER: Senator Garrett, you may proceed with LB1106. [LB1106]

SENATOR GARRETT: Thank you, Chairman Seiler and members of the committee. I'm Senator Tommy Garrett, T-o-m-m-y G-a-r-r-e-t-t. I represent the people of District 3 which includes parts of Bellevue and Papillion and Sarpy County. I appreciate the opportunity to introduce LB1106. I became interested in the issue of civil forfeiture when I heard the plight of some innocent property owners who had experienced having their cash confiscated from law enforcement without a citation being written up. During a business trip to Washington, D.C., last summer, I attended a seminar hosted by Grover Norquist and the Heritage Foundation at Americans for Tax Reform. At the seminar I met a young musician from Romulus, Michigan, named Joseph Rivers. Joseph was an aspiring hip-hop artist. Agents from the music industry had suggested to Joseph that his career could really take off if he had a professionally produced music video. Over a period of time Joseph and his mother scraped together \$16,000 and he bought an Amtrak ticket to Los Angeles where he would pay to make a music video. A DEA agent boarded the Amtrak train in Albuquerque, New Mexico, and began asking various passengers where they were going and what their business was. The DEA agent asked to search Rivers, the only black person on the train, asked to search his bag, and Rivers complied. In one of his bags the DEA agent found a Michigan Bank envelope and opened it. The agent concluded that the money had drug residue and confiscated it and also took the \$20-some-odd he had in his wallet. Joseph was never cited. I came back to Nebraska after the conference and learned of similar instances happening here. I think forfeiture can be a valuable tool for law enforcement but it should be used only when actual crimes are being committed. I also believe that for American ideals to live on we need to ensure that the burden of proof lies with the state and not the citizens. The ACLU of Nebraska issued a report this fall showing that between 2012 and 2014, \$43 million was forfeited. I have no problem with that; however, I do have a problem with the over \$16 million that was forfeited without issuing a criminal citation. These statistics show me that Nebraska's civil forfeiture system is hard broke. The Heritage Foundation finds that 78 percent of all Federal Reserve notes have some sort of drug residue on them while researchers at the University of Massachusetts-Dartmouth put that figure at 90 percent. This makes it easy for law enforcement to seize cash. Another issue is the Franco case. In Nebraska our burden of proof in civil forfeiture cases currently is beyond a reasonable doubt. Since the burden of proof is so high in the civil process, the Nebraska Supreme Court ruled that in criminal cases the defendant was essentially being tried twice. That is why LB1106 proposes essentially abolishing civil forfeiture against individuals and instituting a criminal forfeiture process after the accused has been convicted of a crime. The prosecution would have to prove by clear and convincing evidence that the cash was used in connection with a crime or ill-gotten gains of criminal activity. In LB1106 there are

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exceptions that allow for civil forfeiture process in certain cases where property has been abandoned. My office, the ACLU of Nebraska, and Attorney General Doug Peterson and his staff worked on this proposal and I think it restores the rule of law by putting the burden of proof on the state while preserving a valuable tool for law enforcement. I will take any questions and there are about a half-dozen attorneys testifying after me who can answer the more legally intricate questions as we have the discussion. [LB1106]

SENATOR SEILER: Any questions of Senator Garrett? Seeing none, thank you. [LB1106]

SENATOR GARRETT: Thank you. [LB1106]

SENATOR SEILER: You're going to stick around for...? [LB1106]

SENATOR GARRETT: Yeah. [LB1106]

SENATOR SEILER: Okay. Next...first proponent. [LB1106]

TRICIA FREEMAN: (Exhibit 1) Good afternoon, Senator Seiler, members of the commission (sic). My name is Tricia Freeman. I'm the chief deputy county attorney in the Sarpy County Attorney's Office and I also appear today on behalf of the Nebraska County Attorneys Association. And we are here in support of LB1106. I'd like to take the time that I have this afternoon to perhaps provide a little bit of background on civil forfeiture or asset forfeiture in Nebraska and kind of what I think brings us here today. In 1999 the Nebraska Supreme Court decided State v. Franco, which actually a copy is coming around so you all have a copy of it, and Senator Garrett alluded to it. In State v. Franco, essentially the Supreme Court determined that it was double jeopardy to have two proceedings, a criminal trial in which an individual was convicted and an asset forfeiture proceeding in which assets were deemed to be forfeited, because it was determined that you couldn't prove the forfeiture without also proving the underlying criminal offense. Now, in Franco, the court also told us that if you can put it into one proceeding it would be okay. What you can't do is have two completely different proceedings because that's what leads to the double jeopardy problem. So on that basis essentially what happened after Franco is that prosecutors had to elect. We had to make the choice. We were either going to pursue criminal conviction for a serious law violation--somebody was making or distributing controlled substances or they were possession with the intent that they were going to do so--or we could go pursue asset forfeiture. The proof was still the same. We still had to prove it at either level. And so effectively what I think happened at that point is that we oftentimes, and more often than not, would elect prosecution, which meant that assets then would just sit. And what happened over time is that law enforcement began to pursue federal forfeiture in order to obtain the funds so that they wouldn't go back to further a criminal enterprise but that would

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allow us to essentially do both. And so I think that what LB1106 does is it takes those two proceedings pursuant to what I...the direction that I think that the Supreme Court offered to us in Franco and says put them together in a single proceeding and they will survive. And I think that the ACLU in their report, when they talk about successful policy reform options, one of them is to require a criminal conviction as an underlying basis for seizure. And so based upon that I think that LB1106 attempts to capture that. And essentially just my parting comment is this: From the county attorneys' perspective, it ought not be an easy thing for us to take people's property. There ought to have a proper basis and proper proof in order for us to be able to do that. And I think that LB1106 tends to capture that objective. I would be happy to answer any of your questions. [LB1106]

SENATOR SEILER: I have one. Do you put that in your complaint as count one and count two or how do you... [LB1106]

TRICIA FREEMAN: Well, I think that the way...it's my understanding, I guess, as I read the bill, and perhaps Corey O'Brien, who will come talk to you after I'm done,... [LB1106]

SENATOR SEILER: Okay. [LB1106]

TRICIA FREEMAN: ...you know, can talk a little bit more about the bill itself. But essentially we have to give notice in our information that we intend to pursue forfeiture. And so I think that it does require that we plead it, which again I think is a notice and a due process issue that we are suggesting to an individual that we are intending to forfeit property. But again it puts it in under the guise of that criminal conviction so the underlying proof is proof beyond a reasonable doubt that they violated a crime. [LB1106]

SENATOR SEILER: So both counts have beyond a reasonable doubt. [LB1106]

TRICIA FREEMAN: Yes. Now I might go...I think that what the bill does though a little bit differently is that not only do we have to prove beyond a reasonable doubt that the underlying conviction occurred, but then there has to be a separate hearing to determine what, if any, amount or to what extent was this particular conveyance of vehicle, for instance, has been used in furtherance of the criminal enterprise. [LB1106]

SENATOR SEILER: You anticipated my next question. [LB1106]

TRICIA FREEMAN: Okay. [LB1106]

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SENATOR SEILER: Thank you. Any other questions? Thank you. [LB1106]

TRICIA FREEMAN: Thanks. [LB1106]

SENATOR SEILER: Next proponent. [LB1106]

COREY O'BRIEN: (Exhibit 2) Chairman Seiler, members of the Judiciary Committee, my name is Corey O'Brien; that's C-o-r-e-y O-'B-r-i-e-n, and I'm the criminal prosecution division chief for the Nebraska Attorney General's Office. Today I appear before you as someone that is in support of LB1106 and as someone that was the primary drafter of LB1106. LB1106 is a modified version of a bill passed into law by the Montana Legislature in the spring of 2015 that seeks to bring Nebraska's existing forfeiture law into compliance with the Franco decision. It requires that asset forfeiture will be combined with the criminal process, so no longer will we have a civil asset forfeiture; instead, we will end up with a criminal asset forfeiture. While the bill contains many components I could not sufficiently detail in the three minutes allotted, in short, the state could seek forfeiture of the money derived from or used to facilitate drug trafficking, gambling, or child pornography offenses by specifically requesting forfeiture of money or property in the same criminal information that contains the criminal charges alleged. It's a lot...it's designed to operate a lot like our existing restitution process. After the state specifically pleads a request to forfeit money or property in the criminal information, the defendant would then have a right to a preliminary hearing, a right to an attorney. And then also of significance is that any innocent third party who has a claim to the property or money sought to be forfeited would have a quick and easy mechanism available to them which would allow them to intervene in the proceedings. In the vast majority of cases under LB1106, forfeiture of money or property derived from or used to facilitate either drug trafficking, gambling, or child pornography can only occur if the defendant is first convicted of a related drug trafficking, gambling, or child pornography crime and the state proves by clear and convincing evidence at a separate hearing held after conviction but before the pronouncement of sentence that the money or property sought to be forfeited was derived from or used to facilitate the drug trafficking offense. If the state meets its burden, then the state can order forfeiture of the money or property sought and then the judge will order forfeiture as part of the sentence that's imposed. Pursuant to our constitution, 50 percent of any money or proceeds from the property forfeited would go directly to schools while the remaining 50 percent would go to a county drug forfeiture fund. Although forfeiture has been the subject of much criticism over the years, and admittedly has deserved some of that criticism, LB1106 is intended to and is fashioned in such a manner as to substantially curtail, if not eliminate, some of the more controversial facets inherent in the forfeiture process. We ask you to advance LB1106 to the floor because I am tired of giving drug dealers their money back, I am tired of giving cameras and computers back to people that manufacture child pornography. This, as the way I see it, is consistent with this committee's longstanding policy not to allow criminals to benefit from their criminal acts, similar to the "Son

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of Sam" law that this Legislature enacted not allowing criminals to benefit by selling their stories to publishers or to movies. Thank you. And I'd certainly entertain any questions you have as somebody that was intricately involved in the drafting of the bill. [LB1106]

SENATOR SEILER: Senator Pansing Brooks. [LB1106]

SENATOR PANSING BROOKS: Thank you, Attorney General O'Brien. I just...I wanted to just make a comment thanking the Attorney General's Office for coming forward on this. This is an important piece to help support due process of our laws in our state, and I really appreciate this effort by your office and by you to fight for due process of laws. [LB1106]

COREY O'BRIEN: Thank you. That means a lot. [LB1106]

SENATOR PANSING BROOKS: Thank you, appreciate it. [LB1106]

SENATOR SEILER: Anything else? [LB1106]

SENATOR PANSING BROOKS: I don't have anything else. [LB1106]

SENATOR SEILER: I have one thing. [LB1106]

COREY O'BRIEN: Yes, sir. [LB1106]

SENATOR SEILER: When you said that 50 percent goes to the school district, is that in the school district where the offense occurred? [LB1106]

COREY O'BRIEN: You know, I thought about that today when I was preparing my testimony and I wanted to go back and review the constitution to see exactly if it specifies that. And it's the same provisions where I believe that that is the case, because it's in the same provision of the constitution where it says that all fines and penalties shall be paid to the school district in the amount of 50 percent. [LB1106]

SENATOR SEILER: Lancaster County pulls a nice little gimmick with any fines, their district, that are fined by the state goes to Lancaster County even though the occurrence may be out west, so kind of.... [LB1106]

COREY O'BRIEN: Yeah. I don't know how it works, to be honest with you. [LB1106]

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SENATOR SEILER: Okay. [LB1106]

COREY O'BRIEN: But I was thinking about that today, whether or not it stays in the locality of where... [LB1106]

SENATOR SEILER: Take a look at that. [LB1106]

COREY O'BRIEN: ...the locality where the seizure actually occurred. [LB1106]

SENATOR SEILER: Right. [LB1106]

COREY O'BRIEN: And I don't know the answer. I guess I always assumed it did, but I don't know. I saw Senator Coash shaking his head that it doesn't, so. [LB1106]

SENATOR SEILER: It doesn't always. [LB1106]

SENATOR COASH: It doesn't always. [LB1106]

SENATOR SEILER: No. [LB1106]

COREY O'BRIEN: Okay, that's news to me. [LB1106]

SENATOR SEILER: Not a problem. [LB1106]

COREY O'BRIEN: Okay. [LB1106]

SENATOR SEILER: One other thing is, do you... [LB1106]

COREY O'BRIEN: Yes, sir. [LB1106]

SENATOR SEILER: On your second hearing, that's when you prove up the value and the...how do you give notice to a third person is what I'm getting at. I mean you got the third person has the right. You've put that into the statute. That's fine. [LB1106]

COREY O'BRIEN: Right. [LB1106]

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SENATOR SEILER: But how do you notice it? Do you have to...I was thinking the feds put that in...a notice in general paper. [LB1106]

COREY O'BRIEN: Well, if you look at the pleading requirements that we actually put into the statute, the prosecutor is supposed to basically plead who the registered owner of the property is, even if it's not the defendant. Now whether or not... [LB1106]

SENATOR SEILER: If they know. [LB1106]

COREY O'BRIEN: If they know, and a lot of times we don't know. [LB1106]

SENATOR SEILER: Right. [LB1106]

COREY O'BRIEN: But I don't know that there is any specific provision... [LB1106]

SENATOR SEILER: Notice statute. [LB1106]

COREY O'BRIEN: ...that we put in here that we must provide that person notice. I'd certainly be amenable to that because I'm not afraid of that. [LB1106]

SENATOR SEILER: Right. [LB1106]

COREY O'BRIEN: I think that's only fair. But if we've overlooked that, we'd certainly entertain that. [LB1106]

SENATOR SEILER: Take a look and see if that's... [LB1106]

COREY O'BRIEN: Sure. [LB1106]

SENATOR SEILER: I think the feds run a notice in the World-Herald, or places like that, of property that is being noticed to any potential owners but... [LB1106]

COREY O'BRIEN: Well, and if you notice in the bill, we do have certain provisions where we may not know the owner. [LB1106]

SENATOR SEILER: Right. [LB1106]

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COREY O'BRIEN: So say we...and I had a case like this in Omaha years ago. [LB1106]

SENATOR SEILER: And I'm sure the defendant is saying, it's not mine, uh-uh. [LB1106]

COREY O'BRIEN: I know. I had a case like this in Omaha where the cops actually found an unlocked car in the Crossroads parking lot that had a million dollars in cash and 50 kilos of dope sitting on the front seat. We could never figure out whose car that was that had, you know, all this stuff in it. And so, you know, we still want to have the opportunity to take that car. [LB1106]

