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Judiciary Committee
February 08, 2017

[LB53 LB107 LB108 LB160 LB447]

The Committee on Judiciary met at 1:30 p.m. on Wednesday, February 8, 2017, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB108, LB107, LB160, LB53, and LB447. Senators present: Laura Ebke, Chairperson; Patty Pansing Brooks, Vice Chairperson; Roy Baker; Ernie Chambers; Steve Halloran; Matt Hansen; and Adam Morfeld. Senators absent: Bob Krist.

SENATOR EBKE: Good afternoon. It is 1:30 and since we have five hearings today we're going to try to start on time. My name is Laura Ebke. I'm the Chair of the Judiciary Committee. I represent District 32 and I would like to start off by allowing those who have made it in to introduce themselves.

SENATOR BAKER: Senator Roy Baker, District 30.

SENATOR HALLORAN: Senator Steve Halloran, District 33, Adams County, southern Hall County and western Hall County.

SENATOR EBKE: And we will eventually, I think, be joined by Senator Morfeld from Lincoln. Senator Krist will be gone today I believe. Senator Chambers will probably be here. And Senator Hansen and Senator Pansing Brooks will also be here. Assisting the committee today we will have, over the course of these five hearings, we will have two legal counsels: Tim Hruza to my right and Brent Smoyer is sitting back there waiting in the on-deck circle. And then we have Laurie Vollertsen, who is our committee clerk. Because we've got five hearings and we may have extended testimony on some of them, probably after either number two or three we will take a five- to ten-minute break to let everybody stand up and move around. Depending on how long one and two take, it will be either after the second one or after the third one. On the table over there you will find some yellow testifier sheets. If you're planning on testifying today, please fill one out and hand it to the page when you come up to testify. Our committee pages are Kaylee and Toni, who are students from the University of Nebraska. There's also a white sheet over there which, if you don't want to testify but would like your position on a particular bill recorded, you can sign up there. Because we have five hearings today, I would request that...try to, as you testify, if something has been said before you can just say ditto or something like that to make sure that we keep moving along. We don't need to hear the same thing multiple times probably. We'll begin bill testimony with the introducer's opening statement. Following the opening, we'll hear from proponents of the bill, then opponents, followed by those speaking in a neutral capacity, and then we'll finish with a closing statement by the introducer, should they decide to give one. We ask that you begin your testimony by giving your first and last name and spelling them for the record. If you're going to testify, I also ask that you keep the on-deck chair filled.

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This is the chair right there with the yellow on the edge there. That way we know if there's still more to come on the proponent, opponent, or neutral testimony. Just kind of move to the front if you see that people are filling up. If you have any handouts, please make sure you bring at least 12. If you don't have 12 copies, the pages will help you make them now. We'll be using a five-minute light system. When you begin your testimony, the light on the table will turn green. The yellow light is your one-minute warning. And when the red light comes on, we ask you to wrap up your final thought and stop. As a matter of policy, I'd remind everybody that use of cell phones and other electronic devices inside the hearing room is not allowed. We have very sensitive microphones which pick up all sorts of external noises. Some senators may be using their computers or their phones in order to collect information or to be in contact with their offices. Also, recognize that some senators may be having bills in other committees so may get up and move. It has nothing to do with the quality of your testimony or the importance of the bill. That said, Senator Pansing Brooks and Senator Morfeld have joined us, and so we will begin with LB108. Senator Crawford.

SENATOR CRAWFORD: LB107.

SENATOR EBKE: Okay. LB107, is that the...?

LAURIE VOLLERTSEN: LB108 is (inaudible).

SENATOR CRAWFORD: Okay. I'll return.

SENATOR EBKE: Okay.

SENATOR CRAWFORD: LB108. [LB108]

SENATOR EBKE: That's okay. I think we organized it that way based on the committee counsel, so. [LB108]

SENATOR CRAWFORD: Oh, okay. [LB108]

SENATOR EBKE: Okay. [LB108]

SENATOR CRAWFORD: All right. Great. We'll get to LB108 then. Good afternoon, Chairwoman Ebke and members of the Judiciary Committee. My name is Sue Crawford, S-u-e C-r-a-w-f-o-r-d, and I represent the 45th Legislative District of Bellevue, Offutt, and eastern

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Sarpy County. And I'm honored to be here today to introduce LB108 for your consideration. LB108 creates protections for children during arrest, booking, sentencing, and incarceration of a parent or guardian in order to reduce the long-term effects of trauma to the child. Nine percent of children in Nebraska, which equates to approximately 41,000 kids, are living with either one or both of their parents incarcerated. The amount of trauma a child experiences starting at the arrest and during incarceration of a parent can have long-term emotional, psychological, and developmental effects on the child. In fact, research shows that parental incarceration can be just as damaging to a child as experiencing abuse or witnessing domestic violence. According to the International Association of Chiefs of Police and U.S. Department of Justice: Parental incarceration is an adverse childhood experience that can increase a child's risk of negative outcomes in adulthood, including alcoholism, depression, illegal drug use, health-related problems, suicide, domestic violence, and other criminal behavior. Despite the devastating effects parental incarceration can have on the child, the DOJ and the International Association of Chiefs of Police believe that the law enforcement across the country can help mitigate the trauma children experience through trauma-informed policies and procedures. Additionally, maintaining contact with parents during incarceration and being placed with the family or kin during incarceration can help alleviate some of the trauma children experience during this difficult time. LB108 provides protections to reduce the trauma experienced by children at all stages of the process: arrest, booking, sentencing, and incarceration. Regarding the arrest process, LB108 would require police departments across the state to establish guidelines for law enforcement officers to ensure child safety upon the arrest of a parent or guardian. Many police departments across our state already have such policies in place and do a great job of ensuring safety and reducing trauma when making an arrest when children are involved. LB108 would ensure that all police departments establish guidelines for their officers to review. The language in LB108 allows individual police departments across the state to come up with procedures that would be most effective in their own communities that they serve. At a minimum, the guidelines would need to include procedures to ensure that law enforcement officers inquire whether arrestees have minor dependent children who may be present or at another location at the time of the arrest, a protocol for proper arrangement of temporary care for minor or dependent children to ensure their safety and well-being, and education on how law enforcement can assist in mitigating long-term effects of trauma. We've heard some feedback from police departments regarding the protocol for securing temporary care for minors and the education requirements, specifically, access to resources to craft these guidelines. It's our intent that police departments can work with the Department of Health and Human Services and Child Protective Services in their own area to determine the best procedures for identifying temporary care for the child. As for the education requirements, we've left that language nonspecific so police departments can decide which education is most appropriate for their force to include it in the guidelines. In recognizing the additional workload that may be required for departments to provide this education and to establish these policies, I'd like to note that the U.S. Department of Justice and International Association of Chiefs of Police have used grant funding to create a Safeguarding

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Children of Arrested Parents program. In addition to the vast research they have conducted by the trauma experienced by children, they have released a model policy that police departments could use and extensive on-line training for officers on trauma-informed policing. If police departments choose to do so, they could use this model policy when drafting their own guidelines and provide these educational opportunities to their officers free of charge. In the second stage, booking, LB108 requires that custodial parents or guardians with responsibility for minor dependent children are entitled to make two phone calls at no expense if the calls...if call is completed to a relative or other person for the purpose of arranging for the care of children. Eliminating the amount of time the child spends away from the family or kin is critical to reducing trauma. Placing a child with family or kin can also prevent children from having to go into foster care. We did hear from some law enforcement officers there may be times when individuals who are being held are not cooperative or in a state of mind where they could arrange temporary care. For that reason, LB108 provides that the two phone calls should be offered immediately during...immediately during the booking process or as soon practical thereafter. During sentencing judges are provided with a presentence investigation report before deciding an individual's sentence. This report includes information on the individual's economic status, education, occupation, and more. LB108 would require this presentencing report include information on how many minor dependent (recorder malfunction) defendant has along with whether or how they could be impacted by sentencing. This provision gives the judge an opportunity to consider all the necessary factors, including the effect different sentences may have on the children, before making a final decision. Finally, once the sentence begins, LB108 creates considerations that can make the separation a child experiences during incarceration less traumatic. First, it provides for consideration of the incarcerated parent's ability to maintain contact with the child when the Department of Corrections is making facility placements. Through conversations with the Department of Corrections, it was brought to my attention the department must highly consider particular resources and programs an incarcerated individual need, as well as the number of beds available, when making these placements. LB108 simply adds consideration of proximity to children to the list of factors the department considers when making a placement. It does not prioritize it over other factors. Once an individual is placed in a correctional facility, visitation and physical contact are critical in ensuring healthy and regular development as well as parental bonding for the child. Visitation policies that allow children to remain...to maintain, excuse me, their parental relationships are also critical to reducing trauma and long-term effects of parental incarceration. LB108 creates language that requires the Department of Corrections to continue to grow their family friendly policies. One of the main requirements is permitting age-appropriate physical contact through visitations for children. In my conversations with Department of Corrections, we discussed the importance of family friendly visitation policies, as well as the importance of keeping children, incarcerated individuals, and Corrections staff safe during and after visits. For that reason, the language is left open-ended with minimal requirements so experts in the Department of Corrections can best determine how to foster parental relationships at each of their facilities. LB108 also has language

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that provides for the creation of family councils. It's important to know that Department of Corrections is already doing good work implementing these councils in some facilities that allow the children and family members to dialogue with the department about policies and procedures. LB108 will ensure these productive communication methods are used in facilities throughout the state to continue the positive relationship between the department and families. Finally, LB108 provides for collaboration between the Department of Corrections and the Department of Health and Human Services to ensure that children who are wards of the state can visit their incarcerated parents if that's in their best interest. LB108 provides protections for some of the state's most vulnerable children. Watching a parent be arrested or being separated from a parent during a time of incarceration can be extremely traumatizing for children. Trauma-informed policies and procedures during arrest, booking, sentencing, and incarceration can help mitigate some of the trauma these children will experience. Families are the foundation of our community and sustaining these relations, even through incarceration, can help strengthen family bonds that will continue long after a prison sentence and set these children up for future success. LB108 will allow law enforcement to work with Corrections to determine the best way to continue to implement policies and best practices to protect children. I appreciate your attention to this issue and I'm happy to answer questions now or at closing. [LB108]

SENATOR EBKE: Any questions at this time for Senator Crawford? Okay. Thank you. [LB108]

SENATOR CRAWFORD: Thank you. [LB108]

SENATOR EBKE: Okay. First proponent. And, yeah, and again, feel free to start keeping the chair filled there. [LB108]

JULIA TSE: (Exhibits 4-6) Good afternoon, Chairwoman Ebke and members of the Judiciary Committee. My name is Julia Tse, J-u-l-i-a T-s-e, and I am here to testify in support of LB108 on behalf of Voices for Children in Nebraska. Voices for Children in Nebraska is the independent voice building pathways to opportunities for all children and families through research, policy, and community engagement. We believe that all children need stable and loving relationships with adults that they can learn from and trust. We support LB108 because it creates a foundation for child-focused policy and practice when a parent is incarcerated or arrested. Criminal justice reform has been a topic of intense discussion for many years, which this committee very well knows, as the financial costs of mass incarceration came to a head in many states. Still, there is an untold price that has been paid by our families, our children, and our communities. Latest estimates show that there are at least 5.1 million children in our country that have had a parent or both parents incarcerated at some point in their childhood. That includes 41,000 of our own children in our state and that's one of the highest percentages in the country. I've brought a copy of "A Shared Sentence" which includes some of those numbers, so you can take a look at that.

We believe that LB108 creates opportunities for our state to intervene in the hidden costs that are paid by children and loved ones in our state in a way that is strongly supported by research. We are currently organizing listening sessions with Nebraskans who have personal experience with parental incarceration to learn more about how it has impacted our state and what we can do about it. Much of what we have learned has affirmed the need to give thoughtful attention to children who are left behind by incarceration as we discuss public policy. The stories that we have heard are ones of hope, anguish, and anxiety over their children's futures and we hope that their voices will continue to drive this work. First, LB108 would require law enforcement agencies to establish guidelines that ensure child safety when a parent is arrested. And although we realize that policy and practice may already reflect this focus, we believe that it's important to have an intentional dialogue about how this should occur with some level of uniformity across our state. The research on the trauma that children experience if they witness the arrest of their parent, as well as any other traumatic events that may have led up to that arrest, is very, very clear. It's so clear that so many...that many of the other states and jurisdictions have passed similar legislation. And Senator Crawford referenced the guide that the DOJ and International Association of Chiefs of Police have put together. Together with the guidelines that ensure collaboration with child welfare workers, we believe that this will continue to prevent out-of-home placement whenever possible. And I'll just note that last year, in calendar year 2015, there were 311 3(a) filings for removals for kids who had an incarcerated parent or caretaker. Secondly, LB108 would require presentencing investigations to include how any minor or dependent children could be impacted by sentencing. The loss of a parent to incarceration is not just a loss of income. It oftentimes means a greater and more hidden loss of stability. The research in this area is overwhelming. Parental incarceration has been linked to a multitude of adversities that follow children into adulthood, including antisocial behavior, poor educational performance, and decreased physical and mental health. Most alarmingly, the research shows that altogether the stress and the strain of parental incarceration of a family member oftentimes leads children to coming to demonstrate law-breaking behavior and become justice-involved themselves. The intergenerational effects of incarceration was a theme that I heard consistently as I was talking to Nebraskans with what seemed like an inescapable cycle that begins in childhood and speaks to the necessity of this work and how it goes hand in hand with the juvenile justice reform that this committee has worked so hard on in recent years. The final sections of LB108 fortunately offer a first step answer to this important issue. Although the research and data is bleak, we know that there's a solution. Our systems can buffer against the risk and enhance protective factors that grow positive outcomes. This is an important opportunity to build on the successes of the parenting classes and special visiting days that we have in our state facilities already that this Legislature has funded and also on the prison nursery program that's available in York for women. We can continue to better support the children of incarcerated parents and their families by improving communication and making visitation more child friendly. Children don't bond and learn from their parents just by sitting across the table from them. They need to interact. They need to touch them. And this is something that was very clear

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to me as I was talking to Nebraskans. That physical touch is really challenging when a sibling sees a younger sibling touch or sit on daddy's lap but they are told that they can't do that. And I see that my time is up. So with that, I'll close and urge you all to advance LB108 and thank Senator Crawford and this committee for their time and consideration. [LB108]

SENATOR EBKE: Okay. Thank you. Any questions? [LB108]

JULIA TSE: I forgot to add that I have attached to my testimony a letter from a young woman who was a part of our focus group and she shared some of her experiences with visitation in different facilities. [LB108]

SENATOR EBKE: Very good. Thank you. Any questions? Okay. Thank you. [LB108]

JULIA TSE: Thank you. [LB108]

SENATOR EBKE: Next proponent. [LB108]

JASON YAEGER: My name is Jason Yaeger, J-a-s-o-n Y-a-e-g-e-r, and I'm in support of LB108. I was incarcerated. I got out almost eight years ago and I can still see the effects on my child from when I was incarcerated. And you know, I've gone on to be quite successful in life. But I go back...and I go back and I do prison ministry as well. So with the effects of the people that I was incarcerated with and the people that I minister to in prison, I can see that there's a big effect. You can see the repeating of children following their parent's footsteps going back in and, you know, because there's that big disconnect. And that big disconnect is important not to have because, one, there's a lot of times people reoffend when they get out because they've lost everything in life. They have no relationship with their children left. They have no family. They have no nothing. So not only by this is going to help the children because they'll be able to have time with their parent and stuff, because it's important, you know? I mean my father wasn't incarcerated but me and him haven't talked. He just don't want to talk to me because of everything. And I still feel, and I'm 43 years old, and I feel that void in my life because I don't have my father. So I, you know, I could only imagine then that void that the children have because they're a much younger age and they're in that development stage. And so it's a big void and it really affects them. But also, if we could fill that void so it don't happen, it's going to give the parent that's getting released something to come home to. And I really believe it also helps them to not go out and commit more crimes because they got that stability as well. You know, and I mean you just keep seeing it going over and over and over, and I just...we really, really need to work on something like this and I think this is a very positive thing to do because it will help the children have that relationship, because, you know, you get a little bit of phone time and that's about it, you know? Then you get small amounts of visits and then, of course, when they're

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deciding where to place you, I was in federal prison and I got placed all the way in Texas. Well, there's no way my children could come see me. So it wasn't until my last year that I got moved to Yankton, South Dakota, where it's close enough that I could start having visits. And by then, you know, all of it was...all the damage was already there, you know? Because if it could have been early on, the visits could have been there, everything could have happened. I really believe that my daughter would be doing a lot better in life than she is today. We struggle with her quite a bit. And I know that that's exactly what it was, is because I was incarcerated. I wasn't there for her. So I really support that we do everything we can to make this happen because the children need it, not, like I said, not only do the children need it, the parents need it, you know? And so I'll just keep it short here like that. But I just wanted to get right to the point and, you know, it's like we really need to pass this. [LB108]

SENATOR EBKE: Thank you, Mr. Yaeger. Any questions for Mr. Yaeger? Thank you for coming today. [LB108]

JASON YAEGER: Thank you. [LB108]

SENATOR EBKE: Next proponent. [LB108]

SPIKE EICKHOLT: Good afternoon, Madam Chair, members of the committee. Spike Eickholt, S-p-i-k-e, last name E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association, testifying in support of LB108. Our organization is supporting primarily Sections 1 and 2 of the bill, and those are provisions of the bill that provide or require the law enforcement agencies in Section 1 to have a policy with respect to dealing with children of arrestees, and Section 2 deals with the jails and so on that deal with a policy regarding people who are being booked into the jail. When our organization looks at the bills that are introduced, we decide what our position is going to be. And although this bill does not directly deal with the practice of criminal defense or what happens in the courtroom and that sort of thing, many of our members took the position that we should really support this, because we have had many clients in our practice that have been in the situation where someone has a warrant, the police show up at the home to arrest that person on the warrant. That person is the only parent home with small children. What happens to the kids? We've had situations where our members have been in court with someone who's being sentenced. They bring their kids to court. Either they're hoping for the best or perhaps that they thought that if they brought their children to court with them it would affect the sentence. But they are arrested. What is to be done with the children? As Senator Crawford said, for the most part, the law enforcement agencies have policies now, either written or unwritten, that usually address these situations and they ought to be commended for it. But I think what Senator Crawford said is right, that the Legislature should adopt or recommend a uniform policy that all agencies have when dealing with children of arrestees and people who are

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being booked in the jail to mitigate the harm that could happen and does happen to those children. So we would urge the body or the committee to consider primarily Section 1 and Section 2 of the bill. I know that there's a fiscal note to it. I think the rest is targeted or deals with people who are actually serving sentences. What we see on a regular basis is what happens to people who are arrested who have small children. [LB108]

SENATOR EBKE: Okay. Thank you, Mr. Eickholt. Any questions? Okay. Thanks. [LB108]

BECCA BRUNE: (Exhibit 7) Hello, Chairperson Ebke and members of the Judiciary Committee. My name is Becca Brune, B-e-c-c-a B-r-u-n-e, and I am the child welfare program associate at Nebraska Appleseed. Nebraska Appleseed is a nonprofit organization that fights for justice and opportunity for all Nebraskans. I'm here to testify in support of LB108, which ensures policies are in place to protect children from additional trauma when a parent or guardian is arrested and incarcerated. Specifically, we support the provisions of LB108 that require law enforcement to establish guidelines for officers to ensure safety of the child upon the arrest by asking if they are caring for a minor child, arranging for temporary care, and also requiring for the education of law enforcement on the long-term effects of trauma. These measures would lessen the effects of trauma and may help prevent future child welfare involvement. As a social worker, understanding the complex effects of trauma was core to my education. While witnessing the arrest of a parent might just seem like one moment, the effects of that trauma can be long-lasting. For children who are still developing, traumatic events can have profound effects on their life by influencing their mental and physical health. Parent incarceration is one of a list of experiences considered adverse childhood experiences, as you heard from Senator Crawford, which is a traumatic event that can have an impact on the child's health and well-being. And according to the Kids Count report, in 2012 parent incarceration was rated as the fourth most common of those adverse childhood experiences for children in Nebraska. While having a parent incarcerated is not reason alone for a family to enter the foster care system, children of incarcerated parents do have a greater risk for involvement with the system. The practices required by LB108 may help prevent system involvement by ensuring their care and safety and minimizing trauma from the moment of arrest. We also support LB108 because of the cooperation and collaboration that is encouraged between law enforcement and the Division of Children and Family Services. At Appleseed, we also advocate for policies and practices that provide older youth in the foster care system with the supports they need to successfully transition into adulthood. And these best practices required in LB108 ensure that all youth, even teens who may often be perceived as old enough to handle the situation but have still experienced that trauma and could often benefit from the opportunity to maintain a strong relationship with a parent while incarcerated, are provided this care and support as well. So having a parent or caregiver that is incarcerated may mean changes to daily life, a child's living arrangements, their financial stability, and their long-term well-being. So thank you for your time today and we ask you to advance Senator Crawford's bill so that consistent guidelines can help

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mitigate the damaging effects associated with the trauma of witnessing a parent's arrest and separation during their incarceration. [LB108]

SENATOR EBKE: Okay. Thank you, Ms. Brune. Any questions? Thank you for being here today. Next proponent. Okay. Opponent. [LB108]

KATRINA THOMAS: (Inaudible.) [LB108]

SENATOR EBKE: Proponent or opponent? [LB108]

KATRINA THOMAS: Proponent. [LB108]

SENATOR EBKE: Proponent. Come on up. [LB108]

KATRINA THOMAS: Hello. I am Katrina Thomas, K-a-t-r-i-n-a T-h-o-m-a-s. I want to thank Senator Crawford for introducing this bill and the Judiciary Committee for taking their time to hear this. Years ago I began my academic research on female incarceration and reintegration while attending Nebraska Wesleyan, yet my personal experiences with the criminal justice system began when I was 19. It's been over a decade since my release from prison. I understand how difficult and challenging reintegration can be. I will forever live with the collateral consequences of my convictions, especially due to the impact my actions and choices have had on my son. Amongst female prisoners, two-thirds are mothers of minor children, with the majority being single mothers, as I was, providing most of the daily care for their children before incarceration. Women's imprisonment is...female-led households leads to children who suffer from their mother's absence and a break in family ties. There's not enough time, I know, allotted for me to speak on all the positive impacts of this legislation, so I'll just highlight a few personal examples. The requirement of two phone calls would have been crucial. The first time I was...that I went to jail I could only make one phone call, of course, to get ahold of legal and my family, but I wasn't able to call my son and let him know everything was going to be okay. What had happened, and just for the trauma of the child, when I finally left my son's father after years of abuse, my son was kidnapped by his family and had severe separation anxiety. So when I finally got him back, I mean the bond was there. He would not leave my side, you know? And so not being able to call him and tell him, you know, Mom messed up, I'll be home soon, that was really hard, so the two phone calls. The hardest one was probably the age-appropriate contact. When I was incarcerated, he was five years old. That was when, after three, they could not sit on your lap. You could only have a quick hug and that was it. And since my son and I were so bonded, he couldn't figure out when he came in, because I wouldn't...it was a really hard choice to let him come and visit me in prison but I did that because I didn't want him to think I abandoned him or things like that. And so when he would come to visit and I could just give him

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a quick hug and he couldn't, like, sit on my lap after that or things like that, he couldn't understand it and it really, you know, he just kept...would...he would cry and he'd be like, why can't you hold me, why can't you hug me, you know? So that was a really hard one. So I encourage that, as long as it's appropriate, that you should be able to have physical contact with your children. And then when we go to also the policies going off that, the policies with the visitation, and really working with state wards is very encouraging and I hope this passes, because if you have ever been to a male versus female prison, especially so here you're in Lincoln where it's a lot easier for people to be able to come and see you, the males. And so the women bring in their children and, you know, more likely and get to see their children. When you're in York, it's really difficult to be able to get your children there to see you and the visitation room is completely different. It's mostly just other people coming to visit you and your children aren't able to get there to see you. So I was fortunate that my family helped me out, but a lot of women don't have that. Okay, I'll hurry. So the sentencing I'll skip but I'll never excuse my past behaviors and my son did not deserve what I have put him through, yet that doesn't change the fact that I'm still his mother and responsible to guide him into building good character and becoming...making better choices. One point I want to make is if this...if we can implement this, the quickest way that women end up back incarcerated or lose their...when they lose their children, that's the point where they recidivate. And so having this family connection is very important. So quality programs and services that promote routine and quality contacts with children facilitate effective parenting skills and support, and family reunification play a key role in successful outcomes. Policies such as LB108, which have proven to reduce recidivism, would help incorporate parental roles for incarcerated parents, which benefit children and family and society as a whole. And I'm here on behalf of Voices for Children, Reentry Alliance of Nebraska, and NASW. [LB108]

SENATOR EBKE: Okay. Thank you, Ms. Thomas. [LB108]

KATRINA THOMAS: Thank you. [LB108]

SENATOR EBKE: Any questions? Thank you for being here today. [LB108]

KATRINA THOMAS: Thank you. [LB108]

SENATOR EBKE: Any other proponents? Any opponents? [LB108]

MAREN WESTRA: I'm sorry, (inaudible) proponent. [LB108]

SENATOR EBKE: Okay. [LB108]

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MAREN WESTRA: (Exhibit 8) Good afternoon, members of the Legislature. My name is Maren Westra, M-a-r-e-n W-e-s-t-r-a, and I'm here today on behalf of the Urban League of Nebraska in support of this bill. In case you are not familiar with the Urban League of Nebraska, we are a community organization located in the northeastern part of Omaha that seeks to lead Nebraska in closing the social economic gap in the African-American, other emerging ethnic communities, and disadvantaged families in the achievement of social equality and economic independence and growth. Our mission is to be an empowering voice in the community, advocating for economic self-reliance, parity, power, civil rights, and equal opportunity for all. For many years we've served as a valuable community resource by offering direct programming and services to our constituents, including youth, and that's what I want to focus on today is the unique perspective that we have into the challenges faced by our youth in particular. That's a large part of the direct programming that we offer. Our Education and Youth Development Department offers an array of academic and prosocial services for youth in our community, and our support of this bill is founded on an understanding of the unique challenge and struggles faced by these kids. Senators, as you may know, African-Americans are nationally arrested at a rate of nearly six times that of whites in America, and in Nebraska that rate of arrest for African-Americans jumps up to eight times that of white individuals. It's, therefore, very important to the Urban League of Nebraska that we consider the disparate experiences of people of color in our criminal justice system and how that affects the community and the families of the kids that we represent, because the kids that we work with are some of those most likely to be affected by parental or guardian arrests and we feel it is our duty to protect them. So I spoke to one of the staff members who oversees programs that works with youth directly to see if she knew of any stories that have recently impacted kids, and right off the top of her head she said something had just happened two weeks ago. A youth, a high school junior that she works with, was woken in the middle of the night. Police, like, knocked through the front door; came right in; it was, you know, a violent, aggressive arrest of a parent that she experienced. And then just a couple hours later she went to school and she went through her school day and told this staff member from the ULN that she just had to smile her way through it. And so I think that shows an incredible strength of these kids in this community. It shows that this is something that is faced by these kids and if we can reduce that level of trauma in that arrest, it will help them go to school, smile their way through it, as this young lady did, and have better academic achievement, less distractions in school, and better, healthy relationships, and a better view and positive view of the police, which I think is very important to healing some of the divides in that community. So we just think it's shameful that this student would have to be subjected to that trauma of a violent, middle-of-the-night arrest unless it's absolutely necessary, and we don't think that it is in many of the cases. So this bill would help limit circumstances where that's happening when it doesn't need to be. And like I said, the kids that we serve experience things that you and I may never understand. It's our job to advocate for their emotional and physical well-being. So this is an important measure to carry out in fulfillment of this duty and supporting this bill supports Nebraska children. [LB108]

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SENATOR EBKE: Thank you, Ms. Westra. Any questions? Thank you for being here today. Okay, we'll try again. Any more proponents? How about opponents? Any opponents? Neutral testimony? Director Frakes. [LB108]