SENATOR SEILER: Sure. I understand. [LB1106]

COREY O'BRIEN: And so under that situation we would actually have to file notice in The Daily Record in Omaha or a legal publication... [LB1106]

SENATOR SEILER: Okay. [LB1106]

COREY O'BRIEN: ...to put the world on notice: Hey, look, we've got this car that we're going to forfeit as part of an in rem action. And so we do have that notice requirement there where we don't necessarily know the owner. But in terms of, you know, if a husband is driving the wife's car while he's doing his drug deal, we don't have anything I don't think specifically in the statute that puts her on notice or we have to provide notice to her. That could be but I'm certainly willing to put that in there if that's missing. [LB1106]

SENATOR SEILER: Okay, thank you. Any further questions? Seeing none, thank you for your testimony. [LB1106]

COREY O'BRIEN: Thank you. [LB1106]

SENATOR SEILER: Any further proponent? [LB1106]

JESSE HATHAWAY: Jesse Hathaway, J-e-s-s-e H-a-t-h-a-w-a-y, research fellow, The Heartland Institute. Chairman Seiler, members of the committee, first of all, thank you for giving me this opportunity to testify today. Like I said, my name is Jesse Hathaway. I'm a research fellow for the Center on Taxes and the Economy with The Heartland Institute. If you've not heard of it, it is a 32-year-old national nonprofit research and education organization. Our mission is to discover, develop, and promote free-market solutions to social and economic problems like the one that

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we're discussing today. We're headquartered in Illinois and we focus on providing solutions to national/state lawmakers, like yourself, and as well as lawmakers at the local level, with the research and analysis that they need to know about the policy issues of today. Civil asset forfeiture, you know, is becoming a real important issue here in not only Nebraska, but across the country. It's also called civil judicial forfeiture. And it's somewhat of a controversial legal process in which law enforcement agencies seize--"seize" is the imprecise word for it--personal assets from individuals or groups suspected of engaging in crime or illegal activity. Mostly, generally speaking, this is done without even bringing criminal charges against those who were...from whom the assets are taken. Supporters of the process would say that it allows law enforcement agencies to use seized assets toward their enforcement efforts, you know, basically take...transforming property that's used in illicit means or illicit ways into resources to be used for the public benefit. Critics, such as myself, of the process would say that it gives the law enforcement agencies an economic incentive to seize property and also penalizes innocent property owners. Here in Nebraska the standard of proof is relatively high. It's beyond a reasonable doubt. But even with that high standard, the cost of violating Nebraskans' civil liberties this way is too high. The \$43 million figure has been cited by others, so I am not going to elaborate on that beyond that. Basically it just becomes new, off-the-books revenue. So back in 2003, there's actually an example of a Nebraska citizen who was very negatively affected by civil asset forfeiture. His name was Emiliano Gonzolez. He was traveling home from Chicago. [LB1106]

SENATOR SEILER: You may proceed. [LB1106]

JESSE HATHAWAY: All right. [LB1106]

SENATOR SEILER: Make it short. [LB1106]

JESSE HATHAWAY: Sorry. All right. He was traveling back to Nebraska from Chicago. He was pulled over for a traffic infraction and failed to disclose that he had been previously pulled over for speeding. His cash, his life...not only his life savings but the savings of friends was taken from him and he...the court...the case went all the way up to the federal level where the...it was ultimately ruled that it did not matter that the police could not prove that the cash was being used for an illegal purpose, it just mattered that it looked like it was an illegal purpose because it was such a large amount. To sum up, some people might say that civil asset forfeiture is about making law enforcement's job more difficult. I don't...that's not the case; in fact, it's actually the opposite. By restoring the trust that the community has that law enforcement is working towards their benefit, not towards the benefit of their budgets, that leads to improved community-police relations. [LB1106]

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SENATOR SEILER: Okay. [LB1106]

JESSE HATHAWAY: Thank you for your time. [LB1106]

SENATOR SEILER: Any further...any questions of this witness? Seeing none, thank you for your testimony. Next proponent. [LB1106]

LEE McGRATH: (Exhibits 3 and 4) Mr. Chairman, members of the committee, my name is Lee McGrath, M-c-G-r-a-t-h. I'm the legislative counsel for the Institute for Justice. The Institute for Justice is a libertarian public interest law firm and we defend people's property rights and their due process rights. Tomorrow...and we're doing this in the area of forfeiture reform across the nation. It is an honor to be here with you, Mr. Chairman and members. Tomorrow my colleague will be...one colleague will be testifying in Tallahassee; another, today someone...my colleague is in Oklahoma City; a third colleague will be testifying in an Annapolis; and this morning we sued the state of Indiana over its forfeiture laws. It is an honor to tell you that the Institute for Justice supports this legislation. It is absolutely critical that a person first be convicted of a crime as a prerequisite to his losing property through forfeiture. That is the right process, therefore, no one acquitted of a crime should lose his property through forfeiture. What is being handed out to you are two suggestions that I would make/offer to this committee. One are some technical changes. You can see my handwriting on the bill. The first you see on page 10. I've added the words "in the same prosecution." This is to ensure that Franco doesn't come back and bite you again. The core finding in Franco was it must be in the same prosecution, the same hearing, and modifying a separate hearing would be important. Secondly, Mr. Chairman, I'd ask you to move to page 23 where I am proposing, on 15, 23, and 24, that you adopt the same language as it relates to innocent owner claimants. This is not the spouse. This is the wife, the neighbor, the parent, the grandparent. The question before the court is knowledge. In the bill--I think it's just a typo--there are some inconsistencies as to how you define that knowledge. More substantively, what I would offer to you is something that is in the Maryland bill, in the Ohio bill, has been enacted in New Mexico, and that is an anticircumvention problem. Mr. Chairman, members, you are responsible for codifying the criminal law. Law enforcement should not be in the business of forum shopping. Law enforcement should not have the option of outsourcing to the federal government and circumventing your decisions about what forfeiture...how forfeiture should be processed here. You deserve the respect from the executive branch. [LB1106]

SENATOR SEILER: Your red light is on. Can you sum up? [LB1106]

LEE McGRATH: I will sum up. What this provision does is it puts into your code a prohibition on law enforcement for outsourcing most of the seizures that occur in Nebraska but allows them on seizures above \$50,000 in cash, all the property can be outsourced to the federal government.

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So it draws a line when there is real interstate criminal syndicate activities and allows local law enforcement and state law enforcement to collaborate with the feds. But on the smaller stuff your decisions should be respected and law enforcement should not have the option of seeking more favorable and potentially more lucrative federal forfeitures. Mr. Chairman, I am happy to answer any questions about my firm's work as well as these technical, tiny, and substantive suggestions. [LB1106]

SENATOR SEILER: Senator Ebke. [LB1106]

SENATOR EBKE: Thank you, Mr. Chairman. Mr. McGrath, couple of brief questions I think. First of all, you mentioned that you've got people around the country right now. How would you describe some of these other...the other reforms in some of the other states compared to what we're trying to do here? Are they similar or... [LB1106]

LEE McGRATH: Mr. Chairman, Senator Ebke...Ebke (phonetically)? [LB1106]

SENATOR EBKE: Yes. [LB1106]

LEE McGRATH: Thank you, Senator. This is a modest proposal. What Senator Garrett has brought in front of you is a proposal similar to what was enacted in Montana and in Nevada this past year and 24 months ago in Minnesota. It is not as far, it is not as radical, it is not as dramatic as what occurred in New Mexico. In New Mexico, a Republican governor in a border state, who used to be a prosecutor, signed a piece of legislation that put all money, whether it's federal, whether it's state, into the general fund. This bill respects what's in your constitution and deals with the...only the work of prosecutors, not the work of cops on the street. So I would characterize this as being a modest, straightforward bill enhancing due process. It is similar to what is currently in front of the new...it is different from what is in front of the New Hampshire Legislature, which they're taking all the money and putting it into the general fund. You're not addressing that. It is different from...it is similar to what is before the Maryland Legislature which is requiring a conviction prerequisite and having this...the Maryland...the good people of...the legislators are considering this anticircumvention provision. And there are some other states, but I'm happy to answer other questions for you. [LB1106]

SENATOR EBKE: Okay. Okay, great. My other question applies to your anticircumvention page,... [LB1106]

LEE McGRATH: Yes. [LB1106]

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SENATOR EBKE: ...the second point there where you talk about preemption of local townships and things like that, then enforcing stricter forfeiture requirements or whatever. Can you tell us a little bit about the history of that? [LB1106]

LEE McGRATH: I can. [LB1106]

SENATOR EBKE: Thank you. [LB1106]

LEE McGRATH: Now I am not very familiar with Nebraska's constitutional tradition as it relates to the power of the state versus local control. But in New Mexico, a state that came into the Union I think after Nebraska, local control is a very big issue. And so unlike other states in which a municipality's power is derived from the state, New Mexico, it's another dynamic. And so this clause was designed for New Mexico in cases where local control is a big issue. If that is not the case in Nebraska, if municipal power is...if you don't have charter cities and municipal power is derived from the state, you may exclude paragraph (B) here. [LB1106]

SENATOR EBKE: Thank you. [LB1106]

SENATOR SEILER: Any further questions? Senator Pansing Brooks. [LB1106]

SENATOR PANSING BROOKS: Yeah. Could you just briefly, Mr. McGrath, tell us about what the...in the same prosecution you said it referred to a Supreme Court case. [LB1106]

LEE McGRATH: Yes. Mr. Chairman, Senator Pansing Brooks, my read of the Nebraska Supreme Court decision in Franco and the court's finding of double jeopardy was based on the idea that the court was very uncomfortable about something happening in the criminal side and something happening on the civil side. And what...the court found double jeopardy in the fact that these two things were happening independently. So what Senator Garrett is doing, and I think he goes a long way to address the Franco decision, is to say we're going to have only one process, it's going to be a criminal process. Now I think in the drafting of this he wanted to bifurcate and require that the conviction go first. And so he uses, on page 10, line 3, the idea of a separate hearing. Now from my perspective and my read of Franco, I know where he wants to go. He wants to order those things that one goes first. But by adding my suggestion, my technical suggestion, in the same prosecution you send a screaming message to any justice on the Nebraska Supreme Court that this is one single process and you don't have the Franco dynamic of two processes going on. [LB1106]

SENATOR PANSING BROOKS: Okay, thank you. [LB1106]

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LEE McGRATH: Thank you. [LB1106]

SENATOR SEILER: You might know this, might not. Didn't the Justice Department just recently announce that the feds were no longer going to share their loot with anybody else? [LB1106]

LEE McGRATH: Mr. Chairman, Senator, you are in the right church about that. Let me help you get to the right pew. [LB1106]

SENATOR SEILER: Okay. [LB1106]

LEE McGRATH: The federal program of equitable sharing is very popular and it is a way in which state law enforcement agencies circumvent state law. They work with the feds because the feds are better payers. The feds pay up to 80 percent of the forfeited proceeds back to local and state law enforcement. A congressman saw this \$1.2 billion sitting in the United States Treasury Department's kitty and said, we need that, too, in the general fund of the United States Treasury, and ripped \$1.2 billion out of the Department of Justice's forfeiture kitty. In December the Department of Justice realized it had a cash flow problem. And so it announced that it was delaying the payments to Maryland, to Oklahoma, to Nebraska, to Minnesota, to all those states that participate in this federal collaborative effort in slowing down those payments. In essence, like any organization that has a cash flow problem, what it's banking on is that Nebraska law enforcement will continue to collaborate with the federal government so that it could...the federal government can turn around pay Oklahoma, Maryland, and Minnesota. The Department of Justice is banking on the idea that tomorrow's seizures that are forfeited under federal law pay yesterday's bills that are owed to other states. That has caused great concern. But what it has also done is presented an opportunity to narrow the use of the federal programs, the adoptions and the joint task forces, to things that are really serious, to those interstate movements of drugs, to that traffic coming out of Colorado that you are...that people in this state are concerned about that are big drug dealers. And my suggestion is that you seize the moment--pardon the pun--seize the moment to codify in Nebraska's law that collaboration with the feds, either through a joint task force or through adoption, occur only when it is a serious amount of property as...and draw the line at \$50,000 in cash. [LB1106]

SENATOR SEILER: Thank you. Any further questions? Seeing none, thank you for your testimony. [LB1106]

LEE McGRATH: Mr. Chairman, members, thank you. [LB1106]

SENATOR SEILER: Any further proponents? [LB1106]

BRAD RICE: (Exhibit 5) Good afternoon, Senator. Senator Seiler and members of the Judiciary Committee, I am Colonel Brad Rice, B-r-a-d R-i-c-e, superintendent of the Nebraska State Patrol. I am here to testify in support of LB1106. Seized money and the proceeds from seized assets are distributed as set out in Article VII-5 of the Nebraska Constitution. If the crime is a drug offense, half the money is distributed to counties for drug enforcement purposes and half is distributed to the schools. Forfeiture laws are intended to deprive criminals of illegal gains and of equipment used to further their criminal activity; vehicles used to transport drugs and money gained from the sale of illegal drugs are typical examples. LB1106 strengthens Nebraska's forfeiture laws by establishing sound judicial procedures and processes in order to protect the rights of both the innocent and the guilty. Prosecutors must first obtain an underlying criminal conviction before they can proceed with a forfeiture hearing. Forfeiture is not an option if the defendant is found not guilty. After the conviction, the bill requires a separate evidentiary hearing before the court on the issue of forfeiture. It allows a defendant to not testify at their criminal trial and to testify at their forfeiture hearing. Under this bill, a defendant is not forced to choose between their constitutional right to remain silent at a trial and protecting their property. The court may also appoint an attorney to represent the defendant at the forfeiture hearing if they are indigent. Innocent third parties may also claim their property and participate in the forfeiture hearing and may have an attorney appointed to represent them. The standard required under the bill is clear and convincing evidence, which is higher than the preponderance of evidence standard used in civil actions but less than the beyond a reasonable doubt standard required for criminal convictions. At first blush these protections may appear contrary to law enforcement goals but they are not. It is important for the state of Nebraska to have a fair forfeiture process with protections for innocent third parties, as well as guilty persons. This bill achieves a balance of society's goals: preventing criminals from enjoying the fruit of their criminal activities while better protecting the rights of the guilty and innocent third parties. Thank you for your time. I would be happy to answer any questions you may have. [LB1106]