SCOTT FRAKES: (Exhibit 9) Senator Ebke. Good afternoon, Chairperson Ebke and members of the Judiciary Committee. My name is Scott Frakes, F-r-a-k-e-s, and I'm the director of the Nebraska Department of Correctional Services. I'm here today to provide neutral testimony on LB108 and clarify the potential fiscal impact of the bill on NDCS. I thank Senator Crawford for approaching the department about the provisions of LB108 and being willing to discuss how best to structure this legislation so that it is workable for children, families, and the department. I have communicated the department's position on the bill to Senator Crawford and offered to work with her to identify alternatives which would accomplish the objectives of the bill without as significant of a fiscal impact. LB108 provides the Department of Correctional Services shall adopt a number of policies regarding children with incarcerated parents, including: considering the ability to maintain contact with children when making facility placements; adopting child-friendly visitation policies, including age-appropriate physical contact throughout visits for children under 13 years of age; encouraging communication between children and incarcerated parents, including the formation of inmate family council programs; and supporting visitation of parents or guardians by state wards. I'm supportive of programs to encourage communication and ongoing contact between incarcerated parents and children, and agree with the philosophy behind LB108. The department has implemented family councils...inmate family councils; offers parenting programs, such as Destination Dads; encourages visitation by children, including state wards; and operates the nursery program at NCYF which has received national acclaim. I'm offering neutral testimony today for two reasons: concern over the logistics of providing expanded contact visits to children under 13 years of age; and the potential fiscal impact of this legislation. NDCS is a small correctional system operating significantly above capacity. The department does not have a lot of flexibility when placing inmates and the primary focus is on programming needs and security risk. The department currently considers proximity to family when making facility assignments but will examine options to give more weight to inmates with children in this process. Expanded contact visits for young children are something I support in concept. In order to safely implement expanded contact visits for children, however, separate visiting hours for families would be necessary. Having two different sets of physical contact rules for inmates in the existing visiting rooms would create safety and security concerns. Expanding visiting from five to six...from five days to six or seven days a week in order to provide family contact visits is estimated to require seven additional protective services staff--let me try that one more time--estimated to require seven additional protective services staff at our secure facilities. The other option is to reduce general visiting hours and provide for family contact visits within existing resources. I was a little confused when I read the fiscal note on the bill which indicates that NDCS already received funding in 2013 and 2015 for duties similar to those in LB108 and that no additional appropriation is needed. The funding that the department

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received in 2013 and 2015 was to fund the Destination Dads parenting program that is provided by the local nonprofit Christian Heritage at several of our facilities. These funds are passed through to Christian Heritage to operate the program and are not available to the department to hire additional staff needed to expand the required expansion of visiting hours. I support and agree with Senator Crawford's recognition of the importance of family to successful reentry for incarcerated parents and their children. The language in LB108, as currently drafted, would require additional staff to accommodate expanded contact visits or reduction in those visiting hours to accommodate it, and as a result I am neutral on LB108 at this time. The department is willing and looks forward to working with Senator Crawford to achieve the worthwhile goals of increasing communication and developing positive relationships between children and their incarcerated parents. Thank you for the opportunity to testify today and I would be happy to answer any questions. [LB108]

SENATOR EBKE: Do we have any questions for Director Frakes? Thank you for being here. Oh, I'm sorry, Senator Halloran. [LB108]

SENATOR HALLORAN: No, you're fine. Thank you for your testimony. Can you kind of give us...well, a freshman, a little idea of what the inmate family councils are, what they do? [LB108]

SCOTT FRAKES: Well, they're still an evolving concept. So what we started with initially was offering people that come to visiting the opportunity to either come early or stay after the visiting session to meet with the management staff at the facilities to talk about issues, either opportunities to improve the visiting program or other concerns they have about general conditions within the facility. Ultimately, where I plan to go as time and resources allow, is to create some type of a statewide or an agency level committee. We're not ready for that yet so at this point it's facility focused. [LB108]

SENATOR HALLORAN: And the Destination Dads program, can you kind of elaborate on that a little bit? [LB108]

SCOTT FRAKES: It's a form of a parenting program. It's offered at several facilities, including the State Penitentiary, at Tecumseh, at the Omaha Corrections Center, and at the Lincoln Corrections Center; provides dads with tools to be better parents. It also opens up opportunities for additional interaction with their children. Sometimes special visits are part of that program. So it's a good example of a program that can give parents, in particular dads, skill sets that will help them both while they're completing their incarceration and when they return to the community and try to restore that family life. [LB108]

SENATOR HALLORAN: And that's provided by Christian Heritage? [LB108]

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SCOTT FRAKES: Yes. [LB108]

SENATOR HALLORAN: Do they have a Destination Moms that you're aware of? I know this isn't something... [LB108]

SCOTT FRAKES: Yeah. [LB108]

SENATOR HALLORAN: ...you have control over. I'm just curious. [LB108]

SCOTT FRAKES: Well, it's a question I ought to be able to answer. I don't believe I've got a Destination Moms yet. [LB108]

SENATOR HALLORAN: Okay. Thank you. [LB108]

SENATOR PANSING BROOKS: Okay. Any other questions? I have one, Director Frakes. [LB108]

SCOTT FRAKES: Okay. [LB108]

SENATOR PANSING BROOKS: Thank you for coming. [LB108]

SCOTT FRAKES: Yes. [LB108]

SENATOR PANSING BROOKS: So is the main issue space or is it personnel or...? I mean clearly, you know, the juvenile to prison pipeline, we talk about all these different pipelines and, you know, the more that we do to keep families connected certainly has to help. So I'm trying to figure out if...or if it's...I mean could there be programs run by people in the community that would help to facilitate this for you or what is it, because it clearly, I just...I think about these kids. It's got to be just...I understand punishment for the adult but I do not understand the kids as well. [LB108]

SCOTT FRAKES: I think you and I are in agreement. The family members and the children should not have to serve time. It, specific to...really it's just the one sentence in the bill that talks about increased physical contact for children up to 13 years of age, that drives a need to either have additional visiting hours so that we can have some different visiting time so we can manage that piece. Or it means taking time away from general visiting so that we can have that specialized visiting. In our larger facilities I don't know that we have enough resources dedicated

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to visiting as it is. So it is very much a personnel issue specific to the physical contact piece. I want to grow things like what we are planning right now. I'm not going to get into details right at this moment. We're working on some plans for some parent-child activities that are very different than anything we've done in this department. So I do see our ability to increase special visiting days and special events that are family/children focused and that's a piece that we're going to continue to work on. And I, when I met with Senator Crawford, we were going to look at this physical contact piece and see if there's room to do some things differently than what we do right now. We're pretty strict, I agree. [LB108]

SENATOR PANSING BROOKS: Okay. Well, thank you. I hope there could be some resolution that's...I appreciate your coming today. [LB108]

SCOTT FRAKES: Thank you. [LB108]

SENATOR PANSING BROOKS: Thank you. Any other questions? Thank you. [LB108]

SCOTT FRAKES: Thank you. [LB108]

SENATOR PANSING BROOKS: Further neutral testimony. Welcome. [LB108]

ANDI BISHOP: (Exhibit 10) Hi. My name is Andi Bishop, A-n-d-i- B-i-s-h-o-p. Thank you for allowing me to testify neutral about LB108. I have been a family advocate for the Destination Dad team for approximately two and a half years. As family advocate, my job duties include: facilitating classes with male inmates at the four main facilities; organizing and supervising Daddy Day visits; organizing and facilitating our DVD from Dad project; compiling class rosters, waiting lists, and data; as well as providing support to families impacted by incarceration. Working with the Department of Corrections to help strengthen fathers and families with the goal of reducing recidivism and the cycle of incarceration has been an honor and a privilege. My passion for fathers and families is fueled by my own experience as a mother of two beautiful children whose father served ten years in the federal system. Although the father of my children served time in the federal prison system, my children have many of the same feelings and experiences that children who have a parent incarcerated in Nebraska experience. My son was a year old and I was pregnant with my daughter when their father left. My son became very clingy to me after his father left, making it very challenging to work and run a household on my own. He went through a period of time when he was about four years old where he believed that his father would not be in prison if he was just a better child. He told me that if he was not alive that his dad would be better. That was the first time that I fully realized that kids internalize things differently than adults do. Their dad would call and talk to them on the phone, but when he was unable to call my son would become anxious and ask if his dad was

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hurt. When my son was in school, he learned very early not to tell people where his dad was due to the reactions of the other kids at school. Now that he is older and had several years of therapy, he still longs for that relationship with his father. As a parent of children with an incarcerated parent, I had my own struggles. I received no financial help of any kind while he was in prison. Phone calls were so short that it was very difficult to fill him in on all the things going on with the kids, so there was never any time left for him to provide me with any emotional support. Judgment from the people around me was also very difficult. I remember several occasions I was talking to other moms about parenting and they would ask about the father of my children. I didn't want to lie to the people around me, but I will never forget the way they would visibly take a step away from me as soon as they found out where he was. When I joined the Destination Dad team, it became apparent to me that the way my children feel is the same as most children who have a parent in prison. Children need to have their relationship with both parents. I will never forget a first-time Daddy Day visit between a 15-year-old girl and her father. When I met this young lady, she was very quiet and withdrawn. She wouldn't make eye contact with me and just had such a sad look to her. The way she lit up when her father walked in that room was an amazing thing to see. This young lady became a different person as soon as she got to spend time with her father. I have the honor of seeing this young lady every month now and I get to see the changes that this...or to see the changes in this young lady is clear evidence that children need the relationship with the incarcerated father. In my role as family advocate, I have routine contact with children who have an incarcerated father, as well as the caregivers of those children. One of the things that I am frequently told is that regular visits with dad are very restrictive. Children tell me that it is tough to see their father and not be able to sit on his lap or receive hugs or kisses from him. Many times I observe children come into the Daddy Day visits and appear to be scared to touch their father. They will sit quietly until I remind them they are allowed to get up and play. Many caregivers of these children report that they do not bring children to regular visits very often because of the restrictions and their fear of the restrictions causing more traumas to their child. When program participants request Daddy Day visits, part of my job is to make that initial phone call to the caregiver. Many times when I speak with the caregiver, they will cry and tell me about wanting their child to see the father, and they will tell me how much their child wants to see their father. The caregiver is unable to make the visit happen due to the facility where he is currently residing. I am frequently told that there just isn't money for the gas to the facility that the father has been placed. I realize there's no easy solution when it comes to placement of inmate fathers, but facility location does have an impact on children and families. Caregivers tell me that the impact incarceration has on their children is huge. They frequently tell me their children have fears and anxieties about the safety of their father. They also report that the children behave better at home and at school when they are able to see their father more frequently. Through my personal and career experiences, I have learned that supporting inmate parents and their families is a complex task. There are no simple solutions, but I believe that small changes can make a big difference in a tough, complex situation. The partnership between the Destination Dad team and the Department of Corrections has been such a blessing. The

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mutual respect and support is what makes positive change for families possible. Thank you for allowing me to share my story as well as my work experiences with the Destination Dad program. [LB108]

SENATOR EBKE: Thank you, Ms. Bishop. Senator Pansing Brooks. [LB108]

SENATOR PANSING BROOKS: Thank you very much for coming, Ms. Bishop. Why are you neutral on this bill? [LB108]

ANDI BISHOP: Mostly just because we understand that the Department of Corrections only has so much room to place the fathers. I mean Tecumseh exists so to say that that should be like a top priority I think is really challenging. [LB108]

SENATOR PANSING BROOKS: Thank you. [LB108]

SENATOR EBKE: (Exhibits 1-3) Any other questions? Thank you for being here today. Is there any other neutral testimony? If not, Senator Crawford, do you want to make your way up? And I will read letters in support from Amy Miller of ACLU Nebraska; a letter of support from Peg Harriott of the Children and Family Coalition of Nebraska; and a neutral letter from Douglas Weinberg, DHHS, Division of Children and Family Services. Senator Crawford. [LB108]

SENATOR CRAWFORD: (Exhibit 11) Thank you, Chairwoman Ebke. And thank you, committee, for your attention and your good questions. I do, as I'm closing, just want to try to address a couple of points raised. And I want to thank Katrina Thomas for coming and sharing her story. It's a very brave thing to do and I appreciate that very much. I do want to just clarify that the aim of LB108 is not to have a set uniform policy in terms of arrest across the state but really to encourage a conversation in each municipality and county to ensure there is a policy in place. And there is a model policy that could be copied if that was helpful to the department. And it's not intended to prescribe a particular approach but, instead, just to ensure there are conversations that are in place and something is...and those conversations I think will lead to improved practices and that that is filed. And there's no set evaluation of those plans. It's really prompting that conversation and that filing of the policy. That's as far as LB108 is intending to go. And I also want to acknowledge and thank Director Frakes for meeting with me and I applaud the work that he's doing to try to improve the situations for families and do note that we had a conversation about, you know, the challenges of the age-appropriate physical contact. It is really a challenging part, challenging to accomplish. You heard from some of the testifiers about how important that is, but it is a challenging thing to do with the existing space and existing staff. And so I thought it was important to still put that in the bill for us to recognize that and have a conversation about that and see what we could be doing, and this committee especially, in terms

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of moving forward in that direction and improving in that direction. And happy to have other conversations if there's some creative way for us to move forward immediately or recognize a pathway to move in that direction. That's what's really critical is to recognize how important it is and to move in a direction that allows for that as quickly as we can within the parameters that we have. So that's something that I think is important to recognize and I just want to acknowledge that I recognize that's a challenging part of the bill. And there are other parts and, again, we can see if there's a way to adjust or address that part of the bill, but I encourage your attention in terms of recognizing the other elements and also just to acknowledge it is not required that the family be the top priority in placement, just that it's...the information is there and it's one of the factors that's considered, because, again, there are limitations to what we're able to do. I do have an amendment that I'll leave with the committee that inserts "custodial" parent, and strikes "proper" and inserts "reasonable" in terms of care of the...taking care of the children. And so I'll leave that with the committee and I'll be happy to talk to the committee about other potential amendments that you may be interested in and talk to other stakeholders who are interested as well. Thank you. [LB108]

SENATOR EBKE: Thank you. Any questions? Senator Halloran. [LB108]

SENATOR HALLORAN: Thank you, Senator Crawford, for bringing this bill. It's clearly in need, there's no question about the need. But maybe I misunderstood. In your closing remarks you said something about this was...the intent of this was mostly to start a conversation. [LB108]

SENATOR CRAWFORD: So what I was referring to, if you go to...if you look at the bill itself, the part that Director Frakes indicated is the most challenging in terms of space and staff is on page 7, lines 15 through 18, and that is adopting the family friendly visitation policies that allow age-appropriate physical contact--very important goal. As he indicated, when you're trying to supervise or watch, you know, multiple people who have visitors, the challenge, as he noted, it would, to do it effectively, would probably require a separate visitation time. So is that something that we would want to appropriate funding for them to expand space or expand staff to be able to really make that happen effectively? [LB108]

SENATOR HALLORAN: Okay. [LB108]

SENATOR CRAWFORD: Are there...there may be steps in that direction we could take, but it is...that is the most challenging part of the bill in terms of being able to say we could put these pieces in place. [LB108]

SENATOR HALLORAN: Okay. Thank you. [LB108]

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SENATOR EBKE: Any other questions? Thank you, Senator Crawford. [LB108]

SENATOR CRAWFORD: Thank you. [LB108]

SENATOR EBKE: You want to grab your next? [LB108]

SENATOR CRAWFORD: Okay, I'll go grab my next one. [LB108]

SENATOR EBKE: Great. Thanks. That closes the hearing on LB108. LB107 is next. Switch committee counsel here. Whenever you're ready. [LB108 LB107]

SENATOR CRAWFORD: (Exhibit 7) All right. Thank you. Good afternoon, Chairwoman Ebke and members of the Judiciary Committee. My name is Sue Crawford, S-u-e C-r-a-w-f-o-r-d, and I represent the 45th Legislative District of Bellevue, Offutt, and eastern Sarpy County. And I'm happy to be here today to introduce LB107 for your consideration. LB107 addresses an issue related to sexual abuse of minors in our state. When this issue was first brought to my attention by Bellevue Police Chief Mark Elbert, I was shocked to learn of a gap that currently exists in our sexual assault statutes. LB107 seeks to close this gap and ensures that adults who hold positions of special trust with a minor between 16 and 18 years of age can be held accountable for sexual abuse. Section 28-319.01 of statute states a person commits sexual assault of a child "When he or she subjects another person who is at least twelve years of age but less than sixteen years of age to sexual penetration and the actor is twenty-five years of age or older," and similar language for sexual contact. This gap leaves minors between the age of 16 and 18 unprotected. National statistics indicate that 1 in 6 women and 1 in 33 men will be sexually assaulted at least once in their lifetime and that the majority of sexual assault victims experience their first assault before their 18th birthday. If a minor is sexually assaulted by an adult who holds a special...a position of special power or trust in their lives, such as their healthcare professional, educator, or youth facility supervisor, that adult should be held accountable no matter his or her age. In Nebraska, we hold these professionals to high standards and trust them to serve, educate, and protect our children. And as parents, we should feel safe knowing that adults who hold influencing positions of trust with our children will be held accountable if they violate this trust. LB107 closes this gap and will hold healthcare providers, school employees, youth facility employees, and adults in positions of special trust, which is explicitly defined in the statute, accountable. During this process I've worked with various stakeholders, including law enforcement and child advocates, to craft the bill's language narrowly. This includes drafting definitions that apply specifically to adults holding position of special trust in relation to the child victim in most cases. I've drafted an amendment that makes this distinction even more clear, such as distinguishing that a healthcare professional is guilty of sexual abuse of a patient or client if they are subject...if they subject his or her patient or client to sexual penetration or sexual contact as opposed to a patient

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or client. It also narrows the definition of school volunteer so it is only applicable to volunteers who have direct oversight and authority over the child victim. And I appreciate a constituent who sent this example to me, was concerned about a way that the bill might be interpreted. So this ensures that a 19-year-old volunteer wrestling coach cannot be charged with sexual assault for relations had with an 18-year-old significant other who is not involved with wrestling in any way. Finally, the amendment would add a few other provisions to the definition of a position of special trust, such as a child's attorney, an assigned youth mentor, and a youth coach. In December of last year, the Inspector General of Nebraska Child Welfare identified 36 cases involving sexual abuse of state wards or children under the jurisdiction of the juvenile probation system. LB107 extends important sexual abuse protections to all minors in the juvenile probation program, youth rehabilitation programs, staff-secure facilities, and other youth facilities serving vulnerable minors across our state. Following my testimony, you'll hear from law enforcement and the Nebraska Coalition to End Sexual Assault and Domestic Violence. In their testimonies you'll hear more about this gap that leaves minors vulnerable under our sexual assault statute. LB107 provides protections for these minors and ensures that adults who hold positions of special trust and power are held accountable if they are guilty of sexual assault. I appreciate the committee's attention to this issue and would be happy to answer questions. [LB107]

SENATOR EBKE: Do we have any questions for Senator Crawford at this time? Okay. [LB107]

SENATOR CRAWFORD: Thank you. [LB107]

SENATOR EBKE: Thank you. First proponent. If the proponents would start making their way to the front so that we are queued up and ready to go. [LB107]

TIM MELVIN: Senators, thank you for giving me the opportunity to speak today at this hearing. My name is Tim Melvin, T-i-m M-e-l-v-i-n. I'm a lieutenant with the Bellevue Police Department. I work in the criminal investigations division, which investigates sexual assaults involving minors as well as adults. I'm here today on behalf of my department to support LB107. Our current sexual assault laws do not protect minors that are ages 16 through 18 years of age from being victimized by persons in a position of special trust. Parents justifiably put their trust in school staff, church leaders, healthcare professionals, just to name a few, to take care of their children. Unfortunately, there are instances in which these people take advantage of the minors they are trusted to care for. Under our current law, it is not against...it is not illegal for a minor 16 to 18 years of age to have a consensual sexual relationship with a person in a position of special trust. This allows the adults in the position of special trust the ability to groom and take advantage of the minor. They often have day-to-day contact with these minors and build rapport and role model relationships. Once they gain the trust of the minor, it is easier for them to exploit the relationship into a potentially sexual one. Our agency has investigated several instances

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recently of this and I have a colleague here that will speak to that. And if you have any questions... [LB107]

SENATOR EBKE: Any questions? Okay. Thank you. [LB107]

TIM MELVIN: Thank you. [LB107]

ANDY JASHINSKE: Good afternoon, Senators of the Judiciary Committee. My name is Andy Jashinske; it's J-a-s-h-i-n-s-k-e. I am the supervisor of the Bellevue Police Department's family crimes unit. We investigate primarily crimes against children. We have...we represent three different school districts in the city of Bellevue, as well as several private schools. And, of course, we have churches, counseling organizations in our area as well. Our agency, as Lieutenant Melvin mentioned, has investigated these types of cases which involved individuals that were in a position of authority over minors which we could not really do anything about. We'd still investigate them but we were unable to take any criminal action. So I'm going to give you three examples of a few recent ones that occurred within the last couple of years. Last year we investigated a case in which an 18-year-old female reported that she had sexual conversations with her teacher at the school and at one point they actually had sexual contact in the school. And we investigated that matter and determined that there was nothing that we could do about it. So we investigated it. The school found out about it. But there's no criminal law against that. Another case from last year involved a coach. A 17-year-old female at one of our schools reported that she had sexual intercourse with a coach at the school. Again, since she was 17, she fell outside of our current statutes and we were unable to take any criminal action regarding that case. A case from 2015, about two years ago, there was a 16-year-old female who also reported having sexual contact, or sexual intercourse actually, with her teacher, and this was actually in the classroom and it was occurring during school hours as well as after school hours. Again, in that case, we could notify the school about it but we could not take any criminal action. So as Senator Crawford said, and Lieutenant Melvin, we trust that when we send our children to school or a counselor or youth group that they will not be taken advantage of by these individuals. At this point, we don't have any teeth, any laws to make sure that that happens. Thank you for your time today. I'll answer any questions. [LB107]

SENATOR EBKE: Any questions? Guess not. [LB107]

ANDY JASHINSKE: All right. Thank you. [LB107]

SENATOR EBKE: Thanks for being here. [LB107]

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STEPHANIE HUDDLE: (Exhibit 8) Good afternoon, Chairperson Ebke, members of the Judiciary Committee. My name is Stephanie Huddle, S-t-e-p-h-a-n-i-e H-u-d-d-l-e. I'm the public policy coordinator for the Nebraska Coalition to End Sexual and Domestic Violence, and I am here today to testify our support regarding LB107. The Nebraska Coalition to End Sexual and Domestic Violence is a statewide nonprofit advocacy organization committed to the prevention and elimination of sexual and domestic violence. We provide training and program capacity building to Nebraska's network of domestic violence and sexual assault programs, supporting and building upon the services they provide. Our mission is to enhance safety and justice by changing the beliefs that perpetuate domestic violence and sexual assault. We believe that LB107 is an effort to do just that and will allow those who have been subjected to sexual coercion and sexual violence to be better served throughout Nebraska. Teachers, coaches, doctors, youth group leaders, baby-sitters, and others hold very special positions of trust when working with youth. They are entrusted to help children and are oftentimes seen as mentors. Because of their positions within the school or community, these adults are often with children in one-on-one settings. And while children may legally consent to sexual activity at the age of 16, there is reason for concern regarding a sexual relationship between a youth and a person in a position of trust or power. A person who holds a special position of trust is a helping professional, someone who is there to assist children and help cultivate them as they navigate through their teenage years. For many children, this can be a very awkward and confusing time, and they may have questions about their bodies and their sexuality. Abusers may use manipulation, flattery, threats, such as cutting a person from a sports team, to facilitate this abuse. Because of the nature of the relationship between the abuser and the victim, there is often a low reporting rate for sexual abuse by a person in a trusted position. Sexual abuse or assault by a person who holds a position of trust is a violation of boundaries and can leave victims feeling like they have been betrayed by someone they should have been able to trust. According to the Rape, Abuse and Incest National Network, it is not uncommon for victims to have anxiety disorders, depression, and feelings of guilt, shame, anger, or confusion. Victims often have difficulty with intimacy and may develop sexual dysfunction. This can also lead to an increased risk of suicide for some victims. Additionally, a study conducted by the Office of Juvenile Justice and Delinquency found that when compared to nonvictims, victims of child sexual abuse are approximately four times more likely to abuse drugs, four times more likely to experience posttraumatic stress disorder as adults, and three times more likely to experience a major depressive episode as an adult. By passing LB107, you are ensuring additional protections for Nebraska's youth, which is an important step in enhancing victim safety. The Nebraska Coalition to End Sexual and Domestic Violence asks you to advance LB107. Thank you for your time and I'll be happy to try and answer any questions. [LB107]

SENATOR EBKE: Any questions? [LB107]

STEPHANIE HUDDLE: Thank you. [LB107]

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SENATOR EBKE: Thanks for being here. Next proponent. [LB107]

COREY O'BRIEN: Good afternoon, Madam Chair, members of Judiciary. My name is Corey O'Brien, C-o-r-e-y O-'-B-r-i-e-n, and I am the chief prosecutor for the Nebraska Attorney General's Office. I appear here today on behalf of the Nebraska Attorney General's Office, as well as the County Attorneys Association, who I know also submitted a letter in support of LB107. I just wanted it known on the record that we did not work with Senator Crawford's office or ask her to bring this bill on our behalf, as she indicated, but we are in support of the bill. I can tell you from my personal experience as a prosecutor, probably annually we get anywhere from five to ten calls in the office from despondent mothers and parents and children who have been sexually taken advantage of by either a teacher, a coach, a minister. And there is very little that we can do for them other than, you know, perhaps consider some misdemeanor child abuse allegations or contributing to the delinquency of a minor, some things that don't really represent the seriousness of the offense. And so we applaud Senator Crawford for bringing this bill. I have not had an opportunity to see whatever amendment she's proposed. There are probably some things in here in terms of the definitions and the way that the bill is put together that could use some work. And on behalf of the Attorney General's Office, we're committed to helping in any way we could possibly do so. So other than that, I would be happy to answer any questions you might have. [LB107]

SENATOR EBKE: Thank you, Mr. O'Brien. Any questions? Okay. Thanks. Any other proponents? Going once. Any opponents? Welcome. [LB107]

APRIL O'LOUGHLIN: Welcome. Thank you. Madam Chairperson, members of the committee, thank you for listening to me today. My name is April O'Loughlin, O-'-L-o-u-g-h-l-i-n. I am here on behalf of the National Criminal Defense Attorneys Association...or Nebraska, excuse me. I am a former prosecutor and I am now a public defender and have been in that capacity now for the past six years. I am here in opposition to LB107. I know that I guess I'll take issue with a couple of things or point out a couple of things that Senator Crawford pointed out. I want to state with the groundwork that in no way do we agree that whether or not these relationships that were cited by Detective Jashinske and Officer Melvin are appropriate or may be bad decision making. But I think to elevate them to the capacity of a forcible situation or a situation where you're talking about a child that doesn't have the capacity to consent, I don't think that certainly this committee or this Legislature should prepare to make that leap. Having said that, I think that Senator Crawford points out that right now there is a gap in the 16- to 18-year-old range in terms of protection under the law. I would respectfully disagree with that with respect to the language that's currently in the bill. The language that's indicated creates a bright line rule that says that regardless of the situation consent is not at issue. I think that opens up a precarious can of worms, both in terms of the law and its application. There are several situations where...and I'll just hit on a couple that Detective Jashinske hit upon, who I've had the occasion to work with on

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cases and I respect his opinions on things. But with respect to an 18-year-old female and a teacher, if we're going to take the position that an 18-year-old has the capacity to vote, the capacity to enter the military, then we're going to say under a bright line rule that that person does not have now in every situation the capacity to consent, I think that opens up a dangerous can of worms. With respect to the language that's outlined, I know that that was brought out by the County Attorneys Association that there is some language in here that is open to interpretation, and I think opens potentially a dangerous landmine for the application of the law. Specifically, the word "volunteer" is broadly defined. The words, the definition, "special trust" is broadly defined. Does this Legislature and this committee want to get in the precarious position of defining what a special trust is? Do we put police officers on that list, because they're not on that list. Do we put lawyers on that list? They're not on that list. If a...I think that these cases, certainly the cases that were brought up by law enforcement, in almost every jurisdiction where you're going to see in those cases that make the news are the ones where you're talking about a teacher and a student. Some states have taken the position that that relationship needs to have special protections, and certainly that may be the case, but that's not what we have here. What we have here is a situation where we're trying to define what a special trust and special relationship is, what a health professional is, what a volunteer is, what an employee is, what a youth center is, and that is I think when you combine that broad language with the inflexibility of the inability to consent, it creates special problems for the application of this law. I would point out that what you do with a 20-year-old who is volunteering on a soccer field with an 18...and dating an 18-year-old, under the application of this law, if there is consensual sexual relations he would be in violation or she would be in violation of this law. So I think that it creates a difficult situation that certainly, while we understand maybe the inappropriateness of some of these relationships, I think there's a more appropriate way to deal with that in terms of how you address the language or the specific relationships that we're really trying make sure that we're protecting those individuals. Finally, I would focus that there is a general language that the "but (not) limited to" language that's reflected in there and I think that also opens to interpretation, that if we're going to have a nonconsensual aspect of this then I think what we're dealing with needs to be very specifically defined under the terms of this law. So I would urge you to consider opposing this law as it is written now in terms of the specific language that, again, opens I think too broadly up to interpretation. [LB107]

SENATOR EBKE: Okay. [LB107]

APRIL O'LOUGHLIN: Any questions? [LB107]

SENATOR EBKE: Thank you, Ms. O'Loughlin. Senator Pansing Brooks. [LB107]

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SENATOR PANSING BROOKS: Thank you for coming, Ms. O'Loughlin. I guess have you talked with Senator Crawford and worked with her on how to maybe change some things or discussed ways to improve it, because it seems to me like this is a gap in coverage, so. And I agree that we do let people vote, but we also know all the studies that say that an adult's brain doesn't fully develop till 26. So I think there are some difficulties with that stance as far as allowing young women to decide for themselves whether or not, and not put a greater burden on the teacher or the coach or somebody who's in a position of power and authority over that student. So I'd like to hear you speak to that. [LB107]