SENATOR SEILER: Any questions of this witness? Thank you very much for appearing. [LB1106]

BRAD RICE: Thank you. [LB1106]

SENATOR SEILER: Next proponent. [LB1106]

AMY MILLER: (Exhibits 6 and 7) Good afternoon, Senators. My name is Amy Miller; that's A-m-y M-i-l-l-e-r. I'm legal director for the ACLU of Nebraska and I'm handing out both the testimony and the report that Senator Garrett alluded to that we sent you an electronic link back in the fall. Clearly the nonpartisan nature of the testifiers in support of this bill that you've seen indicate what a wise reform and what a necessary reform it is. We told several stories of some of

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the people that we've interacted with directly. In my time with the ACLU I've represented half a dozen individuals who were never charged with a crime, not even a traffic offense, but had to go to federal court or state court to fight to get their money back. One of the stories we told, one of the most recent ones, Pastor Marco Silva is a traveling evangelical minister who moves from Spanish church to Spanish church. He presents a short film about his orphanage that he runs in Peru, passes the hat, and tries to collect money. Now he was pulled over just outside of Seward by deputies who said that he had failed to signal his lane change. And then in the course of the traffic stop they asked if they could search his car. And he says, I am a godly man so I said yes because I wish to help the police. At that point they came across the \$4,000 cash and the \$10,000 in checks and credit card receipts that he had from his travels. This looked so inherently suspicious they pulled him in and held him for four hours, questioning him and his fiance about where the money came from. And Pastor Silva said, I kept trying to show them the film about the orphanage but they did not want to see it. He also described how upsetting it was to him that he really did want to comply with everything law enforcement wanted to do. I'm not an expert in this field, but I'm not aware of any drug dealers or human traffickers that work with checks and credit card receipts, but they seized all of the money, including the random change that Pastor Silva had in his pocket, and sent him on down the road. Now we were able to receive the money back after a couple of months, but most people are not that lucky. Most people have to go to court. They have to hire an attorney. If they're lucky they'll find an attorney who will work on a contingency fee basis and take a slice off of their cash if they win it back. This is just not a fair process for innocent people. Keeping forfeiture available for those who, in fact, have been found guilty of a crime is a reasonable balance between both the rights of the innocent and those who are seeking this effort for law enforcement purposes. And, Senator Seiler, you asked Mr. O'Brien about notice to third parties in publication. I think if you look at the bill on page 23--I did not bring my glasses--page 23, line 4, there's a provision there that talks about notice in publication to ensure that someone will find out what's going on if they're looking at legal notices, as well as an obligation to try to reach the person who is the actual legitimate owner of the property. I'm happy to answer any questions if you have them. [LB1106]

SENATOR SEILER: I have a question on your letter, on page 2, John Nelson account. Is that \$4,800 or is that \$4.80 or \$48? And I'm sure it's not... [LB1106]

AMY MILLER: That is a fast typist who did not catch her thing. Yes, that is only \$48,000. [LB1106]

SENATOR SEILER: Okay. [LB1106]

AMY MILLER: There is an extra...strike the extra zero. He did not have \$400,000; he had \$48,000. [LB1106]

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SENATOR SEILER: Thank you. Any further questions? Senator Pansing Brooks. [LB1106]

SENATOR PANSING BROOKS: Thank you. Thank you for coming, Ms. Miller. I appreciate it. I was wondering if you have been able to review the suggested changes which Mr. McGrath has proposed. [LB1106]

AMY MILLER: I haven't yet. We have had such good success working with the model bills that Mr. McGrath's organization and others have come up with, and the Attorney General's Office, that I'm sure we'll all put our heads together and take a quick look. He is absolutely right that the federal system is where most of this money has been flowing. And if we can shut that pipeline off, that would be great. Being able to figure out how to do that without violating any separation of powers or supremacy issues I think is the only trick, but Mr. McGrath's organization is one of the leaders and the experts in this field, so we'll look hard at what their recommendations are. [LB1106]

SENATOR PANSING BROOKS: Okay. So if some amendment were possible, you would be in agreement to that. [LB1106]

AMY MILLER: We would. [LB1106]

SENATOR PANSING BROOKS: Thank you. [LB1106]

SENATOR SEILER: Any further questions? Thank you. [LB1106]

AMY MILLER: Thank you. [LB1106]

SENATOR SEILER: Next proponent. Seeing nobody moving, opponent. [LB1106]

JUSTIN KALEMKIARIAN: Mr. Chairman, Senators, my name is Justin Kalemkarian, J-u-s-t-i-n; last name Kalemkarian, K-a-l-e-m-k-i-a-r-i-a-n. I'm an attorney with the Berry Law Firm here in Lincoln and I'm here also on behalf of the Nebraska Criminal Defense Attorneys Association. In listening to the testimony today, it would seem kind of odd that I would stand up here in opposition. We're opposed in general, in principal, to the idea of civil forfeiture, and I don't think that's any surprise to any of the senators here today. The problems that we have with this bill are a couple. Number one, it adds further punitive measures to statutes, criminal statutes that already have sufficient punishments contained therein. To simply add on...in the language of the bill, it's clear that upon sentencing the judge can then ask for forfeiture. We believe that the levels of incarceration, the option of probation, and fines are sufficient to deter crime and to ensure the

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safety of the public. Without forgoing that opposition, however, I'm concerned about a couple of more specific things. Number one, I'm a little bit confused about what happens with 28-431. That's the forfeiture statute that's in place already. My reading of LB1106 is that--in Section 11 on page 21--it does say that "an in rem action for forfeiture of property may only be sought by the prosecuting authority when the owner or possessor," and it goes through several different scenarios. My concern is though that creates confusion as to whether or not 28-431 is still in place. I'll give an example, a real-world example of how that might come up. We had a...we have argued successfully on a motion to suppress on a case in a different county and that motion was granted. I filed it and it was granted. The case was then dismissed under I think what the intention of LB1106 is that now that has been...that case was dismissed, the cash that was seized, and it was a significant amount, be returned to the owner. My concern is that, 28-431 still being in place, that might still come into play and the prosecuting attorney could then start an in rem action against that money. Even though Section 11 seems to prohibit it, with 28-431 still on the books I think that could be a problem. And as you're...as the senators are aware, say at a pretrial motion, if that's granted, the case is dismissed, jeopardy has not attached. And as Mr. McGrath pointed out Franco, that case would not apply. The second reason, more specific reason I'm concerned about this bill is that I'm proud to be a Nebraskan. I'm proud to live in a state that has the highest burden possible for forfeitures. That's beyond a reasonable doubt. We're all aware that that's the current status. What this bill does though is it keeps the "beyond a reasonable doubt" standard for criminal convictions, obviously, but it then lowers that burden down to clear and convincing for the purposes of forfeiture. I don't, for one, I don't see how that further protects the public. I think that further erodes the civil liberties that we already enjoy. For those reasons, I stand in opposition of LB1106. Are there any questions? [LB1106]

SENATOR SEILER: Any questions? I just have one. [LB1106]

JUSTIN KALEMKIARIAN: Yes. [LB1106]

SENATOR SEILER: You said the judge asks for forfeiture after the...he doesn't really ask for forfeiture, it's already pled in (inaudible). [LB1106]

JUSTIN KALEMKIARIAN: And I'm sorry, Chairman. I did misspeak on...I misspoke on that. [LB1106]

SENATOR SEILER: No problem, just wanted to clarify the record. Any further? Yes, Pansing Brooks. [LB1106]

SENATOR PANSING BROOKS: Thank you. Thank you for coming. Is it Mr. Kulemmcarrion (phonetically)? [LB1106]

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JUSTIN KALEMKIARIAN: Kalemkiarian. [LB1106]

SENATOR PANSING BROOKS: Kalemkiarian. [LB1106]

JUSTIN KALEMKIARIAN: Every judge says it s little bit different. I answer to a lot of different last names. [LB1106]

SENATOR PANSING BROOKS: Okay. Can you show me where it changes the burden to clear and convincing evidence in the statute, or the bill as proposed? [LB1106]

JUSTIN KALEMKIARIAN: For example, on page 10...well, sentence that begins on page 9, continues on to page 10, line 2, "be forfeited as a part of the sentence imposed if it finds by clear and convincing evidence adduced at a separate hearing," there's...it continues on, but that's the important portion. [LB1106]

SENATOR SEILER: And you're stating that it should stay consistent with beyond a reasonable doubt? [LB1106]

JUSTIN KALEMKIARIAN: We are in general opposed to the bill. But without giving up that opposition, yes, we would argue that that...those protections that we enjoy now should be kept at that beyond a reasonable doubt, not only for the personal liberties... [LB1106]

SENATOR SEILER: Can you think of any other civil type of remedy that has beyond clear...beyond a reasonable doubt? [LB1106]

JUSTIN KALEMKIARIAN: Not off the top of my head at this time, Chairman. [LB1106]

SENATOR SEILER: I've practiced for 49 years and haven't found one yet, so. Okay. I'm sorry. Any further questions? [LB1106]

SENATOR PANSING BROOKS: I don't. Thank you. [LB1106]

SENATOR SEILER: Thank you very much. [LB1106]

JUSTIN KALEMKIARIAN: Yep. Thank you. [LB1106]

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SENATOR SEILER: Next proponent...or opponent, excuse me. Seeing none, anybody in the neutral? Seeing none, Senator Garrett, you may close. [LB1106]

SENATOR GARRETT: Thank you, Senator Seiler and members of the committee. I've got to say what an absolute pleasure it was working on this when I came back from Washington, D.C., with this civil asset forfeiture issue, and what a pleasure it was working with the Attorney General and his office. And if you felt a disturbance in the force to have the Attorney General's Office, the ACLU, and the Institute of Justice--libertarians, liberals, and conservatives--all in one office working together, it was a sight to behold. And it was a great pleasure for me to be able to work this. And there was a lot of work went on with the attorneys in the Attorney General's Office, the ACLU, the Institute of Justice, to get this bill where it is. You know, the mention of...we would love there to be the preponderance of evidence being what it is, but clear and convincing evidence is...if we could find a way around that double jeopardy, we would love to have that too. But we couldn't find a way around that. So this is one of those issues where when you look at it, the initial concept of civil asset forfeiture was really great because we were going to take assets away from drug dealers and pornographers and child pornographers and those types of people. But it ran a little astray and it started violating the rights of innocent civilian citizens. And so this bill I think will really get it back to where it needs to be. One of the things Lee McGrath mentioned earlier is in Minnesota the average civil asset forfeiture is \$1,400. We're not talking about huge amounts of money. You know, we talk about trying to go after drug kingpins and everything. But when you look at the average civil asset forfeiture, when you're talking \$1,400, you can see that a lot of innocent civilians...citizens are getting caught up in this. And then for them to have to go through the whole judicial proceeding of proving that that wasn't ill-gotten gain or the results of some criminal activity, that's preposterous. And so I really feel very strongly about this bill and I encourage the members to pass this to General File. [LB1106]

SENATOR SEILER: Any questions of Senator Garrett? Yes, Laura Ebke. [LB1106]

SENATOR EBKE: I'd just make one comment. You referred to it as a disturbance in the force, and I was thinking of it more in terms of the perfect storm (laughter). So I appreciate that. Thanks for bringing it. [LB1106]

SENATOR GARRETT: Thank you. [LB1106]

SENATOR SEILER: Any other questions? Thank you very much. Senator, you may commence on LB1108. [LB1106]

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SENATOR GARRETT: (Exhibit 1) Thank you. Thank you, Chairman Seiler, members of the committee. Again, I am Senator Tommy Garrett, T-o-m-m-y G-a-r-r-e-t-t. Thank you for allowing me to testify on behalf of LB1108. LB1108 is a bill that would require the reporting of seizures and forfeitures and follows closely a program that was instituted by the state of Minnesota. Minnesota has adopted legislation that requires all county and state-level law enforcement agencies to record every forfeiture seizure and send them to the State Auditor to be published and reported to the Legislature. These records show what was seized, for what purpose, and the amount of money resulting from each seizure. This is important because it shows if a seizure accompanies a criminal citation, if the property was abandoned, the type of conveyances, firearms, amount of cash, etcetera. Because of their program, Minnesotans now know that last year 465 civil forfeitures had a value of less than \$100; 1,918 civil forfeitures had a value within the range of \$100 to \$499; and 884 civil forfeitures ranged from \$500 to \$999. These forfeitures with a value under \$1,000 account for 69 percent of forfeitures in Minnesota. Minnesotans also know that 13 percent of all forfeitures are firearm forfeitures and can see if the case was an in rem case or a case brought against an individual. Then we have Nebraska where the federal government came in and froze accounts of law enforcement in Omaha because of a lack of reporting and unaccounted-for funds which resulted in the Nebraska State Auditor having to go in and perform an audit. Civil forfeitures provide an important law enforcement tool to interrupt criminal activities, but there is no transparency regarding how forfeitures are being used by governmental entities. LB1108 will ensure that regardless of where the legal action is filed, the circumstances of each forfeiture are reported to permit a greater understanding of this source of revenue and how law enforcement agencies use any proceeds collected through the forfeiture process. The reported information will be collected by the Auditor of Public Accounts for annual reporting to the Legislature. I think LB1108 will be a valuable tool for the Legislature as we access Nebraska's forfeiture programs going forward...assess Nebraska's forfeiture programs going forward. The better the data and more informed our public policy decisions can be as we work to ensure that innocent property owners have...their property rights will be protected. And at that point I'll... [LB1108]

SENATOR COASH: Right here. Thank you, Senator Garrett. A couple of questions I have. How did you land on the Auditor as the repository of this report? [LB1108]

SENATOR GARRETT: Well, when we first started looking at civil asset forfeiture, we were looking at all manner of things. Our first thought was we need to do away with the programming. It was like, no, that's a little bit too radical. And so we started looking at criminal prosecutions. And the first thing that we came down on really was the whole transparency and talking to the Auditor, Charlie Janssen, and the fact that civil asset forfeitures currently are being reported but it's just a total dollar denomination. It doesn't have any of the specifics, which is useless. [LB1108]

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SENATOR COASH: Currently being reported to the Auditor? [LB1108]

SENATOR GARRETT: Yes, but just a bottom-line number with none of the breakout of the circumstances, what was seized, why, if there was a criminal charge. And so we originally were working with the Auditor's Office on that. [LB1108]