APRIL O'LOUGHLIN: Thank you, Senator. And I'm sure that the Nebraska Criminal Defense Attorneys Association is working diligently with Senator Crawford to adjust the language. To address your concerns, I think specifically the fundamental problem as it relates to this is when you have on a first-degree sexual assault or the situation where you have said that a child cannot consent, then that's where the power takes away and we take that burden off of that particular minor child or that victim. In this particular law, you have a situation where you've taken that away. And so any situations where you may have the gray area, there is no gray area. This application says consent is not at issue. So along those situations that you are talking about, absolutely then those victims need to have the protection, every protection the law can provide. But on those situations where that is not the case, in the scenario that I just gave for this committee where you have the 20-year-old volunteering under the definition at the school and he is dating his 18-year-old girlfriend, by sheer application of this law he would be guilty. And so I think that when you take away whatever discretion that is afforded in situations like that, he would fall under, or she would fall under, the definition of a special trust relationship. And I don't think that the merits of Senator Crawford's bill are what's intended in this. And so I think there needs to be...certainly the intent is good and certainly you want to (inaudible) every protection for the victims, but certainly I think you want to do that cautiously and make sure that we're not applying it to situations that are not intended. [LB107]

SENATOR PANSING BROOKS: I clearly think people that are placed in a position of trust ought to be held to a higher standard, so I hope the criminal defense attorneys are working with her on this because it's a significant gap and something needs to be dealt with on this. Thank you. [LB107]

APRIL O'LOUGHLIN: Thank you, Senator. [LB107]

SENATOR EBKE: Any other questions? Okay. Thank you for being here today. [LB107]

APRIL O'LOUGHLIN: Thank you. [LB107]

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SENATOR EBKE: (Exhibits 1-6) Any other opponents? Do we have anyone in the neutral capacity on this bill? Senator Crawford, as you make your way up, I have a few letters. We have Amy Miller from ACLU of Nebraska is opposed; Ivy Svoboda of the Nebraska Alliance of Child Advocacy Centers supports; Kristin Mayleben-Flott of the Nebraska Planning Council on Developmental Disabilities, support; Tricia Freeman, Nebraska County Attorneys Association, support; Eysersalem Lemma, UNMC student delegates, supports; and Juliet Summers, Voices for Children, supports. Senator Crawford. [LB107]

SENATOR CRAWFORD: Thank you, Senator Ebke. And thank you, committee, for your attention to this issue. And I will say that I did have someone from the public defenders talk to me just to let me know their concern about the "but not limited to" language and their concern about the consent. And I will talk to them to see if there are language tightening that can be done. We didn't work through all of that before the hearing because I think there was a sense that they still would have concerns even if the language were tightened in some areas. But I'm happy to talk to them and see if there are...and make sure that we are making the language as tight as we can make it, even if it's something they still have concerns about in the end, and also happy to follow up with the Attorney General's Office to see if he has language suggestions, and with members who may have suggestions because, obviously, we want to make sure that it is a law that protects minors and that it does that in a careful way. And I'm attentive to wanting to make sure we do that well. I will note the amendment that I gave to you already addresses the example that was mentioned in terms of a 20-year-old volunteer coach and with an 18-year-old girlfriend. As long as that 18-year-old girlfriend is not directly under that coach, that would not...with the amendment, that takes care of that issue to make sure that that would not fall...get swept into this situation. So with that, I would look forward to working with the committee, look forward to coming back to you with an amendment and, if necessary, to address some of those concerns that were raised. [LB107]

SENATOR EBKE: Any questions for Senator Crawford? Okay. Thank you. [LB107]

SENATOR CRAWFORD: Thank you. [LB107]

SENATOR EBKE: This closes the hearing on LB107. We now move to LB160. Senator McCollister. Welcome back to the Judiciary Committee. [LB107 LB160]

SENATOR MCCOLLISTER: It feels like home. [LB160]

SENATOR EBKE: It should. Go right ahead. [LB160]

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SENATOR McCOLLISTER: Good afternoon, Chairwoman Ebke and members of the committee. I am John, J-o-h-n, McCollister, M-c-C-o-l-l-i-s-t-e-r, and I represent the 20th Legislative District in Omaha. Before I introduce LB160, I want to remind this committee that I introduced LB991 last year with the same primary objective and it is now the basis for LB160. Prior to the hearing on LB991, Spike Eickholt, on behalf of the Nebraska Criminal Defense Attorneys Association, and I collaborated on amendment language. Together we recommend the amendment...we recommended the amendment to the committee at the public hearing. Lack of time and competing priorities prevented LB991 and the amendment from being advanced. During the interim I told Mr. Eickholt and Senator Chambers I planned to introduce this bill again. LB160 is the bill in question for this session. LB160 would add three categories of crimes for which the victims are entitled to be notified and informed about the status of prosecution of the perpetrators of the crimes in question. Crime victims' rights are guaranteed by Article I, Section 28, of the Nebraska Constitution. They include the right to be informed about the prosecution of the perpetrator, to make the personal statement about the impact of the crime at different stages of the criminal justice process, and other rights. Section 81-1845(1) and (2) implement the constitutional guarantees. They spell out the rights the crime victims have. However, previous Legislatures have not agreed that these rights are extended to every victim of every crime. Instead, current crime...current law extends these rights to victims of a specific list of crimes. This is done by referencing Section 29-119. That section lists the type of crimes for which victims are granted their rights. LB160 would expand the list by adding Section 29-119 to the three categories of crimes previously mentioned. The three categories of crime for which victims would be granted these rights are, first, "third degree assault under section 28-310 when a victim is the intimate partner." This is on page 2, lines 14 and 15. "Third degree" would be added to the list that already includes first-degree and second-degree assault. These three crimes of assault involve intentional or reckless criminal acts that cause bodily injury to a victim. The addition of third-degree assault is restricted to victims who are intimate partners of the perpetrator in order to avoid expanding this scope of cases that would trigger full-blown presentence evaluations and reporting when these are not typically done in cases of third-degree assault. Second, domestic assault under Sections 28-323, this is on page 2, lines 20 and 21. There are three degrees of domestic assault: first, second, and third degree. All would be added to the list by this reference. Third, third-degree sexual assault under 28-320, this is on page 2, line 18 through 19. Current law already allows victims' rights in the cases of first- and second-degree sexual assault, so this would be expanded to include third-degree cases as well. These are the three new crimes to be added to the current list that extends rights to victims. LB160 would add three...these three...add these crimes to the list because of the basic nature of the offenses and the harms to the victims are similar enough to justify recognizing that these victims have rights that we should also protect. There are two housekeeping features to this bill. First, LB160 would revise (2) of 29-119 by reorganizing the listing of crimes to which the current statutes refer. On page 2 of this bill, lines 12 through 24 the Revisor also drafted. LB160 did this by striking current language and moving it to different places in the section. The current statute listed at

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least ten different crimes but they are not arranged in any particular order. LB160 would improve the existing statute by placing the crimes it refers to in numerical order. This change would make it easier for prosecutors, defense attorneys, and judges to follow when they work with this law. Another...a second housekeeping feature, LB160 would correct the grammar of the current law by moving a phrase from one place to another. The phrase is, "has had personal confrontation with the offender." It is now found on page 2, lines 25 through 26. The bill would strike the phrase from the location and move it to a new position on page 2, lines 10 through 11. This would correct a previous drafting issue. This change was made because as it now reads the phrase referring to "personal confrontation" with offenders can be readily...can be read to modify all list of crimes that comes before it. That would mean the victims' rights granted by Chapter 81 would apply not only to victims but also bystanders claiming a personal confrontation. In other words, witnesses would receive the same treatment as victims. However, the rights of the witnesses are different from the rights of victims. Witnesses are not given the right to submit written impact statements at sentencing, conditional release proceedings, and other proceedings that affect the punishment of the perpetrator. Rights of crime victims are different in subsection 81-1848. Making this grammatical change to Section 28-119 would eliminate the unintended consequences of the current wording. Expert testimony will follow from victims' advocates and those who use the proposed changes in the practice of law. Thank you. [LB160]

SENATOR EBKE: Thank you, Senator McCollister. Any questions? Okay. First proponent. [LB160]

TONI JENSEN: Good afternoon, Chairperson Ebke and members of the Judiciary Committee. My name is Toni Jensen, T-o-n-i J-e-n-s-e-n, and I'm here today representing the Nebraska Coalition for Victims of Crime to testify in support of LB160. Our coalition is made up of individuals who are working directly with victims or directly with victims' issues across the state of Nebraska. Our organizational purpose is around improving victims' access to their constitutional and statutory rights in our state. We feel that LB160 is a step in that direction. Crime victims are described in the Nebraska Crime Victim's Reparations Act. The bulk of the rights provided to victims can be found in Statute 81-1848. That statute and others related to crime victims' rights use the definition, as indicated by Senator McCollister, in 29-119 to describe "victim." We feel that the small expansion of the current definition of "victim" proposed in LB160 will help to better serve crime victims across the state. As you likely know, the crime victims' bill of rights provides many things to Nebraska's crime victims, including an opportunity to be heard throughout the criminal justice process, including initial charges, plea negotiations, sentencing decisions, and parole hearings. It also requires simple notification to victims when any proceeding is canceled, continued, or rescheduled so that a victim doesn't travel unnecessarily for a hearing. The crime victims' bill of rights also provides victims with important protections, not only for their physical security when attending court hearings but also for the protection of their personal identifying information. It is for all of these reasons, but specifically

the last, that we want to see the definition of "victim" expanded. LB160 adds three categories of victim, as Senator McCollister indicated: third-degree assault when the victim is an intimate partner, third-degree sexual assault, and all classifications of domestic assault. It's been our experience in working with victims that first- and second-degree offenses are often pled to a third degree or charged as a third degree based on available evidence or witnesses. The victims of these crimes currently do not have the right to be notified, to be present, and to be heard at proceedings, perhaps because their assault wasn't as bad or because there wasn't sufficient evidence to prove a higher classification of the crime. Additionally, victims of domestic assault experience extreme risk for their participation in the criminal justice process and, as such, need some of the specific protections provided for in the crime victims' bill of rights. Our board encompasses victim advocates who have worked with crime victims in urban and rural areas of our state for decades. We can confidently say that many victims hesitate to be a part of the criminal justice process out of fear for their personal safety or fear that others will find out about their victimization and use that information to retaliate or intimidate. We believe that providing this small expansion to the definition of "victim" will help to improve victims' involvement with the system and also their experience of the system. In closing, the Nebraska Coalition for Victims of Crime thanks Senator McCollister for bringing this bill forward and asks the committee to move LB160 forward. Thank you for your time and I'd be happy to answer any questions. [LB160]

SENATOR EBKE: Okay. Thank you, Ms. Jensen. Anybody have any questions? Okay. Thank you for being here. [LB160]

STEPHANIE HUDDLE: (Exhibit 2) Good afternoon, Chairperson Ebke, members of the Judiciary Committee. My name is Stephanie Huddle, S-t-e-p-h-a-n-i-e H-u-d-d-l-e. I'm the public policy coordinator for the Nebraska Coalition to End Sexual and Domestic Violence, and I am here to testify regarding our support of LB160. The Nebraska Coalition to End Sexual and Domestic Violence is a statewide nonprofit advocacy organization committed to the prevention and elimination of sexual and domestic violence. We provide training and program capacity building to Nebraska's network of domestic violence and sexual assault programs, supporting and building upon the services they provide. Our mission is to enhance safety and justice by changing the beliefs that perpetuate domestic violence and sexual assault. We believe LB160 is an effort to do that and will allow those who have been subjected to crimes of sexual and domestic violence to be better served throughout Nebraska. Advocates working in the local domestic violence and sexual assault programs across the state often find that victims fear reporting these crimes. This fear is based in part on their belief that their identity will be known and associated with a crime committed against them. It was this fear that led Congress to implement protective measures through the Violence Against Women Act, as well as the Family Violence Prevention Services Act. When passing both pieces of legislation, Congress implemented protections regarding the information that can be shared about victims of domestic

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violence, dating violence, sexual assault, and stalking. Federal laws authorizing grant programs prohibit those receiving such funds from sharing personally identifying information about victims without informed, written, and reasonably time-limited consent. The 2013 reauthorization of VAWA clarified those who receive grants shall not disclose, reveal, or release any personally identifying information, regardless of whether the information has been encoded, encrypted, or protected in some other manner. Grantees are required to certify they are keeping identifying information confidential in order to receive funding through VAWA and FVPSA programs. All 20 of the community-based domestic violence and sexual assault programs in Nebraska receive federal funding with these confidentiality requirements. The confidentiality protections set forth by grant conditions provided in VAWA and FVPSA apply to any victim who requests services, receives services, or has received services in the past from a victim service provider. The area of Nebraska law addressed by this legislation does not reflect the privacy right for victims of domestic violence and sexual assault. LB354, as it was amended into LB605, was the first step in ensuring Nebraska law does recognize the importance of a victim's privacy rights. The laws amended by LB605 refer back to 21...or, excuse me, 29-119, a law which does not list any form of domestic violence, third-degree sexual assault, or third-degree assault under 28-310, which, as the prior testifiers have said, is a charge that's often used for plea agreements in domestic assault cases when that victim is an intimate partner. By passing LB160 you are not only ensuring compliance with the Violence Against Women Act and the Family Violence Prevention and Services Act grant requirements; you are also making a statement that tells victims of these crimes the state of Nebraska intends to protect their identity should they report the crime to law enforcement. This is an important step in enhancing victims' safety and also ending violence. The Nebraska Coalition to End Sexual and Domestic Violence asks you to advance LB160. Thank you for your time and I'll be happy to answer any questions. [LB160]

SENATOR EBKE: Thank you, Ms. Huddle. Any questions? [LB160]

STEPHANIE HUDDLE: Thank you. [LB160]

SENATOR EBKE: Okay. Thanks for being here. Next proponent. [LB160]

JUSTIN KALEMKIARIAN: Madam Chair, members of the committee, my name is Justin Kalemkiarian and I am here today on behalf of the Nebraska Criminal Defense Attorneys Association. [LB160]

SENATOR EBKE: Could you spell your name, please. [LB160]

JUSTIN KALEMKIARIAN: Yes. Justin, J-u-s-t-i-n, last name Kalemkiarian, K-a-l-e-m-k-i-a-r-i-a-n. [LB160]

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SENATOR EBKE: Thank you. [LB160]

JUSTIN KALEMKIARIAN: I've had to spell that a time or two for judges. I'm here today to support LB160 for two main reasons: number one, to support Senator McCollister and thank him for listening to the concerns of the Nebraska Criminal Defense Attorneys Association; and two, because this bill expands the class of victims who can present statements directly at probation or to judges. This is important because, although prosecutors, at least in my practice, often do pass along such statements, there are times and occasions when a victim's statement might not match up with the prosecutor's argument at time of sentencing. And the victim then doesn't have recourse and doesn't have an avenue to provide that statement to the court. It is true that the victim could provide it to the defense attorney, but the concern that we have is in doing so that might potentially open up our clients to the prospect of allegations of tampering with witnesses and other such types of criminal activity, and we certainly don't want that. So what this would allow is it would allow for the victims of third-degree sexual assault and allow for the victims of third-degree domestic violence to submit those letters directly to the probation office for insertion into the PSI. And as I said, that's important because if it comes directly from the victim it might mean something different than if it comes from the defense attorney. It might seem a little more disingenuous if it comes from the defense attorney. And again, I don't want to open up and we don't want to open up any of our clients to the possibility of witness tampering. And so for those two main reasons, we would ask that you support LB160. I would be happy to take any questions. [LB160]

SENATOR EBKE: Any questions? Thank you for being here today. [LB160]

JUSTIN KALEMKIARIAN: Thank you. [LB160]

SENATOR EBKE: Next proponent. [LB160]

COREY O'BRIEN: Good afternoon again, Chairwoman Ebke. My name is Corey O'Brien, C-o-r-e-y O-'-B-r-i-e-n. I'm the criminal prosecution section chief for the Nebraska Attorney General's Office. Counsel, legal counsel, threatened me to be very brief today, so I will be, and I'll just say ditto for just about every reason that has been stated before. But this is a commonsense expansion of the definition of "victim." It makes sense for not only the inclusion of information in PSIs for those types of third-degree assaults, but also placing duties on prosecutors and victim witness advocates to actually make contact with the victims of those crimes. It hasn't been done and this is a step that's probably a couple of years...that it should have happened long ago I guess is what I'm trying to say. So I thank Senator McCollister for bringing this and on behalf of the Attorney General's Office we do support the bill. We'd like to see it advance. Thank you. [LB160]

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SENATOR EBKE: Okay. Thank you, Mr. O'Brien. Any questions? Thanks for being here. Are there any other proponents? Do we have any opponents of this bill? Do we have anybody testifying in the neutral on LB160? Senator McCollister, would you like to close? [LB160]

SENATOR MCCOLLISTER: I'd like to thank the committee for your time listening to this bill. And the proponents, I'd like to thank them for their testimony. I would hope, unlike last year, that this committee will move the bill promptly so we can hear it in due course on the floor of the Legislature. [LB160]

SENATOR EBKE: Okay. Thank you, Senator McCollister. We have... [LB160]

SENATOR MCCOLLISTER: Thank you very much. [LB160]

SENATOR EBKE: (Exhibit 1) We have...any questions? We have one letter of support from Ivy Svoboda of the Nebraska Alliance of Child Advocacy Centers. This concludes the hearing on LB160. We're going to take a five-minute break and see if Senator Schumacher shows up. And if not, we'll move to Senator Chambers' bill. I'm not sure where Senator Schumacher is. [LB160]

BREAK

SENATOR EBKE: (Recorder malfunction)...open the hearing on LB53. Senator Schumacher. [LB53]

SENATOR SCHUMACHER: Thank you, Chairman Ebke, Chairperson Ebke, and members of the Judiciary Committee. My name is Paul Schumacher, S-c-h-u-m-a-c-h-e-r, representing District 22 in the Legislature and here today to present LB53. You know, maybe the older you get the more you want to talk about the good old days. And in the good old days, right about the time I was elected county attorney back in 1979--that's when we went to school barefoot and walked uphill in the snow--they had just implemented a new criminal code that was implemented and passed I think in 1976. Prior to that, there was a hodgepodge of different criminal provisions and some of them didn't reflect the present time, the penalties were kind of uncoordinated and helter-skelter, and there was a national effort to do commonsense criminal law that would enable prosecutors, defense attorneys, and judges to apply a rather simple but comprehensive and flexible mechanism. And by gosh, it worked. It worked really pretty good. There were plenty of laws for...on the books. And if you wanted to really come down on a defendant, you could. You could find how they violated this and if they violated that, they probably violated this, and you could stack enough charges against them to make them want to plead guilty if they wanted to plea bargain--not a bad system. And the judges, the district judges at least that I worked with,

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had discretion within the sentencing range once somebody was either...pled guilty either by a guilty plea or through a trial found guilty. The judge had a big range that he could sentence in and generally came pretty close to hitting the nail on the head of what was fair considering the nature of the offense, the nature of the victim, the offender, the resources available to the state, whether it should be probation or actually a jail or a penitentiary sentence. And I felt it worked. And even today there is very few things that happen that are bad in society that was not covered by that original criminal code. I quite frankly think it wouldn't be a bad idea just to say let's roll back the clock, and I bet you we wouldn't lose very much in the quality of justice, probably pick up some. Along the way, the Legislature, maybe for political reasons, maybe just because there was an outrageous case where a judge had messed up giving somebody too light a sentence, for whatever reason started monkeying with the system and introduced a thing called mandatory minimum sentences. And a mandatory minimum sentence says, Judge, even if you feel that justice would not be served, even if you feel that the defendant really, really doesn't deserve this, you're going to give them this minimum penalty anyway, you're going to...and that minimum penalty is not going to count in the same way other penalties do toward good time. It's...you're not going to be able to apply probation to this case like you would normally do. You're going to really hammer them because we sitting here in Lincoln know what you should do and remove some of that discretion from the system. Now a good prosecutor can take a crime that has a mandatory minimum sentence and turn it into one that does not have by simply adjusting the charge to an offense that doesn't have the mandatory minimum, so there's flexibility there in the hands of the prosecutors. And prosecutors generally like that kind of flexibility because it encourages the use of the guilty plea, which saves him time and money and, in this environment, that's a big thing. Similar thing with the habitual criminal convicted twice of a felony and go to the penitentiary and third time is charm time and you get the possibility of being charged and convicted of being a habitual criminal, which throws on a mandatory chunk of time at the end of your sentence, something I think on the order of ten years extra. Okay? And that happens regardless of the situation. If you're unlucky enough to be convicted of that, that's what the judge shall do, again taking away judicial discretion to say, you know, in this particular case, first two offenses were possession of marijuana more than a pound and, you know, there...this wasn't the savoriest character and, yeah, we put him away and, by gosh, we're going to invest the kind of additional time that a habitual criminal thing requires even though it doesn't really make sense. And I've had judges and the origin of this legislation was some of the local judges telling me, you know, on some of these cases we need some flexibility. Well, how do you deliver the flexibility to the judge without taking away from the prosecutor the ability to say to the defendant there is risk involved, you make us spend the money, you may pay the additional time? And that's a real-world thing. And so what this does is on the mandatory minimum sentences it gives a judge an out. If a judge says, look, the glove doesn't fit, this person should not be subject to a mandatory minimum sentence, then the judge has got the option to ask for two other judges to look at the situation and if one of them agrees then the...he doesn't have to do the mandatory minimum. It leaves an escape hatch. Doesn't take away any risk from the analysis that a defense

attorney or a defendant might do, because they don't know how the judges are going to come out. If they want to buy safety, they'll plea bargain down to a lesser offense or something that doesn't carry a mandatory minimum, like they always do. But it does give the safety mechanism to the judiciary so that they can say, wait a minute, this is just too far off. Likewise, once a state has proven the elements of a habitual criminal offense and has shown that this person is a habitual criminal before the judge has got to hammer them, if the judge says, looks to me like this person should be hammered, a little different version of the same thing. And actually there's flexibility, if the committee would want to, to apply the theory. The judge says, bring me two other judges, let's look at this. And if they agree that it's a case where the habitual criminal application is proper, they can go ahead with it--again, an escape hatch. These are not necessarily married together. If the committee would say let's do something with mandatory minimums but not do something with habitual criminal, there's...they're not married together. Also from the bill that we had last year which raised the very same issues, and much of the reason is to keep this before the committee until the problem is resolved and these injustices are taken care of, is that this applies only to drug offenses rather than some of...a broad range of offenses, so at least we begin to address the issue, because so many of our offenses are drug-related offenses, so many of those offenses are mental health-related offenses and just compound our prison problem with whatever 20 to 40 percent of the folks incarcerated, incarcerated because of mental health or drug issues. That's what the bill is about. It's before the committee. The committee can have some flexibility if it chooses to address this issue. Maybe there will be a way that something can be done either this year or down the road with addressing what has become unfair, and it's probably become unfair because lock them up and throw away the key is a popular thing, was a popular thing, although an expensive and probably impractical thing. And we have to think our way out of those situations that our politics has gotten us into. I'll be happy to answer any questions. [LB53]

SENATOR EBKE: Any questions for Senator Schumacher? [LB53]

SENATOR PANSING BROOKS: I think I do. [LB53]

SENATOR EBKE: Senator Pansing Brooks. [LB53]

SENATOR PANSING BROOKS: Thank you for coming, Senator Schumacher. I'm just interested, I've tried to look up some of the history about mandatory sentencing and how we got here and so for...prior to the imposition which I think was just, I don't know, sometime while federally...I'm looking at all the things and federally and state are different time lines, obviously, but it's someplace between '87 and 2000 that we started imposing the federal...we sort of start adding mandatory minimums. Is that correct? [LB53]

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SENATOR SCHUMACHER: It was after I was out of the county attorney's office which I left the county attorney's office in 1987. Before then it was...we just had four classes of felonies and it was easy... [LB53]

SENATOR PANSING BROOKS: Right. So you had the maximum ability and not the minimum, right? [LB53]

SENATOR SCHUMACHER: Well, no, they had a thing called indeterminate sentencing. [LB53]

SENATOR PANSING BROOKS: Yeah, the one-third rule. [LB53]

SENATOR SCHUMACHER: One-third rule. And so a judge could say as one of the options he had was to impose an indeterminate sentence from I think it was not more than a third of the maximum up to the maximum, and that ended up in getting you more time if the judge felt that not doing it...that type of sentencing and just sentencing you to, you know, 10 years on a 20-year possibility, which was interpreted I think as a 1 to 20 at that time. He had the ability to do the indeterminate sentence and make sure you stayed in longer. But the thing worked. It just really worked. [LB53]

SENATOR PANSING BROOKS: I tried to bring the one-third rule back my first year and just got resoundingly trumped on that but...so I understand many of the arguments on that. That's...I have no further questions just right now. Thank you. [LB53]

SENATOR EBKE: Any other questions for Senator Schumacher? Going to hang around? [LB53]

SENATOR SCHUMACHER: I'll try to hang around a little bit. We're listening to ways how we can cut taxes and increase spending in the Revenue Committee, so. [LB53]

SENATOR EBKE: Revenue Committee, okay. [LB53]

SENATOR SCHUMACHER: Thank you. [LB53]

SENATOR EBKE: First proponent. [LB53]

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KENNETH ACKERMAN: (Exhibit 2) Good afternoon, Madam Chairperson Senator Ebke and committee members. My name is Kenneth Ackerman, K-e-n-n-e-t-h A-c-k-e-r-m-a-n. As I testified two weeks ago, I am a veteran and my wife and I work with citizens, many who are military veterans who enter and leave the prison system. We also work with Freed for Life and Nebraska Criminal Justice Review. I realize there is a great problem with repeat offenders, some who are labeled habitual criminals. Director of Prisons Scott Frakes asked in this room, how do I deal with those who do not program or will not program? Just automatically giving them longer sentences with the label of "habitual criminal" may not be the best answer. I was...I served over five years in California prisons with extreme overcrowding. It resulted in federal authorities forcing the release of thousands. One of the key reasons for the overcrowding was the popular "three strikes" mandatory sentencing law. I support Senator Schumacher's change in the branding of habitual criminals by requiring a greater level of scrutiny with an essential three-judge system for consent. This will help lower the increasing rate of incarceration in Nebraska. With fewer in prison, there can be more programs offering job skills, education, and counseling to help those willing to learn how to turn around their lives and keep from reoffending. As I learned in prison, when change becomes popular in prison, more are willing to work on change. The results will produce a lower prison population, a safer society, and more law-abiding citizens with a stake in success. I urge you to support this and I'm glad to take any questions. [LB53]

SENATOR EBKE: Thank you, Mr. Ackerman. Any questions? Thank you for being here today. Next proponent. [LB53]

JOHN KREJCI: (Exhibit 3) When one gets older, one gets slower. [LB53]

SENATOR EBKE: That's okay. [LB53]

JOHN KREJCI: My name is John Krejci, K-r-e-j-c-i. I want to testify in support of LB53 and I represent Nebraskans for Peace. Welcome, Senator Ebke, as...congratulation on your chairmanship. And my senator is Senator Hansen. Good to see you. And then I know everybody else except the guys on the corner. Mandatory minimum sentences were intended to take the bad guys off the street. I suspect they're a result of the "get tough on crime." However, they have several down sides to them, which was mentioned: they overcrowd prisons; they tie the hands of the judges; and they also cost us a lot more money. And we know that overcrowding prisons is number one problem in Nebraska. So LB53 modifies the arbitrariness in blind mandatory minimum sentences. I want to support this bill but I think the three-judge panel for habitual criminal sentencing is a little too cumbersome and I'd like to see something just straightforward. I'm going to...the rest of my testimony I'm going to give in favor of Senator Chambers' bill, the little vignette. So thank you very much and I've still got the green light. Any questions I will entertain. [LB53]

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SENATOR EBKE: Thank you, Mr. Krejci. Any questions for Mr. Krejci? Okay, well, we'll see you back here in a few minutes, huh? [LB53]

JOHN KREJCI: All friendly faces. Thank you. [LB53]

SENATOR EBKE: Thank you. [LB53]