SENATOR COASH: Okay, well, that makes sense, because as I read the intent of the bill, my thought immediately went to the Crime Commission, which is legislatively instituted, which tends to track a lot of very similar things with regard to criminal activity, so just wanted to put that out there just as we debate this bill. And I'm wondering if the Crime Commission for you was anything that you considered. [LB1108]

SENATOR GARRETT: No, we had just been talking with the Auditor. I had not considered the Crime Commission. [LB1108]

SENATOR COASH: (Exhibit 2) Okay. My next question, and I doubt you probably heard about this, but city of Lincoln is saying that this would require the Lincoln Police Department to oppose a section and some of the sections...Section 2 of the bill, because it would require new programming, additional reports, and additional equipment. So I'll just...I'll make sure you have a copy of this so you can take a look at it and see if you agree with that or not. [LB1108]

SENATOR GARRETT: The initial push back we got that this was going to require too much in the way of law enforcement and municipalities reporting, and my response to that is tough noogies. I mean you're taking money and assets from citizens. Some of them are criminal and it's well deserved, but we in the Legislature, we the people of Nebraska, should see what's going on. And again, I had my eyes watered with the whole civil asset forfeiture and the equitable sharing program that the Department of Justice has and how it seemed like the majority of our cases were going towards the federal program which circumvented state statute and shorted our education fund and our drug education fund because, as was mentioned earlier, 80 percent of those proceeds were going back to the local law enforcement or state law enforcement agencies. [LB1108]

SENATOR COASH: All right. Thank you, Senator Garrett. I don't see any questions from the committee. [LB1108]

SENATOR GARRETT: Thank you. [LB1108]

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SENATOR COASH: Appreciate it. We'll take the first testifier in support of LB1108. Welcome. [LB1108]

RUSS KARPISEK: Thank you, Senator Seiler, Senator Coash, whoever is chairing still (laughter). Members of the Judiciary Committee, for the record, my name is Russ Karpisek, R-u-s-s K-a-r-p-i-s-e-k, and I am the legislative liaison for the Auditor of Public Accounts. Auditor Charlie Janssen sends his regrets for not being here, but he did have a prior obligation. I'd like to thank Senator Garrett and Colin Fury for looking to the Auditor's Office for cooperation with this bill. On bills like this we would usually testify in neutral capacity because it's asking us to do something. But as Auditor Janssen is a big proponent of transparency and good recordkeeping, we decided that we would testify as a proponent today. Since Senator Janssen--Senator/Auditor Janssen--and I were both in the Legislature, we feel that getting this information to the Legislature is important. And I guess, Senator Coash, as you brought up, are we the right place to have it, the perfect place? I don't know that. But we're very willing to take it on and work with the Legislature at, I will add, without a fiscal note, and we will work it into our current budget. We would ask that the reports be made quarterly. I think in one place in the bill it says monthly and maybe another place it says quarterly. And we've talked to Senator Garrett about that and I think that makes sense. Our office did do an audit of the State Patrol on this issue, because I think the funds were frozen, and I have one copy. Anyone can go anytime on our Web site, the Auditor's Web site. This audit, as all of ours, all of our audits are on there. So when you think we're not doing anything, they're all on the Web site (laugh), which we're doing a lot but we just hear that sometimes. As far as I know, everything was good in the audit. Some money maybe was put in a wrong line item, but there was nothing malicious, nothing that looked like anybody was trying to do anything wrong. So again, as far as I know, everything is fine. But as we heard previously, the feds now are maybe deciding they like the money more than giving it to us. Again, we're happy to record this information and report it to the Legislature and absorb this in our current budget. And I'd be glad to try to answer any questions if I can. [LB1108]

SENATOR COASH: Thank you, Mr. Karpisek (inaudible)...I guess you're still a senator. [LB1108]

RUSS KARPISEK: Whatever I am. [LB1108]

SENATOR COASH: Russ, does the Auditor currently do anything of this nature? I mean I know that audits are kind of as needed, as...you know, as situations arise. And I know you do, you know, systematic audits on counties and things like that. But does the Auditor currently do anything similar to what Senator Garrett is proposing in that they on a regular basis get a bunch of information and put it out to the Legislature as this bill is asking to do? [LB1108]

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RUSS KARPISEK: Let's see, we would not on this particular one. But we do bring in...everyone has to...every political subdivision--over 2,000 of them--have to send their budget to us. And I think that's where Senator Garrett was saying that we get these numbers because we can say in, say, the city of Omaha, how much money is in their budget from these seizures. So then, of course, you could extrapolate that out to if they got 50 percent of it, it's double, and things like that. So as far as if we do it on this, no, but we could look at their budget very...everyone's budget and see it as the line item. We do, of course, like I say, the budgets; we also do interlocal agreements with all of, again, the subs in the state. So we have a bill in Government dealing with that, that all the interlocals need to be filed with us at the same time as budgets. So we do get a lot of information and put it on our Web site and share with the Legislature. I don't know that there's any that we do now without being asked. [LB1108]

SENATOR COASH: So let me ask it in a different way. You audit accounts, and so what I can go on the Auditor's Web site and see is you audited this department, this city, this county. [LB1108]

RUSS KARPISEK: Yes. [LB1108]

SENATOR COASH: But when I look at LB1108, it doesn't seem like you're auditing anything, you're just gathering the information and putting it out there. So the task that the Auditor's Office is used to doing, which is following the dollars, making sure they went where they were supposed to go, spent appropriately, that's an audit function. But LB1108 is really an information gathering and posting function. So my...I'll ask it again. Does the Auditor's Office do anything outside of audits... [LB1108]

RUSS KARPISEK: Yes. [LB1108]

SENATOR COASH: ...that's just gathering and posting? [LB1108]

RUSS KARPISEK: Yes. [LB1108]

SENATOR COASH: And what are those? [LB1108]

RUSS KARPISEK: Like the interlocal agreements... [LB1108]

SENATOR COASH: Okay. [LB1108]

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RUSS KARPISEK: ...with all the subdivisions, political subdivisions. So they send all those--are supposed to send all of those--interlocal agreements to us and we put them on a Web site. [LB1108]

SENATOR COASH: But there's no...those interlocal agreements, is there some type of analysis that the Auditor's Office does on those agreements to say, yes or no, these interlocal agreements meet what they're supposed to meet? [LB1108]

RUSS KARPISEK: No, because that would have to be done when they form an interlocal agreement, as I would think about it. It has to meet those requirements before it's done. So I think what you're trying to say is, do we really have any power to say, no, this isn't right? No, we don't, and that is something that I'm sure that we'll be talking to senators in the future about, not giving us the power but putting some teeth into some things, as we're trying to do on the interlocal agreements. [LB1108]

SENATOR COASH: Okay. [LB1108]

RUSS KARPISEK: But we do get information in on a number of things that we put on a Web site or turn over to the Legislature that would be very similar to this. [LB1108]

SENATOR COASH: I just prefer agencies to do...to stay focused and I get nervous when I see new duties put on any agency that goes outside of their scope. I like the Auditor's Office to do audits and make sure the tax money is spent the way it's supposed to. I like other agencies to do what they're supposed to do. I do get nervous about broadening that to the point where now the Auditor's Office just becomes an IT function of gathering and posting information. Not to say... [LB1108]

RUSS KARPISEK: Yeah. [LB1108]

SENATOR COASH: This information deserves to be gathered and posted. I'm just not sure the Auditor's Office is the right place, but I'll leave... [LB1108]

RUSS KARPISEK: And again, I think we already do some things like this. And I guess at the end of the day, if the committee decides that this isn't the right place, that we're not putting a fiscal note on it, I don't think that we're going to be upset other than that we would like to be involved in the process if we can be, because it does come back to where this money is coming from, where the money...how are these local subdivisions getting this money, where is it coming

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from, how much, are we getting it all, those sort of things, which we could do in an audit proper. But again, we can't audit over 2,000 subdivisions every year. [LB1108]

SENATOR COASH: Right. I understand. Any other questions for the Auditor's Office? Seeing none, thanks. [LB1108]

RUSS KARPISEK: Thank you, Senators. [LB1108]

SENATOR COASH: Take the next testifier in support. Welcome. [LB1108]

GAVIN GEIS: (Exhibit 3) Chairman Coash, members of the Judiciary, my name is Gavin Geis, G-a-v-i-n G-e-i-s, and I'm here on behalf of Common Cause Nebraska. Common Cause is an organization that's been operating in the state of Nebraska for over 40 years doing government watchdog work, which includes accountability and transparency, so I'm sure you can imagine we think that citizen access to this type of...sort of information is just worth doing on its face alone. We don't need much more of a reason than citizens deserve to know what's going on in government. But I'll go into a little bit more. So two things I want to point out, and they're my points 1 and 2. I'll just skip over that first paragraph because you guys probably know a lot of that already. But we think that until there's actual transparency in this area of government, major issues, major questions will remain for the average citizen. First of all, what exactly is the role that civil forfeiture plays in footing the bill for law enforcement? Yes, right now we have a total figure, but we don't know really where that money is coming from, who is paying that bill. Nebraskans should be able to look at that data, analyze it and say that's too much, that's not enough. That question can't even be answered right now. Secondly, there is a...well, across the nation right now there are questions of racial injustice in law enforcement, and I don't think civil asset forfeiture is exempt from those questions. And without any data to actually determine who is most often stopped and who often has their assets seized, who is the most often to be affected by this, we can't determine whether or not racial injustice is at play in the system and whether as a Legislature you should be looking at those questions and assessing the effects of civil asset forfeiture on minority populations. Secondly, because there is no right to an attorney right now as it stands in civil asset forfeiture, we don't know. And because there is no transparency, we don't know how much this is affecting the poor. Frankly, it's easy to see how the poor are disproportionately affected by civil asset forfeiture. But our organization is interested in looking at how does economic disparity affect every aspect of government. But right now we can't say whether or not that's even at play here. We have a total number. We don't know who's actually being stopped. We don't know who is actually being seized. So just to sum, until there's actual transparency and data here, we can't even begin to assess what the effects of this process are and whether they're broader, deeper questions that we need to talk about as a state. [LB1108]

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SENATOR COASH: Thank you. [LB1108]

GAVIN GEIS: Thank you. [LB1108]

SENATOR COASH: Thank you, Mr. Geis. With regard to your number 2 question,... [LB1108]

GAVIN GEIS: Yes. [LB1108]

SENATOR COASH: ...and I'm sure Senator Garrett will clarify this if I'm incorrect,... [LB1108]

GAVIN GEIS: Right. [LB1108]

SENATOR COASH: ...but I don't believe that part of the report will be any kind of racial information that goes to the Auditor. [LB1108]

GAVIN GEIS: Correct, not at this point, but at least it will point us toward the cases where this is happening. Right now the only way to really figure out who is being affected by this is by looking at case names, sorting through that data, and then drawing that information. So, no, at this point we don't know anything. This report will get us closer. It'll get us down that road so that we can begin to assess that data. As an organization that's what I do. I go through, I gather information. I'm not shy about doing that. But this would provide us with at least the very beginning steps of being able to say we can gather these cases, we know it affected this many people in these many instances, let's go out, let's gather that data, instead of going case by case. [LB1108]

SENATOR COASH: Well, you're... [LB1108]

GAVIN GEIS: So like you said, it's not in the bill at the moment, that's correct. [LB1108]

SENATOR COASH: Well, you're bringing up a concern that I would have. I'm concerned about the privacy of a person who may have had their property civilly forfeited. If it's part of a criminal case, that's part of the public record, I'm fine with...you know, that is what it is. [LB1108]

GAVIN GEIS: Right. [LB1108]

SENATOR COASH: But I guess I'm concerned about that privacy as well. [LB1108]

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GAVIN GEIS: It's certainly worth discussing, but I don't know how that weighs against the right of taxpayers and voters to know what this process looks like. What we shield taxpayers from and what we don't let them know, that is up for the Legislature to decide at the end of the day. But I think there is, like I said at the top, there is value in accessing data. [LB1108]

SENATOR COASH: Agreed. Any questions for Mr. Geis? Senator Seiler. [LB1108]

SENATOR SEILER: I believe that all the sheriffs, police, State Patrol, have to report stops and the people that they come in contact with for your racial discrimination. And that's all gathered and made in an annual report. So I think this that you're...wouldn't be able to...you should be able to go from this to that report and be able to figure out whether or not it's a racial stop. [LB1108]

GAVIN GEIS: And my only aside would be just the more "crosspoints" of data we have on those sorts of questions, the better, and this would provide us another. [LB1108]

SENATOR SEILER: Have you seen that report? Have you seen the report... [LB1108]

GAVIN GEIS: Yes. Yes, and it is... [LB1108]

SENATOR SEILER: ...that I'm talking about? [LB1108]

GAVIN GEIS: Yes, I know what you're talking about. [LB1108]

SENATOR SEILER: Okay. [LB1108]

GAVIN GEIS: There is...that data exists out there. But like I said, another data point to be able to cross-reference to get a deeper picture of what it looks like in the state of Nebraska doesn't hurt anybody. [LB1108]

SENATOR SEILER: Except it costs money,... [LB1108]

GAVIN GEIS: (Laugh) Well,... [LB1108]

SENATOR SEILER: ...which down the hall they're arguing about right now. [LB1108]

GAVIN GEIS: That's for them to argue. [LB1108]

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SENATOR COASH: Any other questions? Any other questions for Mr. Geis? I don't see any. Thanks for your testimony. [LB1108]

GAVIN GEIS: Thank you. [LB1108]

SENATOR COASH: Take the next testifier in support. Welcome. [LB1108]

LEE McGRATH: (Exhibit 4) Thank you, Mr. Chairman. Members of the committee, my name is Lee McGrath, L-e-e M-c-G-r-a-t-h. I'm the legislative counsel for the Institute for Justice. Mr. Chairman, members, you are four times as efficient as the members of the Minnesota State Legislature. It takes 201 of them to work on state law. But one of the areas in which they have an advantage over you is that they know more about the 7,000 forfeitures that occur in Minnesota on an annual basis. The state auditor there, following the instructions of state legislature, reports every single seizure that occurs. And that, importantly, it is...there are salutary benefits of reporting. More importantly, there is information that they are capturing. They are capturing that the average seizure is \$1,400. Now Minnesota is a very different place than Nebraska. We do not have an interstate...we do not have Interstate 80 running east to west and west to east as a major flow of drugs coming out of Colorado. But they know more than you do and, because of that, they can engage in more important public policy discussions, more insightful public policy discussions. Give you an example: \$1,400 is the average seizure. What did that mean? That allowed Minnesota to open up small claims courts so that property owners did not have to go into district court to raise their claims. Additionally, it tells your counterparts in Minnesota that 95 percent of the time people do the rational thing, which is just walk away, and that's one of the problems that exists in forfeiture. What is being proposed here is a very good bill that will give you more information. What I have handed out to you is a suggestion and that is that what is on page 10...rather, page 8, and what is proposed on page 13 are two different things. To a question earlier about racial identification, page 8 requires law enforcement to identify the race of the person whose property was seized; page 13 does not. So in drafting, the time pressures I suppose of drafting caused these two sections to be different. What I would suggest to you is that you standardize them as I have proposed on the one-pager here. Seven of these things are already in your bill, in this bill. What I am proposing that is new is paragraph (iii), (iv), and (vi), so let me take a moment to talk about...quickly talk about those. [LB1108]