ANDY POLLOCK: Chairperson Ebke and members of the Judiciary Committee, my name is Andy Pollock; that's A-n-d-y, Pollock, P-o-l-l-o-c-k. I'm here as a registered lobbyist for a group, national group called Families Against Mandatory Minimums. I do not believe this group has appeared before this legislative body before, and this is my first year representing them. I want to start off by saying that I'm not a criminal. I don't practice any criminal law. My expertise as a lawyer is not in that arena. But I do represent a group that has 70,000 supporters and members nationwide. It's a group that comes with a little bit different perspective than some of the groups that you've seen before. It's a group that has some connections with the Cato Institute, with the ALEC group, some groups that some people might characterize as center-right or even more conservative. But they, too, have seen some of the damages caused by mandatory minimum sentences in other states and they asked me to come before you today to support and ask you to support LB53, as well as Senator Chambers' bill which will be up later. I'd just say a few things again on the policy side, not the nuts and bolts of the criminal justice system. Around 30 states have recognized that there have been issues and challenges and problems with mandatory minimum laws and they've taken efforts to repeal those or modify them, reform them in the last few years. Some states have repealed them altogether; some states have reduced the mandatory minimums; some of them have passed legislation like you see with Senator Schumacher's bill. The states that have reformed those mandatory minimum laws have seen benefits and there have been a number of states, like I said, 30 that have reformed their mandatory minimum laws, and a number of states have been studied and they've seen tangible benefits. They have reduced prison populations. We've heard about the overcrowding here in this hearing and you've heard about it plenty in other hearings. They've saved millions of dollars. We've heard from our judiciary, from the Chief Justice. You've heard the concerns about not just prison overcrowding but the cost of administering justice. And they also, believe it or not, have actually reduced crime rates in a number of states. We are not necessarily wedded to Senator Schumacher's particular proposal. We, too, think it might be a little bit overly cumbersome. I put it in his hands and in the hands of a couple of you. A bill called the Justice Safety Valve Act which was...has been adopted in states like Maryland, Oklahoma, and North Dakota, and I'd be glad to share that with others of you, it's a little bit simpler solution than the three-judge panel and it allows a judge within that judge's discretion to under limited circumstances set aside the minimum...the mandatory minimum and impose a different sentence. We think it's kind of perhaps a good middle ground between Senator Chambers' bill and Senator Schumacher's bill and I'd be glad to talk to the committee about that

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more at any point. With that, I would conclude my remarks and I would ask you to support and advance Senator Schumacher's LB53. [LB53]

SENATOR EBKE: Any questions for Mr. Pollock? Thank you for being here. [LB53]

ANDY POLLOCK: Thank you. [LB53]

SPIKE EICKHOLT: (Exhibit 1) Good afternoon again, Madam Chair, members of the committee. Spike Eickholt, S-p-i-k-e, last name E-i-c-k-h-o-l-t, appearing on behalf of the Nebraska Criminal Defense Attorneys Association. And I have submitted a letter all...as well, on behalf of the ACLU of Nebraska. I just want to echo what some of the testifiers said earlier. I'm not going to restate those points. We support LB53. We also support the next bill to follow, LB447, Senator Chambers' bill, because our organization would like to see some reform with respect to mandatory minimums. Senator Schumacher's approach with the three-judge panel is a novel approach and it is a way of approaching this issue and his version this year is really triggered, if you will, in two different situations: (1) if there is a conviction of a drug offense under 28-416 involving mandatory minimum, and that's on page 3 of the bill; page 5 of the bill also provides for a three-judge panel option if a person is convicted of a crime involving a habitual criminal allegation. I just wanted to say some things for the record. I'm sure the committee is aware, so I don't mean to explain it pedantically, but I just want to maybe say it for the record that a mandatory minimum sentence means that if you get into the category of a crime involving a mandatory minimum, that means the judge has no discretion and he or she must impose the mandatory minimum. Probation is not an option for mandatory minimum sentence. It's most egregious, if you will, when it comes to drug offenses. If a person is convicted of possession with intent to distribute and they have a significant amount of drugs, they get into the mandatory minimum range in Nebraska. If a person has more than ten grams of methamphetamine or cocaine or a substance that has cocaine in it, crack cocaine, then they are at a ID felony; that is, a mandatory minimum of 3- to 50-year imprisonment. That can be a first-time offender; it can be a person who is just caught with a lot of drugs and even though the allegation and the statements prove that they were possessing it with intent to distribute, they may have just had it for personal use. And ten grams is less than a half an ounce. If you get to five ounces or more, you're looking at 20 to life. And if a person is convicted of a mandatory minimum sentence, as I said before, the judge cannot put that person on probation, even if the judge wants to. And I've had judges state on the record at the time of sentencing that he or she wishes they could do a different sentence but they simply have no choice. And that's unfortunate and Senator Schumacher's approach that if a judge is in that situation and sees this person really doesn't deserve this, it really would not serve the public good by doing this, then that judge can request two other judges to look at the issue and there's a way out of it. Mr. Pollock talked about what other states have done with respect to developing a safety valve or some sort of effort to divert the mandatory minimum sentence. I just want to talk about the habitual criminal law. That

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sounds again, when you first hear it, that's very bad, that must be a violent person. But to be a habitual criminal in Nebraska, a person needs to be convicted at least twice before of a felony offense and at least been to prison for a year. That felony does not need to be violent. It does not need to be a separate type of process through the court system; in other words, a person can have two felony convictions, go to prison for both of those convictions for over a year, and then they are on the habitual criminal range, if you will. It has no real reflection, if you will, of, whether you go to prison for a year, whether those were violent offenses or not. But what happens is that when you are a habitual criminal and the state alleges that and the court finds that the prior convictions are valid for enhancement purposes, then the court has to do a mandatory minimum of ten years. And again, probation is not an option. That person does not earn good time on a mandatory minimum sentence. They cannot be paroled during that time of that mandatory minimum sentence, and that's a problem that you see and why other states have addressed the issue with respect to overcrowding that you have at least, when a person goes through the court system, some sort of a desire to punish that person severely, but then you have these people sitting in prison for years and years and you've got to do something about it. So we would urge the committee to advance this bill or perhaps, as Senator Schumacher indicated, maybe amend it in some way, but at least address this issue of mandatory minimum sentencing. Thank you.
[LB53]

SENATOR EBKE: Thank you, Mr. Eickholt. Any questions? Okay, thanks. Are there any other proponents of this bill? Do we have any opponents of the bill? [LB53]

JIM MASTELLER: Good afternoon. My name is Jim Masteller, J-i-m M-a-s-t-e-l-l-e-r. I'm speaking today on behalf of the Nebraska County Attorneys Association in opposition to LB53. I thought it might be helpful to get I guess the perspective of a prosecutor who actually uses both mandatory minimum sentences, as well as habitual criminal sentences, in his work. These...this LB53 creates essentially two new type of panels, three-judge panels, that previously didn't exist, does not really have a precedent in Nebraska law outside of capital cases where you would have a three-judge panel. There's I think some logistical difficulties and possibly constitutional difficulties with either of these panels. The first one, the mandatory minimum panel, I do appreciate that it targets only mandatory minimums that are the product of a conviction for possession with intent to distribute, a drug offense. It doesn't target all mandatory minimums. In terms of what it does target, it doesn't target possession with intent to distribute marijuana. You could be in possession of a ton of marijuana and not be facing a mandatory minimum. It's not going to target your typical street-level dealers. The street-level dealers that we encounter are selling drugs in amount of 0.2 grams. Our users we're finding with amounts of one gram or less. This is targeting I would say midlevel dealers, dealers that may deal in ounce quantities of anywhere from 10 grams to 140 grams. In terms of this panel, apparently the district court judge would have to make a finding to himself or herself that the imposition would not serve the public interest. That's virtually an undefinable standard. There's no factors that would guide the judge in

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determining what would be in the public interest or what would not be in the public interest. If the judge were to find in their mind that it would not serve the public interest to impose the mandatory minimum, then we would have to have two other judges weigh in on the issue. I do note for the fiscal note from the Supreme Court says that it's...there's no means to reasonably estimate what the impact would be but the General and Cash Fund fiscal impact could be significant dependent on the frequency in judicial districts in which such panels are used. Once it was referred to the three-judge panel, it does not appear that they would be able to review anything other than the presentence investigation. There's no indication if there was a trial they'd be able to review the trial transcript. And it does not appear that the parties would not...would be able to present any additional evidence or argument to the three-judge panel. We run into some interesting difficulties potentially between the interplay of the two panels. Let's say I convict someone of possession with intent to distribute heroin in an amount of four ounces and that subjects them to a IC felony. In theory, the judge could require this mandatory minimum panel to be empaneled and also indicating that the judge may not think it's appropriate. But when you look at the habitual criminal panel, that same judge, upon a review of the presentence investigation, would have to request a panel of three judges to review the appropriateness of the habitual criminal enhancement. This may...it does appear these are two separate panels consisting of different judges. It does appear that there's different standards that would apply and different factors that are considered. So you may have two panels considering the same case. In terms of the habitual criminal, that runs into some potentially constitutional difficulties. The way we file the habitual criminal is we don't use it very often. We only use it on the worst of the worst; in fact, the last conviction I had was someone who had already previously served the habitual criminal sentence and then came out and broke into a girlfriend's house in the middle of the night with a knife and terrorized her family. And the habitual criminal, the defense would not be afforded the right to know at the time we filed the information or in amended information that we are seeking it. This habitual criminal panel would actually come into play if the judge on his or her own review in the presentence investigation thinks that he is eligible for the habitual criminal finding. So we run potentially afoul of due process considerations. There's a Supreme Court case, a U.S Supreme Court case, Apprendi, that says that any factor that could increase the maximum sentence must be alleged in the information and proved to the jury. Obviously, enhancements that are based on recidivism are proven to a jury. I do see my time is up. I'm happy to answer any questions if anyone has any. [LB53]

SENATOR EBKE: Does anybody have any questions? Senator Hansen. [LB53]

SENATOR HANSEN: Thank you, Chairwoman Ebke. Mr. Masteller, can you walk me through what you were saying there in terms of the time line of when the defense finds out about the habitual criminal. [LB53]

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JIM MASTELLER: So the way we do it in Douglas County is, if we decide that we're going to request a habitual criminal enhancement, we actually file that in our charging document. It's alleged as a separate count in our county and it puts the defense on notice that, hey, if we convict you of the underlying offense we've charged you with, we're also going to be seeking the habitual criminal. That puts everyone on notice that he's...this person is potentially facing a mandatory minimum of 10 to 60 sentence if he's convicted of the underlying charge. The way that this is set up in LB53 is I don't need to file anything in my information to put the defense on notice; in fact, the only time this becomes an issue is after the person has already been found guilty, either from a trial or they entered a plea, and the judge, when they're reviewing the presentence investigation, if it says, oh, he or she has two previous felony convictions that he or she went to prison on, it can then be referred for habitual criminal enhancement, which doesn't seem...it seems fundamentally unfair that that determination is made only after the person has been found guilty. [LB53]

SENATOR HANSEN: Okay, thank you. [LB53]

SENATOR EBKE: Did you have a question? [LB53]

SENATOR PANSING BROOKS: Senator Chambers was (inaudible). [LB53]

SENATOR EBKE: Oh. Senator Chambers. Okay. [LB53]

SENATOR CHAMBERS: What is the mandatory minimum on a habitual criminal charge? [LB53]

JIM MASTELLER: It's a mandatory minimum 10 years, then a range of up to 60 years. [LB53]

SENATOR CHAMBERS: And you're aware that in Nebraska the sentence in effect is cut in half, the sentence that is levied. Now if a judge wants to keep somebody in prison for 10 years and the maximum is 60 years, he can do that without, she can do that without a mandatory minimum. Isn't that true? [LB53]

JIM MASTELLER: That is true. [LB53]

SENATOR CHAMBERS: And so the new people might well understand the way that's done is to sentence the person to 20 years and automatically when you go to prison that bottom sentence is cut in half, which means you are not eligible for parole until you've served half of that lower

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sentence, so for that first ten years you're not eligible for parole. We don't need a mandatory minimum to get at what you all say you want. Would you agree? [LB53]

JIM MASTELLER: Yes. [LB53]

SENATOR CHAMBERS: Okay. [LB53]

JIM MASTELLER: If we wanted to ensure a sentence of 10 calendar years and if we were aware that the judge was going to impose even a 20 to 20, that gets us to the same position. However, if the judge is not going to impose a 20 to 20 and does something substantially lower, then that would reduce the effectiveness of the habitual criminal statute. [LB53]

SENATOR CHAMBERS: But there is a way right now to get there without a mandatory minimum in the statute. [LB53]

JIM MASTELLER: There is a way for the judge to get there, yes, yes. [LB53]

SENATOR CHAMBERS: All right. And if a judge...well, I'm not going to go through all that. I'll let others ask questions. [LB53]

SENATOR EBKE: Any other questions? [LB53]

SENATOR PANSING BROOKS: I guess I have a question. [LB53]

SENATOR EBKE: Senator Pansing Brooks. [LB53]

SENATOR PANSING BROOKS: So were you there when...were you working in the...you're the...a county attorney. Were you county attorney back when we had the indeterminate sentencing rule, the one-third rule? [LB53]

JIM MASTELLER: Well, I've always encountered that on Class IV felonies, so I'm familiar with that on a Class IV felony even though the penalty was up to five years, the maximum penalty is like 20 to 60 months, so that's how I've been familiar with it. [LB53]

SENATOR PANSING BROOKS: And does that seem to work effectively or...? [LB53]

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JIM MASTELLER: It's hard to say. I know that some judges would in some cases like to have gone higher. It's just hard to answer that question. I think that the 20 to 60 months, it...since everyone knew that was the law, everyone kind of understood it and accepted it. But there were cases where someone maybe committed a Class IV felony, whether it being a terroristic threat where someone threatened to kill someone's family and the judge wanted to give a higher sentence, even though maximum sentence was 5 years, the judge could only give 20 to 60 months which means they'd be parole eligible after serving 10 months less the time they've spent in jail pending sentencing. [LB53]

SENATOR PANSING BROOKS: Thank you. [LB53]

SENATOR EBKE: Any other questions? Thank you, Mr. Masteller. [LB53]

JIM MASTELLER: Thank you. [LB53]

SENATOR EBKE: Next opponent. [LB53]