SENATOR COASH: Okay. [LB1108]

LEE McGRATH: Little (iii): In the bill today there is only a description of guns. You should know more about it than just guns. You should know about cars and other things that are seized. When you do, you may learn that there is a disproportion of junkers that get seized as opposed to new cars that get seized. Secondly, (iv): You want to know where the seizure took place and you

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particularly want to know the direction of the traffic of where the seizure took place. In Oklahoma, for example, it's been reported that--and in Tennessee--that law enforcement is on the cash side of the highway, it's not on the drug side of the highway. I believe that the law enforcement here in Nebraska should be focused on interdiction and getting these poisonous drugs off the street. They should be working the side that gets these drugs, seizes these drugs, and destroys them before they get onto the streets of Nebraska. There is budgetary pressure to cause them potentially, and you want to know this, work the cash side of the street. [LB1108]

SENATOR COASH: Mr. McGrath, I'm going to see if we have any questions. [LB1108]

LEE McGRATH: Thank you, sir. [LB1108]

SENATOR PANSING BROOKS: I'd like to hear his last thing. [LB1108]

SENATOR COASH: All right, Senator Pansing Brooks. [LB1108]

LEE McGRATH: Thank you, Senator. And the last point that is different that I suggest adding is (vi). What happened to this property? Did the spouse, did the parent get this property back? Was it destroyed? Was it retained by law enforcement? Seven of these things are already in Senator Garrett's bill. Three are suggestions. I encourage you to adopt and standardize the reporting requirements for these ten elements in both your human trafficking and your drug trafficking forfeiture statutes. [LB1108]

SENATOR COASH: All right. [LB1108]

LEE McGRATH: Thank you, Mr. Chairman. [LB1108]

SENATOR COASH: Thank you, Mr. McGrath. And I'll use this opportunity to say that there is requirements of race and ethnicity already in the bill, so I stand corrected on that. Any other questions for Mr. McGrath? Senator Pansing Brooks. [LB1108]

SENATOR PANSING BROOKS: Thank you, Mr. McGrath, for coming forward again. I think it's really nice when people come and have suggested ideas of ways to work on amendments and to show them to us rather than necessarily just coming forward and saying here's where it's wrong. It's really helpful to see your suggestions and ideas because it helps us to understand a little better rather than just saying, well, here's some general policy ideas that don't work. So thank you for that. [LB1108]

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LEE McGRATH: Mr. Chairman, Senator, thank you. I must give credit to Senator Garrett's staff. They're quite an encouraging bunch over there. [LB1108]

SENATOR PANSING BROOKS: They are. Thank you. [LB1108]

SENATOR COASH: All right. I don't see any other questions. Thanks for your testimony. [LB1108]

LEE McGRATH: Thank you. [LB1108]

SENATOR COASH: We'll take the next testifier in support. Welcome. [LB1108]

AMY MILLER: (Exhibit 5) Good afternoon. My name is Amy Miller; that's A-m-y M-i-l-l-e-r. I'm legal director for the ACLU of Nebraska. In the previous hearing I handed out a copy of our report "Guilty Money." And if you glance towards the very back of that report, you'll see a replication of the sorts of reports that Congress gets every year about the money that's seized in Nebraska. We've got a chart that shows you a breakdown from fiscal year 2010 to 2014 that, you know, Milford Police Department got \$14,000. In contrast, 2014, Douglas County Sheriff got \$436,000. Now it doesn't get to the level of granularity that LB1108 would propose. But Congress is getting information on this. The Nebraska Legislature should as well. When we issued our report, we looked at these federal reports and though, ooh, I wonder what's happening in the state court system. And we did an open records request of the Nebraska Court Administrator's Office. I thought it would be super easy, that they'd just be able to pull all forfeiture cases. There is no way that their system is set up to do that, so we sort of made a homemade method where they pulled cases where the defendant was "Cash." We were able to guesstimate that in the last...since 2011, in our state court system there has been about \$3 million in forfeited funds. Now that's just cash. We couldn't easily pull for guns or for cars or for real estate. But what I'm trying to suggest is there is a vast amount of money moving back and forth through our state court system and in our federal court system and we currently have little or no ideas about what's happening where. LB1108 brings that transparency so that everyone can at least then decide whether or not we want to have further conversations. Future Legislatures looking at the information may decide there is a problem here; or, perhaps with more information, we will then be able to sleep content and know that civil forfeitures are happening as they should be. With that, I'm happy to answer any questions you may have. We very much appreciate the bipartisan support of the senators that brought forward not only the underlying interim study but also LB1108. And we look forward to working on any necessary reforms or amendments to bring the bill into final form. [LB1108]

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SENATOR COASH: Thank you, Ms. Miller. I don't see any questions from the committee. Thanks. [LB1108]

AMY MILLER: Thank you. [LB1108]

SENATOR COASH: Take the next testifier in support. Seeing none, is there anyone here to testify in opposition? Seeing none, is anyone here in a neutral capacity? Seeing none, Senator Garret, you're recognized to close if you'd like. [LB1108]

SENATOR GARRETT: Thank you, Senator Coash. Again, I can't tell you what a delight it was to work with the Attorney General's Office and the Institute of Justice and the ACLU, Corey O'Brien and the Attorney General's Office, and the fact that Lee McGrath from the Institute of Justice would travel down here to provide testimony. LB1108 is a beautiful piece of legislation. A lot of times we debate transparency, but this is one of those cases where transparency is a wonderful thing. Nebraskans have a right to know what's going on in the state with civil asset forfeiture. We in the Legislature deserve that right as well. Senator Coash, you mentioned earlier about the possibility of the Crime Commission potentially taking these numbers or getting these numbers. And the only thing I thought about while I was sitting out here was, since the Crime Commission is comprised of law enforcement kinds of people and everything, this is one of those things about them reporting on themselves. I would almost feel that it might be a bit of a conflict of interest or even an appearance of conflict of interest. The fact that the Auditor's Office is already collecting that total number, now we just want a little bit more specificity as to where that number comes from. So I feel really comfortable in talking with Auditor Janssen and Senator Karpisek. I think they have the ability to do that, so. And Lee McGrath made some good points. And much like Senator Patty Pansing Brooks said, kudos to him for providing those specific details on how we can make this law better. Working on this whole civil asset forfeiture situation has really been very enlightening to me because when I found out about how so many of the asset forfeitures were going to the federal program and the equitable sharing program and then I saw how the State Patrol was using some of their civil asset forfeiture money and that they were using a lot of the money to fund the new Crime Lab. I think we all know that the State Patrol, we need a new crime lab. It takes far too long to get drugs processed and everything else, and kudos to them for doing that. But I feel bad as a Legislature that we're leaving it up to the State Patrol to come up with innovative ways to fund what we in the Legislature should be funding. And so this brings a lot of light to a lot of different issues. And I encourage the committee to pass LB1108 and give some transparency to the people of Nebraska and the Legislature on what's going on with civil asset forfeiture. [LB1108]

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SENATOR COASH: (Exhibit 6) Thank you, Senator Garrett. Before I close the hearing, we'll read into the record a letter of support from the National Rifle Association. And we'll close that hearing. Thanks. [LB1108]

SENATOR GARRETT: Thank you. [LB1108]

SENATOR SEILER: Senator Morfeld, you're up on LB980. [LB980]

SENATOR MORFELD: (Exhibits 1-5) Good afternoon, Senator Seiler. Members of the Judiciary Committee, my name is Adam Morfeld; for the record, that's A-d-a-m M-o-r-f-e-l-d, representing the "Fighting" 46th Legislative District, here to introduce LB980. LB980 grants limited immunity to persons seeking help for themselves and/or someone else in need of immediate medical attention due to a controlled substance overdose. The law will only apply to an individual who is experiencing an overdose, is the first person to call for medical assistance, and stays on the scene and cooperates fully with law enforcement when medical attention arrives. This law would apply to the person calling and the person in need of medical attention. This legislation ensures that we are putting lives of Nebraskans first while still ensuring accountability to the law. The Legislature passed two bills into law last year that pertain to LB980. I introduced LB439 last year which granted limited immunity for minors seeking medical attention for themselves or another person experiencing acute alcohol intoxication. In addition, I also introduced LB546 which would make the life-saving drug Naloxone more readily available to family members and friends of possible opiate abusers. In a number of other states these three measures have actually been passed together, so the two that were passed last session and this bill as well. It is important that we must put lives first and provide opportunities for Nebraskans to seek critical medical attention when it is needed. Across the country we have seen a recent epidemic of drug overdoses. Part of this can be attributed to the prudent tightening and increased mandatory monitoring of prescription drugs, the bill by Senator Sara Howard that we advanced just last week and, I would note, it is one that I strongly support. That being said, those addicted to prescription drugs in particular then move to street drugs which are often more dangerous and unpredictable and result in more overdoses. According to a report published in 2014 by the Nebraska Department of Health and Human Services, drug overdose deaths have quadrupled since 1999 and are responsible for 146 deaths in 2002 alone. Tragic deaths can be avoided with policies such as this, and Nebraska would join 34 other states and the District of Columbia with similar laws in different forms if LB980 is passed. It is also important to note that the law would only apply to the possession of a controlled substance and drug paraphernalia. This bill gives ample discretion to law enforcement in the event of a person manufacturing or having the intent to distribute a controlled substance, among other crimes. This bill does not affect those. If the passage of this bill can save one life and encourage one person to make a call for medical assistance when needed, it will be worth it. This is commonsense drug policy that maintains strong penalties for those dealing and manufacturing drugs. I would like to also hand

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out several different--oh, they're already handed out, great--several different pieces of information. And I'd just like to go through them very briefly: first, a letter of support from Karen Linder who actually testified on my bill, LB43...or, actually, it wasn't LB439, because it wasn't before this committee, but the Naloxone bill last session. Her son passed away from a drug overdose and I think is one of many examples of mothers and grieving families who have to deal with this on a daily basis. And I encourage you to read her letter and then also look at the story that ran in the World-Herald about her and other families. In addition, there are some other letters; also a letter of support from the Nebraska Medical Association; and then also from the Department of Health and Human Services talking about the public health crisis that drug overdose deaths is occurring in Nebraska; and then also, another overview of all the different states that have different what we call opioid antagonist access, so things like Naloxone, along with some other information that we have provided. I'd like to thank you for your consideration. I'd be happy to answer any questions and I urge you to advance LB980 to the floor. Thank you. [LB980]

SENATOR SEILER: And you offer that packet as for the record? [LB980]

SENATOR MORFELD: Yes, yep, I can do that. [LB980]

SENATOR SEILER: It will be received. [LB980]

SENATOR MORFELD: Excellent. [LB980]

SENATOR SEILER: Any further? Senator Williams. [LB980]

SENATOR WILLIAMS: Thank you, Senator Seiler. Thank you, Senator Morfeld. A couple of just quick questions so I understand. On page 9 of the bill where you're describing the actions that are necessary to take, under (b), it's the person is the first person to make a request. [LB980]

SENATOR MORFELD: Um-hum. [LB980]

SENATOR WILLIAMS: You see any issue about if it's a group situation and something is going on? Does... [LB980]

SENATOR MORFELD: Yeah. [LB980]

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SENATOR WILLIAMS: I guess I'm throwing that out. Does that need any further clarification?  
[LB980]

SENATOR MORFELD: No, actually. [LB980]

SENATOR WILLIAMS: No? [LB980]

SENATOR MORFELD: And this was a question that came up in that this is almost a carbon copy of LB439, just dealing with drugs instead of alcohol. And that's a great question and it was a question that came up during the discussion on LB439 in committee, which was in General Affairs because that dealt with alcohol. And one of the things that we want to make sure that we do is make it as easy as possible for law enforcement and medical folks to know who is receiving the immunity. And if you have a whole group or a bunch of people in the house or something like that, it becomes far too complicated to administer the immunity. And so the reason why we put the first person to contact the police is to make it so that the administration of this immunity is clear. [LB980]

SENATOR WILLIAMS: Okay. [LB980]

SENATOR MORFELD: And it also alleviates the concerns of some senators would say, well, a whole mass of people participating in this... [LB980]

SENATOR WILLIAMS: "I'm first." [LB980]

SENATOR MORFELD: ...yeah, kind of, you know, activity could get immunity. So it makes it very clear that it's either the person that's calling and the person that's receiving assistance; or there could be a situation where the person that is experiencing a drug overdose may be cognizant enough to call for themselves. [LB980]

SENATOR WILLIAMS: Could have. Second question along the same line is under...on line 23, line (c), and then under that on (ii), the question about they have to cooperate with medical assistance and law enforcement personnel, are you concerned at all about what the definition of cooperate might mean? Does cooperate mean if the law enforcement officer says, I want to know where you got the drugs, I want to know who the dealer was? Is that...if they don't answer those questions, does that mean you didn't cooperate? [LB980]

SENATOR MORFELD: Yeah, that's been a question that we've been contemplating. You know, for me and for the record, you know, my intent is that cooperating with police in the sense of

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helping them figure out what's going on and so that the person can receive the right kind of medical care, and staying on the scene as well so that somebody is remaining there with the individual and they're doing the responsible thing. Now obviously a police officer could interpret that a little bit differently and could ask those questions. I'd leave that up to the discretion of the police, and I would be more than happy if there are senators that are concerned about that being left up to look at. [LB980]

SENATOR WILLIAMS: And again, I am not questioning this bill. [LB980]

SENATOR MORFELD: Yeah. [LB980]

SENATOR WILLIAMS: I think I'm trying to be sure that it does with those kind of things what the intent of this group, and in particular your intent, would be. [LB980]

SENATOR MORFELD: Well, and I appreciate that, Senator Williams. And actually a 15-year-old brought that up with me that was reviewing the legislation, so. [LB980]

SENATOR WILLIAMS: Well, that was right at my level. I'm just telling you. [LB980]

SENATOR MORFELD: So I think, you know, you, along with the 15-year-old demographic, are asking the same question, and I think that might be something that we need to work with folks to clarify. [LB980]

SENATOR WILLIAMS: Thank you. [LB980]

SENATOR MORFELD: Thank you. [LB980]

SENATOR SEILER: Any further questions? [LB980]

SENATOR MORFELD: I cleared out the room. [LB980]

SENATOR SEILER: Thank you. [LB980]

SENATOR MORFELD: Thank you. [LB980]

SENATOR SEILER: First proponent. [LB980]

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TOM STRIGENZ: Good afternoon, Senators. Tom Strigenz, T-o-m S-t-r-i-g-e-n-z, I am the Sarpy County Public Defender, also appearing on behalf of the Nebraska Criminal Defense Attorneys Association. When we had our legislative meeting, we brought up LB980. And, you know, we always try to stay out of public policy type things. That's for the Legislature, not for us to do. But we thought this was a very important bill and we knew it was kind of an add-on to the alcohol one from last year. But we always think these are good bills because our clients make bad decisions and if we can help them make a good decision and save a life, that's what this is all about. I will tell you, Senator Williams, we specifically talked about the cooperation and the "first to make it to the phone call" scenarios. And, you know, again, we basically knew that this was kind of the alcohol scenario also and we figure if, and we hope, this legislation passes that litigation will ensue if one county attorney files under our cooperation issue and that kind of stuff. But the only other issue that we thought as a group we...to be blunt, on page 10, line 3, which...it's paragraph (3) which continues in line 31 on page 9 all the way in that basically just goes on to say, "nothing in this section is intended to interfere with or prevent the investigation, arrest, or prosecution of any person for a violation of subsection (3)..." And then it...and line 3 says, "or for any other crime." We just didn't know if that was inconsistent with the other portion of the whole bill. I mean we know the intent of this bill is to not prosecute for a possession...you know, a possession drug charge. We didn't know if "for any other crime" would cause some concern, an issue. We bring that to your attention, but with that we submit it and wholeheartedly support LB980. [LB980]

SENATOR SEILER: Any questions? Thank you very much. [LB980]

TOM STRIGENZ: Thank you. [LB980]

SENATOR SEILER: Next proponent. Seeing nobody moving, opponent. Neutral capacity? [LB980]

ERIN COOPER: (Exhibit 6) Good afternoon, Senator Seiler and the rest of Judiciary Committee who are left here in this room right now. My name is Erin Cooper; that is E-r-i-n C-o-o-p-e-r, and I am here this afternoon to testify in the neutral position on behalf of the University of Nebraska. The University of Nebraska strongly supports any measure that has the potential to save lives. LB980 through the removal of barriers to calling for aid in narcotic-related incidents could save lives of individuals who are victims of overdoses. In the past year the University of Nebraska has supported a similar bill, LB439, which protected individual students from MIP charges if they were seeking medical attention for themselves or fellow students experiencing alcohol poisoning. We don't want any individuals to hesitate to call for life-saving medical assistance for fear of citations; however, we do recognize that there is a large difference between alcohol, which is a legal substance, and drugs, which are an illegal substance no matter the age of the

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user. For that reason, the University of Nebraska is in support of Senator Morfeld's bill in regards to the overall concept but do urge caution in implementing this bill, taking into consideration the difference between felonious conduct and misdemeanor conduct. Thank you. [LB980]

SENATOR SEILER: What capacity are you representing the university as? [LB980]

ERIN COOPER: I...as in what is my role at the university? I am in Varner Hall. I am the administrative associate under Ron Withem in university affairs. [LB980]

SENATOR SEILER: Okay, that's...the only reason I asked is we had a little problem last year with people saying they represented the university and the university hadn't heard about them, so, okay. Any other questions? Thank you very much for your testimony. [LB980]

ERIN COOPER: Thank you. [LB980]

SENATOR SEILER: Next neutral. [LB980]

THOMAS O'NEILL: Senator Seiler, members of the Judiciary Committee, I'm Tip O'Neill; that's T-i-p O-'-N-e-i-l-l. I'm the president of the Association of Independent Colleges and Universities of Nebraska. And for many of the same reasons that the prior testifier testified to, we also are neutral on this bill. We did support LB439 last year. We realize that this is a slightly different situation. We certainly support not prosecuting people who call in to emergency units to try to save lives and we believe that is a very important thing. And we are concerned about the changing, I guess, dynamics of drug use I think on college campuses because certainly as things change and move from coast to coast, I think we're going to see an increase in certain illegal drug use on our campuses, the OxyContin to heroin sorts of things. We've seen some heroin overdose deaths on college campuses on the East Coast here in some recent years that do concern us. And generally we see those things move across the country. And certainly if we have students who are in a situation where they can call an emergency unit and save a life, we would encourage them to do so. So I hope this committee takes a look at this issue and makes some reasonable decisions regarding it. I'd be happy to answer any of your questions. [LB980]

SENATOR SEILER: Senator Pansing Brooks. [LB980]

SENATOR PANSING BROOKS: Thank you. Thank you, Mr. O'Neill, for coming. I guess I'm just a little bit confused about both your and Ms. Cooper's testimony just because I'm hearing both sides, that you support it but you don't. [LB980]

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THOMAS O'NEILL: Um-hum. [LB980]

SENATOR PANSING BROOKS: So could you explain it a little further? [LB980]

THOMAS O'NEILL: Well, again, it's... [LB980]

SENATOR PANSING BROOKS: I know nobody is in favor of drugs, so that's number one. [LB980]

THOMAS O'NEILL: Right. That's true. [LB980]

SENATOR PANSING BROOKS: Okay, we're good on that, so. [LB980]

THOMAS O'NEILL: (Laugh) And I had something I better not say on the record, yes. [LB980]

SENATOR PANSING BROOKS: Okay, you can tell me later. [LB980]

THOMAS O'NEILL: But you're right. And again, alcohol is a legal product if it's used by someone who is age 21 or over. [LB980]

SENATOR PANSING BROOKS: Yes. [LB980]

THOMAS O'NEILL: And drugs are not necessarily... [LB980]

SENATOR PANSING BROOKS: For (inaudible). [LB980]

THOMAS O'NEILL: ...illegal products, although OxyContin, for example, is a prescription drug which is... [LB980]

SENATOR PANSING BROOKS: It can be, yes, if prescribed. [LB980]

THOMAS O'NEILL: ...a legal product if it's used appropriately. So that's one of the other issues. There are some drugs that may be legal and some that may not be legal. And so... [LB980]

SENATOR PANSING BROOKS: But I presume that your goal is to save as many students as possible, that the call... [LB980]

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THOMAS O'NEILL: That is correct, that is correct. [LB980]

SENATOR PANSING BROOKS: If a call would occur that would save a child's life... [LB980]

THOMAS O'NEILL: That's right. We would hope that there would be prosecutorial discretion utilized, that they wouldn't charge a student or a person. Again, this is not limited to college students either. This is for everyone. So we would hope that there would not be a charge made in that situation. But again, when we're talking about the alcohol situation, it did focus on people who are younger than 21 years old, so it had more of an impact on college-age students than this bill does. And that's why we were probably more concerned about LB439 perhaps because of its impact on students in that age bracket. [LB980]

SENATOR PANSING BROOKS: Okay, perfect. Thank you. [LB980]

THOMAS O'NEILL: Thank you. [LB980]

SENATOR SEILER: Any further questions? Seeing none, thank you. [LB980]

THOMAS O'NEILL: Thank you, Senator. [LB980]

SENATOR SEILER: Any further neutral? Closing? [LB980]

SENATOR MORFELD: Thank you, Senator Seiler. And thank you, members of the committee. I'll just make it very brief. I'll certainly look at the suggestions that the criminal defense attorney suggested. I would also note that I did pass this along to several different law enforcement folks just to get their thoughts on this. Obviously they haven't come and testified in support but I do appreciate their input on there. And I will run any changes also by them because I'm interested in their feedback and their thoughts as well. But with that I'll close. And I know we have several more bills after this. [LB980]

SENATOR SEILER: (Exhibits 7 and 8) We have two letters of support: one from the State Bar Association and the other from PHAN, P-H-A-N. They will be received into the record. [LB980]

SENATOR MORFELD: Great. [LB980]

SENATOR SEILER: Any further questions? Seeing none, thank you. [LB980]

SENATOR MORFELD: Thank you. [LB980]

SENATOR SEILER: Senator Pansing Brooks, you're up on LB843. [LB843]

SENATOR PANSING BROOKS: (Exhibit 1) Thank you, Chairman Seiler. Senator Seiler, members of the Judiciary Committee, for the record, my name is Patty Pansing Brooks, P-a-t-t-y P-a-n-s-i-n-g B-r-o-o-k-s, and I represent Legislative District 28 right here in the heart of Lincoln. I am here to introduce LB843. LB843 deals with an issue that is one of the most heartrending issues in our state. The human trafficking of women, men, and children for sexual or labor purposes is the epitome of our modern-day slavery. Lucretia Mott once said, "I have no idea of submitting tamely to injustice inflicted either on me or on the slave. I will oppose it with all the moral powers with which I am endowed. I am no advocate of passivity." Similarly, I am no advocate of passivity. We must do everything we can to stop this continued sale and abuse of human flesh. The UN defines human trafficking as "the recruitment, transportation...harboring, or receipt of persons by improper means (such as force, abduction, fraud, or coercion) for an improper purpose including forced labor or sexual exploitation." While it seems impossible to most Nebraskan citizens to believe that human trafficking is present in Nebraska, facts clearly show the contrary. Law enforcement agencies agree that the existence of Interstate 80, coupled with Internet sex advertising and the proximity of the casinos across the river, makes Nebraska especially vulnerable to human trafficking. There is plenty of evidence that trafficking is a common occurrence at events like the College World Series, Nebraska football weekends, the State Fair, and even the annual Berkshire Hathaway shareholders' meeting. Because human trafficking takes advantage of a reusable commodity, it is a very profitable criminal activity, second only to drug trafficking. There has been a long perception that prostitution is a victimless crime. That could not be further from the truth. We need to realize that a majority of the prostitutes were victims of sexual abuse as children. Sexual abuse at a young age sets these young women and men up for prostitution by desensitizing them from the experience. They come to believe that this is their value and that this is what is expected of them. Statistics tell us that the average age of when a child is first commercially sexually exploited is 13--13. The steps we took last year by recognizing that children, most of whom are not old enough to consent to sex, should not be charged with prostitution; rather, they are victims of a crime. Now it is time for us to recognize that just because they turn 18, they are no less victims. Whether the woman is in a hotel room or on a side street in someone's car, whether she is trafficked from Council Bluffs to Omaha or from Arizona to Nebraska, from the city suburbs to...from the city to the suburbs, or the victim is a young woman or a young man, the experience of being prostituted causes immense psychological and physical harm. Most prostitutes have men who control them physically, emotionally, and economically. This is not a victimless crime. My bill would amend the statute that criminalizes the act of prostitution. The green copy of the bill redefines prostitution to exclude cases of human trafficking. I have prepared an amendment that I've had passed out to each of you that, instead, provides for immunity against prostitution or a

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prostitution offense. I have had several meetings about this issue with Attorney General Peterson, Lancaster County Attorney Joe Kelly, as well as Douglas County Attorney Don Kleine. I fully appreciate their desire to work with me and the Legislature and to find ways to best address this issue. The amendment before you is the result of those conversations. It would protect victims of human trafficking by giving them statutory protection from prosecution no matter their age. We know these victims are forced or coerced into prostitution and do not attempt to leave or report their predicament for fear of being prosecuted criminally for their behavior. This makes the battle against human trafficking difficult for law enforcement to even gather data on human trafficking. Victims are aware that prostitution is illegal and too often they avoid law enforcement and government help for fear of arrest and prosecution even though they themselves are a victim of human trafficking. Under current law a victim of human trafficking may raise an affirmative defense to prosecution; however, in any affirmative defense, a victim defendant bears a burden to raise this at trial and most of these cases never go to trial because they are pled before that. Further, someone who is a sex trafficking victim often counts on his or her handler to provide the bail or attorney and would rather not make that claim. This bill with the amendment before you would remove the affirmative defense and would, instead, provide that human trafficking victims are granted immunity and simply cannot be prosecuted for prostitution. The prohibitions against solicitation of prostitution, like offering to pay for sex, and against pandering--which is also known as pimping another into prostitution--or against keeping a house of prostitution are not affected by this bill. If we truly want to protect victims of human trafficking, then we need to encourage them to seek help from the authorities and not avoid law enforcement. By removing the possibility of criminal prosecution and not giving them a criminal record, we make it easier for them to get help and to leave this life of desperation behind. This bill and its amendment is a limited protection of immunity from prosecution that is extended as it relates to the crime of prostitution and only to those who are victims of human trafficking. And with that I can take any questions. Yes, Senator Coash. [LB843]

SENATOR SEILER: Senator Coash. [LB843]

SENATOR COASH: Thank you, Senator Seiler. Senator Pansing Brooks, maybe the amendment changes this, but where does the burden of proof lie in proving that the alleged prostitute is, in fact, a victim of human trafficking? In other words, who...does the victim have to prove that or does the... [LB843]

SENATOR PANSING BROOKS: If you read the amendment, on page 5, if you read it in total, page...or, I'm sorry, page 2, line 5, it says, "If the law enforcement officer determines, after a reasonable detention..." So that's part of the problem that people had is that they want to be able to detain those who are trafficked to determine and find out what the issues are, whether...who the people are that are trafficking, and what's going on, so "after a reasonable detention for

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investigative purposes, that a person suspected of or charged with a violation" of the subsection "is a person engaging," so they determine it through their investigation. [LB843]

SENATOR COASH: So it's law enforcement's... [LB843]

SENATOR PANSING BROOKS: Yes. [LB843]

SENATOR COASH: ...job under this bill to say that person is being trafficked. It's not the prostitute herself who has to say,... [LB843]

SENATOR PANSING BROOKS: No, but they could...yes, that's right. [LB843]

SENATOR COASH: ...because what I would be concerned about is--and you mentioned this in your testimony--these guys have a lot of power over... [LB843]

SENATOR PANSING BROOKS: They do. [LB843]

SENATOR COASH: ...over these women. And I could see a situation where they said, if the police pick you up, you just tell them you're trafficked and you're fine, you're going to be out, and then we're going to go back to work. And so I'm concerned about that happening too. I don't know if that's legitimate or not. [LB843]

SENATOR PANSING BROOKS: I can understand that issue. But the problem is we're just penalizing women for something that they have no power over and this allows the law enforcement to know early on as they're talking to them. They're going to get numbers better if they can be saying, you know, is this any kind of trafficking; you know, if you can talk with us about this and we can find out some information, then they'll be able to have much better data about this issue. [LB843]

SENATOR COASH: But if law enforcement, under this bill with your amendment, if law enforcement said, you know what, I don't think there's a pimp in this woman's life, she's doing this... [LB843]

SENATOR PANSING BROOKS: Then they'll charge her, won't they? There will be no trafficking. [LB843]

SENATOR COASH: That's my question. That's my question. [LB843]

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SENATOR PANSING BROOKS: That's not trafficking. It's prostitution. And as I've talked to law enforcement, they are saying about 99 percent of the cases someone else is in control of that person, someone is in control of her money, they're in control of her life, her livelihood; they're branding her; they're tattooing her. This is something where we have to get a handle on this and help law enforcement to be able to get the numbers to investigate with the woman and try to get names and try to get people to come after. [LB843]

SENATOR COASH: So if the woman who is picked...if law enforcement is unable to find that guy in her life, if they... [LB843]

SENATOR PANSING BROOKS: Yes. [LB843]

SENATOR COASH: I mean, and I understand most cases they should be able to, but if they're unable to prove that there's somebody else pulling the strings in this woman's life, she gets...she would get charged then, correct? [LB843]

SENATOR PANSING BROOKS: We haven't gotten rid of the entire charge of prostitution, that is correct, so they determine whether or not the person is suspected of...that they are being trafficked. [LB843]

SENATOR COASH: But if law enforcement doesn't suspect that's the case... [LB843]

SENATOR PANSING BROOKS: ...and they decide that they're going to charge with prostitution, they can charge with prostitution. [LB843]

SENATOR COASH: They can do that. Okay, I just wanted to... [LB843]

SENATOR PANSING BROOKS: That doesn't change that. [LB843]

SENATOR COASH: Okay, that's what I wanted to... [LB843]

SENATOR PANSING BROOKS: This just relates to human trafficking. [LB843]

SENATOR COASH: I understand. Thank you. [LB843]

SENATOR SEILER: Any further questions? Senator Williams. [LB843]

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SENATOR WILLIAMS: Thank you, Senator Seiler. Thank you, Senator Pansing Brooks. A question to follow up on what Senator Coash was asking, where the law enforcement person has that authority and if they make that decision and the person, the woman involved with this situation questions that, you've also removed the affirmative defense of trafficking. I'm wondering whether that makes sense. [LB843]

SENATOR PANSING BROOKS: That may be... [LB843]

SENATOR WILLIAMS: See what I'm saying? [LB843]

SENATOR PANSING BROOKS: Yes. That may be the question. [LB843]

SENATOR WILLIAMS: If law enforcement sits there and says, well, I just don't think there's enough here, and they're going to charge that person,... [LB843]

SENATOR PANSING BROOKS: Um-hum, you're right. That's a good catch. [LB843]

SENATOR WILLIAMS: ...today we still have the ability as an affirmative defense if she can prove. [LB843]

SENATOR PANSING BROOKS: True. [LB843]

SENATOR WILLIAMS: She still has to prove it, or he. [LB843]

SENATOR PANSING BROOKS: Yeah. We haven't found any but, yeah, that's...I agree. [LB843]

SENATOR WILLIAMS: Okay. [LB843]

SENATOR PANSING BROOKS: That's a really good point, Senator Williams. I appreciate your pointing that out and I think we can look back at that and talk with the Attorney General's Office. Some of this language is coming across nationally with some of the...this summer I went to a human trafficking seminar in New York with attorneys general from across the nation and all sorts of different representatives and legislators. And this language actually comes from Mississippi, which has really strict laws right now. We are looking at a number of other laws for future on human trafficking, but this is where we are at this moment, so. And I think I have somebody else that may be able to answer further questions behind me. [LB843]

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SENATOR SEILER: Any other questions? I have one. [LB843]

SENATOR PANSING BROOKS: Yes. [LB843]

SENATOR SEILER: Do you want this AM2064 to be a committee amendment or is this your amendment? [LB843]

SENATOR PANSING BROOKS: I think I'd prefer to have it a committee amendment, so. [LB843]

SENATOR SEILER: Well, then how are you going to amend it to take care of Senator Williams' question? Are you going to do it with a floor amendment or are you going to do an amendment to the amendment? [LB843]

SENATOR PANSING BROOKS: I will do what the committee suggests on that. [LB843]

SENATOR SEILER: It's partly what you want to do. [LB843]

SENATOR PANSING BROOKS: Okay. Does anyone have a suggestion? [LB843]

SENATOR SEILER: Well, you can just let me know. [LB843]

SENATOR PANSING BROOKS: Okay, that would be great. Thank you. [LB843]

SENATOR SEILER: Okay. Any further questions? Thank you. [LB843]

SENATOR PANSING BROOKS: I'll stick around for closing. [LB843]

SENATOR SEILER: Okay. You'd better. You've got the next one too. [LB843]

SENATOR PANSING BROOKS: Oh, yeah, that's true. [LB843]

SENATOR SEILER: Proponents. Any proponents? [LB843]

AL RISKOWSKI: It's Al Riskowski; it's A-l and Riskowski is R-i-s-k-o-w-s-k-i. We appreciate Senator Pansing Brooks for introducing LB843. We at Nebraska Family Alliance would be in

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favor of the bill as amended, as was spoken of today, because we really feel that human trafficking victims need to be seen as victims. I currently serve on the Governor's task force in regard to human trafficking on the research committee. And what we have discovered here in the state of Nebraska by a UNL study that was just completed in 2015, we are seeing that there is somewhere between 50 to 100 of our current high school students, who would be minors, pulled into the sex trade every single year. To me that's alarming that we see out of our Nebraska high schools 50 to 100 young girls being pulled into the sex trade every year. Under our research committee we also...we estimate that there's around 1,200 adults being used in the sex trade here in the state of Nebraska at any one time and that, by our estimates, around 50 percent or more are being coerced in some way. They would be seen as a human trafficking victim, so we think it only makes sense that people who are identified as a human trafficking victim be treated as a victim, not as a criminal. And we know currently there is training underway to help train law enforcement to better identify human trafficking victims. We feel that's a great step forward. I know the Attorney General's Office has been very helpful in making that move forward. So I so appreciate Senator Pansing Brooks and I'm open to any questions that you may have in regard to this bill. [LB843]

SENATOR SEILER: Any questions? Thank you very much for your testimony. [LB843]

AL RISKOWSKI: Thank you. [LB843]

SENATOR SEILER: Next proponent. Opponents? In the neutral? [LB843]

STEPHEN PATRICK O'MEARA: Senator, Stephen Patrick O'Meara, S-t-e-p-h-e-n P-a-t-r-i-c-k O-'-M-e-a-r-a. I appear on behalf of Attorney General Doug Peterson in a neutral position because the Attorney General's Office would oppose the legislation as originally proposed in its original form in the green version. I can address that if folks want me to address that. But in fact, in the amended version, the Attorney General would actually support the bill. We were engaged in some of the research that looked at the Mississippi statute. It somewhat stands alone, but the concept for which we'd laud Senator Pansing Brooks--to advance the protection of women or men that are victimized in sex trafficking--is something that the Attorney General would support. So again, that's really the position of the Attorney General. The Attorney General on October 20 of last year announced the formation, the initiation of the formation of the Nebraska Human Trafficking Task Force. It's available on the Web site and I actually think many of the members here had received copies of that. But at page 19, the beginning of the last paragraph, and at page 27, the Attorney General's position is really spelled out. And although it would not have mandated immunity under the conditions that are discussed in the amended version of this legislation, certainly indicates that it is necessary to train law enforcement not only with regard to observing signs of victimization and then shifting the focus of investigation, but also to better

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train law enforcement with regard to dealing with trauma-informed situations, because these are very difficult to identify certain circumstances. Some of the concerns we would have had about the original bill have already been expressed. I think the circumstances where in fact there is not a "pimp" involved would be difficult to deal with under the original form of the bill. I think there would also be unintended consequences that would actually have a chilling effect on law enforcement discovering cases that involved human trafficking, particularly with its limited resources, if in fact there was a requirement that government as an essence, an element of the crime of prostitution, prove a negative, that is, that there was no human trafficking involved. [LB843]

SENATOR SEILER: Any questions? Did you hear Senator Williams' question that he asked Senator Pansing Brooks? [LB843]

STEPHEN PATRICK O'MEARA: Yes, I believe so. [LB843]

SENATOR SEILER: Are you in agreement that...with amending the amendment to include that issue? [LB843]

STEPHEN PATRICK O'MEARA: You're speaking of reinserting the affirmative defense? [LB843]

SENATOR SEILER: Yes. [LB843]

STEPHEN PATRICK O'MEARA: My understanding is the Attorney General has never opposed that. [LB843]

SENATOR SEILER: Okay. [LB843]

STEPHEN PATRICK O'MEARA: And so I don't believe that there would be an issue there. [LB843]

SENATOR SEILER: When you said you opposed it originally, I wanted to know what area you opposed, so that's...any other questions? Seeing none, thank you. Any further in the neutral? [LB843]

TRICIA FREEMAN: Good afternoon again. My name is Tricia Freeman, T-r-i-c-i-a F-r-e-e-m-a-n. I'm the chief deputy county attorney in the Sarpy County Attorney's Office and I am here also

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on behalf of the Nebraska County Attorneys Association. And we testify neutral because, while we oppose LB843 as it was originally drafted, we are in support of AM2064, which Senator Pansing Brooks has spoken of today, and especially the change as it relates to the law enforcement investigation and whether or not they can determine that the victim is a person who has been subjected to trafficking. And I didn't have prepared comments but I am in the unique position that I've been able to hear a couple of comments that have been made, so I'd actually like to perhaps provide a little bit of additional information related to Senator Coash. Initially when you were speaking of the question of how are they going to determine, how is law enforcement going to determine that as part of their investigation, I might offer the thought that that's the reason that law enforcement must approach their investigations related to trafficking in a multidisciplinary way; in other words, we have to have at the kids who are part of the investigative process. And I would think that as we are combating this statewide, that that's something that's very integral to that investigative process so that when law enforcement is trying to ascertain whether or not we're dealing with someone who has been trafficked, that that advocate can provide the services and perhaps provide the support that's needed for a victim to come forward and to provide that information. And to Senator Williams, who brought forth this issue of the affirmative defense, certainly it's something that we would also support from the association that the affirmative defense language would be put back into the statute and I might also offer that just kind of a practical impact of what that affirmative defense looks like from a prosecution perspective. And I can say that in other situations, for example, "sexting," where we're dealing with kids who are at certain ages and between those ages, when they intend to send a photo, a nude photo, to another recipient that fits within that age range, there is an affirmative defense to charging them with child pornography or providing child pornography. When we're presented with evidence of that, we just simply don't charge if we believe that there's sufficient evidence to demonstrate that that affirmative defense exists. I see it very similarly here that when we have someone who comes in who has been charged with prostitution, who can provide us information related to that affirmative defense, again, I think it provides us with an opportunity to simply make the decision that we won't prosecute. So I do think that it's essential language and I think that it serves not only as a defense for the victim but also as an aid to the prosecution in determining how is it that we're going to proceed in this case. [LB843]

SENATOR SEILER: Any further questions? Seeing none, thank you very much. [LB843]

TRICIA FREEMAN: Thank you. [LB843]

SENATOR SEILER: (Exhibit 2) Any further neutral? Seeing nobody, the ACLU has submitted a letter in support of LB843 and they will be made part of the record. You may close. [LB843]

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SENATOR PANSING BROOKS: Thank you, Chairman Seiler. I just wanted to thank the Nebraska Family Alliance and the AG's Office and also the county attorneys for working together. I think that together we are providing a stronger bill and I hope that we will be making it more able for people to be able to, number one, get data on this despicable crime and to move forward and help victims of prostitution. And I just want to end on a quote by Pope Francis who said, "The human person ought never to be sold or bought as if he or she were a commodity. Whoever uses human persons in this way and exploits them, even if indirectly, becomes an accomplice of...injustice." So thank you all and I hope we can fight for justice today on this. Thank you. [LB843]

SENATOR SEILER: Do we have a flag to wave? (Laugh) Thank you. You may open on LB1079. [LB1079]

SENATOR PANSING BROOKS: Thank you, Senator Seiler. Senator Seiler, members of the Judiciary Committee, for the record, my name is Patty Pansing Brooks, P-a-t-t-y P-a-n-s-i-n-g B-r-o-o-k-s, and I represent Legislative District 28 right here in the heart of Lincoln. I'm here to introduce LB1079. This bill was brought to me by the University of Nebraska at Lincoln. The first and primary intention of LB1079 is the protection of Nebraskans attending football games or other large events by increasing available law enforcement resources, allowing police officers to work outside their primary jurisdiction under contract with another agency. Law enforcement agencies, with limited exceptions, are restricted to their primary jurisdictions and unable to legally provide immediate support to adjacent agencies in emergency or at high-attendance events. LB1079 enhances mutual aid capabilities by expanding law enforcement officers' jurisdiction when contracted to be on duty and working for a law enforcement agency. In addition to allowing officers from outside of Lancaster County to work UNL games, it would also give an officer law enforcement authority when going to assist another jurisdiction, for example, in the case of disaster assistance. Recently several law enforcement agencies sent deputies to Stanton to assist them after the tornado. Because no exigent circumstances existed as required by current law, in reality those deputies had actually no law enforcement authority in Stanton. This bill would remedy such scenario where large-scale events require law enforcement staffing that exceeds the capability of local resources. Secondly, LB1079 would provide recognition of the University of Nebraska Police as its own police department. Currently statutes generally recognize municipal and village police departments. Police officers at the University of Nebraska Police Department receive commissions as state deputy sheriffs from the Nebraska State Patrol, which extends liability to the Nebraska State Patrol for law enforcement actions that are taken by UNL officers who are commissioned as state deputy sheriffs. Not only would the recognition allow the university to commission their law enforcement personnel, it would also remove liability of UNL Police from the Nebraska State Patrol. I just also want to add that there have been some different organizations...different agencies have come to me with some concerns. Obviously we're happy to work with whomever. I want to just add that there are six

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different law enforcement definitions under crimes and punishment in the statutes: 48-202 talks about law enforcement...a law enforcement agency meaning...to be defined as an agency or department of this state or any political subdivision of this state whose primary responsibility is for prevention and detection of crime, the enforcement of penal traffic and highway laws, and the enforcement of arrest warrants. Law enforcement agency means a police department, an office of the town marshal, an office of a county sheriff, and the Nebraska State Patrol. So there will be those here to explain any particularities on this and I'll hang around for closing. Thank you. [LB1079]

SENATOR SEILER: You're welcome. Proponents of this bill, LB1079. [LB1079]

OWEN YARDLEY: Thank you, Senators. My name is Owen Yardley. I'm the chief of police at the University of Nebraska Police Department. And my apologies in advance, you're going to hear a few redundant things that were just mentioned by the senator. [LB1079]

SENATOR COASH: You've got to spell your name for us. [LB1079]

OWEN YARDLEY: I'm sorry? [LB1079]

SENATOR COASH: Spell your name for us. [LB1079]

OWEN YARDLEY: Oh, I'm sorry. Yardley, Y-a-r-d-l-e-y. For those who may not be knowledgeable about us, the University of Nebraska-Lincoln Police Department is recognized by the Crime Commission as a fully constituted law enforcement agency, similar to any other police department you may have in mind. We are one of five Nebraska departments that have received national accreditation through CALEA, the Commission on Accreditation for Law Enforcement Agencies. UNL Police has had officers and a police department for 46 years, having received their commissions from the Governor and the State Patrol through the statutory state deputy sheriff's process. We're nationally recognized for our work in threat assessment and for managing security and protection for large and special events. For instance, on a football game day we manage law enforcement from three other police and sheriffs' departments, as well as officers from other state and federal agencies, security, and other emergency services providers. LB1079 provides us with two significant benefits. First, it allows us to use law enforcement officers from agencies from outside of Lancaster County to aid us in providing law enforcement staffing for these events. Large events draw extremely large crowds, the event itself, as well as the surrounding areas. This significantly taxes the available law enforcement, local law enforcement resources. In addition, national, regional, international incidents have elevated safety concerns which leads to implementing security enhancements which may be compromised if law enforcement resources are not available. Allowing a hosting agency to use officers who are on

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duty and outside their primary jurisdiction would increase the available pool of law enforcement officers and help in providing safety for the participants and spectators. Secondly, this bill would clarify our authority, increases our ability to hire and contract these additional officers, particularly for large events, and removes the unusual situation where one law enforcement agency, because of the current commissioning process, could be held liable and responsible for the actions of our department. We appreciate your consideration of LB1079. [LB1079]

SENATOR SEILER: Any questions? [LB1079]

OWEN YARDLEY: Questions? [LB1079]

SENATOR SEILER: I have one. I'll get to you in a second. [LB1079]

SENATOR EBKE: That's fine. [LB1079]

SENATOR SEILER: The campuses of Kearney and Omaha, do they come under your jurisdiction? [LB1079]

OWEN YARDLEY: No. Currently each campus is separate and, in fact, currently we can't even provide support for those other campuses, which is another thing we'd like to do. [LB1079]

SENATOR SEILER: Does this bill correct that? [LB1079]

OWEN YARDLEY: It will. [LB1079]

SENATOR SEILER: So you'll then be under one jurisdiction? [LB1079]

OWEN YARDLEY: There will still be four campuses. [LB1079]

SENATOR SEILER: Right. [LB1079]

OWEN YARDLEY: But we'll be able to interact with them, help each other collaboratively on security issues, security and police issues. [LB1079]

SENATOR SEILER: Thank you. Senator Ebke. [LB1079]

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SENATOR EBKE: Thank you. So you anticipate, say, a game day, a football game day, and we've got 100,000 people or however many people are there, and you add staffing, say, from the sheriff's department in Box Butte County? Is that something that could happen? [LB1079]

OWEN YARDLEY: It potentially could happen. We would go out and solicit additional officers who may be available but we'd be going through their departments... [LB1079]

SENATOR EBKE: Okay. [LB1079]

OWEN YARDLEY: ...to make sure that we're coordinated with them. [LB1079]

SENATOR EBKE: So they wouldn't necessarily be off-duty officers. They'd be on duty or not? [LB1079]

OWEN YARDLEY: This bill would provide they have to be on duty. [LB1079]

SENATOR EBKE: Okay. And whose jurisdiction are they operating under at that point? Yours? [LB1079]

OWEN YARDLEY: They would be operating under us. [LB1079]

SENATOR EBKE: Okay. So what will you do...I would expect that while the laws may be the same, that the procedures may be somewhat different from jurisdiction to jurisdiction. How do you make sure that the methods employed by a law enforcement officer from Box Butte County or Keya Paha County or someplace like that isn't...is operating under your standards? [LB1079]

OWEN YARDLEY: Right. When we have them...currently what we do, we have multiple agencies who are working with us. We do briefings, we do educational training for all those people who are working with us. We work under an incident command system which also is...puts us in place and positions us so if an emergency does happen, we can transition immediately into an emergency situation. So our staffing is all under...every agency that works is working under us. If we have agencies, for example, the State Patrol who comes in, they may have officers coming in from western or northern Nebraska who are not from here. We try, and also with the other local agencies, we try as much as possible to have our people engaged with them or partnered with them. Or if there's calls that come in that are going to require, say, an arrest or some extra responsibilities, follow-ups, we'll have those assigned to our people so that we can free these people up to do more of the security functions. [LB1079]

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SENATOR EBKE: I'm not so concerned... [LB1079]

OWEN YARDLEY: Okay. [LB1079]

SENATOR EBKE: I'm not really so concerned about the State Patrol or the Lincoln Police Department or even Lancaster County Sheriffs. [LB1079]

OWEN YARDLEY: Understand. [LB1079]

SENATOR EBKE: But I mean I could see a situation where somebody from a totally different, you know, kind of department would... [LB1079]

OWEN YARDLEY: And that concept would be the same. [LB1079]

SENATOR EBKE: Okay. [LB1079]

OWEN YARDLEY: That process we would use for anybody that's coming in to work with us. [LB1079]

SENATOR EBKE: Great. Thank you. [LB1079]

OWEN YARDLEY: We do...sorry. [LB1079]

SENATOR EBKE: That's okay. [LB1079]

SENATOR SEILER: Any further questions? Thank you very much for your attendance and your testimony. [LB1079]

OWEN YARDLEY: Thank you. [LB1079]

SENATOR SEILER: Further proponent. Seeing none, opponent. [LB1079]

RHONDA LAHM: (Exhibit 1) Good afternoon, Chairman Seiler and members of the Judiciary Committee. I am Rhonda Lahm, R-h-o-n-d-a L-a-h-m, director for the Department of Motor Vehicles. I am appearing before you today to offer testimony in opposition to LB1079 on behalf of the department. As introduced, LB1079 expands in the Nebraska criminal code and the

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Nebraska Commission on Law Enforcement and Criminal Justice statutes the definition of law enforcement agency to include the police department of an agency or department of the state. The expanded definition of law enforcement agency creates some uncertainty as to the impact on the Department of Motor Vehicles, in particular, our fraud division. LB1079 directly impacts the DMV because the agency has a fraud unit which employs four full-time investigators. The fraud unit's work is quite specialized, involving the investigation of motor vehicle and driver licensing fraud, including identity theft. These functions are markedly different when compared to a traditional law enforcement agency. The DMV is not a law enforcement agency, nor do we consider the fraud unit a separate law enforcement agency. To be labeled as such creates the necessity to comply with administrative regulations which are not applicable to our specialized work. The fraud unit has proven to be a tremendous asset to the state of Nebraska under the current provisions of law. The unit is able to concentrate their efforts and focus on criminal violations within the scope of the agency's responsibilities. Thank you for your time today, and I would be happy to answer any questions that you have. [LB1079]

SENATOR SEILER: Questions? I have a little question. How does that bringing the university police under the term "law enforcement" affect you? [LB1079]

RHONDA LAHM: In the bill where it defines law...it says law enforcement agency shall mean a police department of an agency or a department of the state, since there is not a definition of police department and our officers have arrest authority, then it's...that's what part of my concern is, is it's not clear whether or not they would become a law enforcement agency or not because there's no clear definition here as to what that would be. So my concern is having a separate law enforcement agency within our agency. [LB1079]

SENATOR SEILER: How does it get it under your agency? [LB1079]

RHONDA LAHM: Because they're employees of mine, our fraud division are employees of mine. [LB1079]

SENATOR SEILER: No, I'm talking about the members of the University of Nebraska. [LB1079]

RHONDA LAHM: The members of the University of Nebraska Police Department would not, but this is not...this doesn't define them specifically in the bill. It talks about a law enforcement agency, meaning a police department, so there's no definition of what a police department is. So our officers are officers with arrest authority. So if they fall in that definition, then they now become a law enforcement agency by this changed definition within a state agency. [LB1079]

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SENATOR SEILER: Go ahead, Senator. [LB1079]

RHONDA LAHM: Sorry. [LB1079]

SENATOR COASH: Thank you, Senator Seiler. Ms. Lahm, so you have four full-time investigators and they're... [LB1079]

RHONDA LAHM: Correct. [LB1079]

SENATOR COASH: Are they...they're sworn law enforcement? [LB1079]

RHONDA LAHM: Correct. [LB1079]

SENATOR COASH: And they're under the DMV's jurisdiction? [LB1079]

RHONDA LAHM: Correct. [LB1079]

SENATOR COASH: Do they operate under anyone else's jurisdiction? [LB1079]

RHONDA LAHM: No, I mean, other than their...I mean they have to follow any laws of peace officers and training requirements, etcetera. [LB1079]

SENATOR COASH: Okay. Would you have an objection if investigators of the DMV were exempt from this bill? [LB1079]

RHONDA LAHM: No, I wouldn't object to...that doesn't...exactly. That would...that's my concern just so it's clear that we're not...they don't become a law enforcement agency. [LB1079]

SENATOR COASH: So you'd prefer to have...so if your investigators were exempt out of this bill, it would remove your objection to the bill. [LB1079]

RHONDA LAHM: It would remove mine, but something I just would like to point out is there's other state agencies that have investigators. So this could apply to some other agencies. [LB1079]

SENATOR COASH: Okay. [LB1079]

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RHONDA LAHM: But mine specifically, that is my concern, correct. [LB1079]

SENATOR COASH: Okay. Did you talk to Senator Pansing Brooks about this? [LB1079]

RHONDA LAHM: Yeah. [LB1079]

SENATOR COASH: Okay, good. Thank you. [LB1079]

SENATOR SEILER: Do you have arrest powers for your investigators? [LB1079]

RHONDA LAHM: They have arrest powers for what we do. So for example, people who are...obtain vehicles through title washing or title fraud or whatever, yes, they have arrest authority. [LB1079]

SENATOR SEILER: Okay. Thank you. Any other questions? Seeing none, thank you for your testimony. Further opposition. [LB1079]

BRAD RICE: (Exhibit 2) Good afternoon again, Senator Seiler and members of the Judiciary Committee. I am Colonel Brad Rice, B-r-a-d R-i-c-e, superintendent of the Nebraska State Patrol. I am here to testify in opposition to LB1079 as drafted which would give town marshals, city police, county sheriffs, and university campus police statewide police authority and arrest powers. Except when an officer is in fresh pursuit or coming to the aid of another police officer, their law enforcement powers are restricted to the geographical boundaries of their town, city, and/or county. Currently two techniques are used to provide local law enforcement with broader police powers when needed. A memorandum of understanding, or MOU, can be signed between cities or counties to grant police powers within multiple jurisdictions. Secondly, the Governor can appoint special deputy state sheriffs credentials to give select officers expanded jurisdictional police authority. The State Patrol administers these credentials on behalf of the Governor and these appointments are usually limited in their scope and by geographical boundaries. This is often done for members of joint task forces, which allows them to participate in investigations and arrests throughout a designated task force region. LB1079 appears to eliminate, or at least compromise, current jurisdictional limits. We understand the proposal to provide town marshals, city police, deputy sheriffs, and campus police law enforcement authority in all counties throughout the state if the respective head of that agency allows it. Strict coordination would need to occur between various jurisdictions to ensure that unintended confrontations or consequences do not occur. This bill also raises concerns regarding which law enforcement agency would have liability in situations such as this. We understand the rationale behind LB1079 and we know it is written with good intentions, but it is too broad. The bill goes beyond

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what is needed by the University of Nebraska to provide and maintain security at large events. The legitimate goals of LB1079 can be better achieved through some more focused approach that allows the university to hire outside law enforcement officers to supplement its own forces during large events. Thank you for your time and the opportunity to testify before you today. I'll be happy to try to answer any questions you might have. [LB1079]

SENATOR SEILER: Any questions? [LB1079]

BRAD RICE: Could I add also, we've spoken with Senator Pansing Brooks on this too. We've had a chance to communicate so we are in communication there. [LB1079]

SENATOR SEILER: Okay. Thank you for your testimony. Any further in the neutral? You're going to go neutral on us (laughter)? You may close. [LB1079]

SENATOR PANSING BROOKS: Changed my mind. [LB1079]

SENATOR SEILER: You may close. [LB1079]

SENATOR PANSING BROOKS: Okay, thank you. Thank you, Senator Seiler. And I want to thank UNL Chief Owen Yardley for coming with this issue. I know that especially the game days are a big issue and that it's been difficult for them to bring in extra law enforcement personnel. So that's a good part of this whole bill. Also I just want to add my thanks to Colonel Rice and to Director Lahm and for coming and contacting our office. We are not wed to the language. We are happy to make it less broad. I think with a short session things happen so rapidly that we haven't been able to get together on what that language might be. But anyway, I know that the university and the enforcement agencies are happy to all work together, so that's my goal. [LB1079]

SENATOR SEILER: Okay. [LB1079]

SENATOR PANSING BROOKS: Thank you. [LB1079]

SENATOR SEILER: Any questions? Seeing none, will the committee just wait until we...I want to discuss some (recorder malfunction)... [LB1079]