COREY O'BRIEN: (Exhibit 4) Thank you again, Chairwoman Ebke. Members of the Judiciary Committee, my name is Corey O'Brien, C-o-r-e-y O-'B-r-i-e-n, and I am the criminal prosecution section chief for the Nebraska Attorney General's Office. LB53 is nearly identical to LB984 that was brought last year by Senator Schumacher with the exception of the modifications that he made only including the three-judge panel for the drug offenses, and we do appreciate that because the things that the Attorney General's Office is most concerned of with regard to the mandatory minimums are those crimes involving sexual assault of children, firearms offenses, and violent felonies. But with...we're still opposed to LB53. Among the concerns that we have are serious questions about procedural due process that Mr. Masteller highlighted, especially the habitual criminal portion of the bill. The Attorney General's Office is also concerned about the fiscal note, the inefficiencies inherent in the processes described, and the additional financial resource and time cost this proposal will place on an already taxed judicial branch. In addition to these concerns, the Attorney General's Office questions the necessity of LB53. While it's been asserted that there is abuse of mandatory minimums in the habitual criminal statute in order to obtain pleas from potentially innocent defendants, I assert that such an assertion is overstated or nonexistent. To illustrate, I have distributed a handout containing a brief synopsis of the last five cases I've pursued for the habitual criminal enhancement. This is over the past seven years in my employment in the Attorney General's Office. This brings me to the point of the fact that in all five of these cases that I've pursued the habitual criminal statute, four of them went to jury trial and one of them actually pled guilty to the criminal...to habitual criminal enhancement. None of these filings were pursued in order to coerce pleas but instead were pursued in order to restrain extraordinarily violent offenders who

incessantly repeated their crimes and would endanger the safety and well-being of law-abiding citizens were they not incarcerated for lengthy prison terms. With all due respect to Senator Schumacher, as I travel across Nebraska, having visited and handled cases in 60 of Nebraska's 93 counties and appearing before 45 of Nebraska's 56 current district court judges, I do not see or hear about rampant abuse of mandatory minimums and the habitual criminal statute by county attorneys or prosecutors. This brings me to my next point about how prevalent these cases actually are. According to Department of Corrections, as of today's date, there are currently only 211 prisoners out of 5,118 inmates in the facility serving an habitual criminal statute. That equates to roughly 4 percent of the total department's inmate population. Additionally, over the last eight years, the number of offenders annually admitted to the department for Class IC and ID felonies has averaged between 2 percent and 5 percent of the annual number of inmates admitted. In 2016, the number of inmates admitted for Class IC and ID felonies was 122 out of 2,072 inmates. That roughly equates to around 5 percent of last year's total. Additionally, I'd like to briefly respond to the criticism that mandatory minimums deprive sentencing judges of their discretion. While it's true that judges do not have the discretion to sentence offenders who commit mandatory minimums to probation, it's inaccurate to espouse that these mandatory minimums are the equivalent of the federal sentencing guidelines because judges still do have considerable amounts of discretion. In the case of IC felonies, they have 47 years to play with and...I'm sorry, 45 years to play with in Class ICs; ID is 47 years; and for habitual criminal, 50 years. Beyond these points we would also note that as proposed LB53 potentially undermines two primary penological purposes served by criminal justice laws, and I'd like to give a quote from State v. Etchison, a case decided by our Nebraska Supreme Court. "The primary function of the criminal law is to protect individuals and society from the depredations of the criminally bent. In furtherance of this purpose, it is deemed necessary to mete out punishment as a deterrent," to the offender himself, as well as to others who might follow in his ways. The State of Nebraska Attorney General's Office believes that mandatory minimums and the habitual criminal accomplish these purposes. For those reasons, we oppose LB53. I'd be happy to answer any questions any of you may have. [LB53]

SENATOR EBKE: Senator Chambers. [LB53]

SENATOR CHAMBERS: You know that more than 90 percent of the prosecutions in criminal cases will end in a plea? [LB53]

COREY O'BRIEN: I would say probably more than that, Senator. [LB53]

SENATOR CHAMBERS: Um-hum. And you know that prosecutors stack charges to encourage a person to enter a plea, don't you? I'm not going to quibble with you. If you say no, then you just are one who had different experiences from those I'm aware of. [LB53]

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COREY O'BRIEN: Well, I heard Senator Schumacher mention that he did when he was a prosecutor and I substantially encourage myself and my other prosecutors not to do that. I mean, you know, we have cases where right now that we're handling where there were 57 burglaries in Sidney. Did we charge 57 counts of burglary? We did not. [LB53]

SENATOR CHAMBERS: Well, the court will tell you this is ridiculous, this is cumulative, and it's not...it's wasting the court's time and... [LB53]

COREY O'BRIEN: And I couldn't agree with you more. [LB53]

SENATOR CHAMBERS: ...that (inaudible) wouldn't be done. [LB53]

COREY O'BRIEN: I couldn't agree with you more. [LB53]

SENATOR CHAMBERS: Okay. [LB53]

COREY O'BRIEN: And it doesn't take 57 counts to do justice in those kind of cases. [LB53]

SENATOR CHAMBERS: But here's what I want to know: What difference does it make to you what happens on the court side? If you file an appropriate charge, it goes to a jury trial or bench trial, that's all your responsibility is as a prosecutor. What happens after that is not a matter for the executive branch, it's now in the hands of the judiciary, or do you disagree? [LB53]

COREY O'BRIEN: I disagree in one aspect. Yes, my job is to do justice, but it's also to prevent that person from harming another person again. [LB53]

SENATOR CHAMBERS: Well, that's up to the judiciary. You don't determine what the sentence is that the court is going to hand down. [LB53]

COREY O'BRIEN: Fair enough. [LB53]

SENATOR CHAMBERS: So you can have your feelings, but it's a judicial decision that's to be made. Even if you have a mandatory minimum, it's still a judicial system...I mean decision. [LB53]

COREY O'BRIEN: I agree. I agree with that, but also I can tell you in my experience every judge wants to hear what my feelings are and no judge wants to be on an island imposing a

sentence without hearing both sides of the argument and deciding based upon that, and our opinion is very valued in terms of what we decide and what we say. [LB53]

SENATOR CHAMBERS: So that people understand, there are 93 counties, each one having a county attorney. Maybe in some small counties somebody might, you know, serve as two, but for ease of discussion there are 93 jurisdictions where a county attorney operates. So you conceivably could have 93 different standards for looking at a particular crime. So there is not uniformity across the state, there is not consistency, the judges look at these things differently, so in the criminal justice system it is a hodgepodge and nobody can determine a rational basis for much of what happens. That's what I want to say before I get to this. In order for the habitual charge to be sought, whether like in Douglas County they charge it at the beginning or someplace else, the two felonies...do the two felonies that are the predicates have to be violent or any two felonies can be a basis for a habitual criminal on a third felony of any variety? [LB53]

COREY O'BRIEN: Does it have to be violent under current law? No, but they also have to have been sent to the penitentiary for a period of one year on each of them. [LB53]

SENATOR CHAMBERS: But the fact is...say that again? [LB53]

COREY O'BRIEN: They have to have been sent to the penitentiary on those felony convictions for a period of one year for it to apply to allow us to enhance on the habitual criminal. [LB53]

SENATOR CHAMBERS: Right, so it could be a one-year sentence on each of the two prior felonies and on the third one it doesn't matter what that felony is. It could be a Class IV felony which doesn't even carry a mandatory minimum, couldn't it? [LB53]

COREY O'BRIEN: Theoretically, yes. [LB53]

SENATOR CHAMBERS: Are you aware that there often are dissenting judges in these mandatory...I mean in these habitual criminal cases, saying that the person was sentenced and did his or her time for the first one, sentenced, did his or her time for the second one, the third one is double sentencing for everything and that third one could carry a lesser penalty than either of the prior two? So there is no rationality to it at all. It's something that the prosecutors wanted. It was something that came about in that "tough on crime." In some states...well, in at least one case a guy got life when the third crime dealt with stealing some Oreos and a court reversed that and it caused them to look at a lot of those situations. Do you think in all cases that justice is served when a habitual criminal charge is brought? [LB53]

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COREY O'BRIEN: Do I think that criminal justice is served every time an habitual...every time I bring it? [LB53]

SENATOR CHAMBERS: In your opinion. I know what the law says. [LB53]

COREY O'BRIEN: In my...every time I bring it, absolutely. I believe criminal justice is served. [LB53]

SENATOR CHAMBERS: I didn't just limit it to you. As a policymaker I cannot say one prosecutor does this so that justifies it because if that were the case I could say this prosecutor overcharges so that is going to be the standard and we'll wipe it all out. [LB53]

COREY O'BRIEN: I can tell you, in 19 years of practice, I've never heard a judge complain about habitual criminals in the manner you're describing. [LB53]

SENATOR CHAMBERS: No judge? [LB53]

COREY O'BRIEN: Not one. [LB53]

SENATOR CHAMBERS: Okay, then I can't discuss it further with you; not that what you're saying is untrue, but I'm aware of judges who don't like it and they say that it goes against the basic precept of Anglo-Saxon jurisprudence where you're not punished twice for the same crime and you have two crimes that have been...the person has been punished for in accordance with the law, then punishment again is heaped on those other two and in reality that's what happens. However way you cut it, it's baloney. But I don't want to keep you here too long. That's all that I will ask. [LB53]

SENATOR EBKE: Any other questions for Mr. O'Brien? Thank you for being here today. Do we have any other opponents? Is there anyone testifying in the neutral capacity? Senator Schumacher. We do have one letter it looks like from Spike Eickholt of ACLU Nebraska in support. I guess he's mentioned that already. [LB53]

SENATOR SCHUMACHER: Thank you, Senator Ebke and members of the committee. A couple of things. First I'll focus a little bit on the habitual criminal statute, and it doesn't have to be a violent crime in the first two. Any good, old felony will do it. That statute appears on page 4 of the bill, "Whoever has been twice convicted of a crime, sentenced, and committed to prison," for a year--doesn't say a violent crime. With regard to the argument that, gee, there isn't enough notice, if this is given serious consideration, easy, easy to fix on...and it won't even have to argue

the point. On line 24 of page 5 where it says a judge can call this panel "with the consent of the prosecuting attorney," we can simply say, "can call this panel if the prosecuting attorney has alleged that in the charges"--taken care of. The cost? Oh, my goodness! It costs \$35,000-40,000 a year to have somebody in the penitentiary. Just saving one year in the penitentiary pays for quite a lot of hearings. And so the cost is not a material factor with regard to that. It's minor, minor, minor. What was interesting though is I did not hear much objection to the removal of the mandatory minimum, nor much of a defense for the mandatory minimum, no argument that, look, the mandatory minimum gives more protection than would be had otherwise, that the mandatory minimum is a good thing because otherwise judges would be turning all kinds of wild criminals loose without a penalty, never heard a defense of the mandatory minimum part of this statute. I know we didn't need a mandatory minimum in the '80s. I know that probably the thing that Senator Pansing Brooks introduced with indeterminate sentencing provided more than enough coverage and discretion for the judges back in those days. It was only the fad to throw away the key that brought about some of these wrinkles and it really made for, I'm sure, good speeches on the floor of the Legislature. We've gone way too far down that line of special sentences, special staging, special rights for special people, special sentences for special victims, than what justice should require. It would seem to me...I know that judges have complained with regard to the mandatory minimum provisions. There are just times that glove does not fit the hand and there should be a way out of it. This mechanism, some alternative mechanism, there should be an escape hatch. Those of us in the Legislature are not that smart to know exactly what justice means in the individual case, and that justice, that ultimate setting out of the penalty, belongs in the hand of a judge, not a prosecutor, not a dog in the hunt of a rabbit, but the judge who is trying to balance, and hired and trained to balance, the interests of society with the interest of the defendant and with the ultimate interest of justice in the system. I'd finally tell the committee that this bill is intended as a vehicle. It covers the two areas of concern. Feel free to amend, to tweak it. I'll be happy to do what I can to carry it if there is some movement in this area, but we have a problem and we have a problem in which we can fix it if we choose to address it. And if not, life will go on and I bet out in Sidney or wherever, where they had 58 burglaries, they charged more than one burglary and they still had a lot of leverage and I wonder if that person pled guilty or contested it. But I'm sure there was some plea negotiations if they pled guilty. I'll be happy to take any questions. [LB53]

SENATOR EBKE: Any questions for Senator Schumacher? Senator Pansing Brooks. [LB53]

SENATOR PANSING BROOKS: Thank you, Senator Schumacher. So you decided not to mess with the penalties and just strike out the mandatory minimums and put in... [LB53]

SENATOR SCHUMACHER: Go back to exactly what the penalty was back under the 1976 code. [LB53]

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SENATOR PANSING BROOKS: Yeah, I think it was in the '90s that some of that happened. [LB53]

SENATOR SCHUMACHER: That was a fad time. That was Contract with America; that was a hang 'em high and throw away the key; that was if we just pack them into jail crime will go away and we'll be great again, all those things. That was nice slogans. [LB53]

SENATOR PANSING BROOKS: So in reality you've sort of left them in place but allowed an extra step that judges could then use their discretion. [LB53]

SENATOR SCHUMACHER: Right. It's trying to find a middle ground. Were I king, I'd probably go along with something like Senator Chambers' suggestion and just get rid of the whole mess. But trying to accommodate and seeing if we can do something, even if it's a little bit, I put this vehicle out there. You've got another vehicle in Senator Chambers' bill. It's a problem that we should address. Who knows, maybe one day we will. [LB53]

SENATOR PANSING BROOKS: And I, too, have had judges talk to me about them that do not like that it ties their hands. Thank you. [LB53]

SENATOR EBKE: Anybody else? Okay. [LB53]

SENATOR SCHUMACHER: Thank you for the committee's time. [LB53]

SENATOR EBKE: Thank you, Senator Schumacher. This closes the hearing on LB53. Senator Chambers. [LB53]

SENATOR CHAMBERS: Madam Chair. [LB447]

SENATOR EBKE: Senator Chambers. [LB53]

SENATOR CHAMBERS: Members of the Judiciary Committee, I'm Ernie Chambers. I represent the 11th Legislative District in Omaha. I am bringing a bill which would do away with mandatory minimum sentences. Before I go into that, let me make a few general comments. Mandatory minimums do not protect the public. Mandatory minimums do not deter crimes. Those who commit crimes don't know what the penalty is, so they don't plan to get caught, they don't expect to get caught, so there can be no deterrence whatsoever. What was happening when they started putting these things in place is that they ran out of new crimes to create. They

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couldn't create new crimes, so they said we will take what we have and make it an enhanced system. So what they said they'll do is make it mandatory that a certain amount of time be served. Prosecutors don't care about the fallout from what they do. What mandatory minimums do is to lead to prison overcrowding wherever you have them. There can be no obtaining of good time when you have a mandatory minimum. You must serve that mandatory minimum day for day. What these prosecutors either don't know or don't care about is that good time is a management tool used by the prisons to be an incentive for convicts to behave. Little children in school are told if you get a blue mark that's good, a red mark is bad, so you want to get blue marks, the incentive. Grown people are given praise, they're given little bonuses, other things to incentivize them to do what is desired to be done. So when you have many people in a prison serving mandatory minimums--they cannot get good time, there is no reason to behave, nothing is gained by doing well and you can't get out early, so forget it--what that does is to create a more volatile situation where one already exists. It endangers the guards. They want to call them corrections officers. It endangers other inmates because it has the impact, metaphorically speaking, of putting more steam in a pot until the pressure of the steam is greater than the ability of the pot to contain it and the pot blows up and you have riots and some of the other problems that prosecutors don't care about. They want to be able to stack up charges to get plea bargains. They don't want to go to trial. They're lazy. All rivers and most people are crooked because they follow the path of least resistance. What this bill that I'm offering you will do, and I put it in my statement of intent because it is so brief, it eliminates selected mandatory minimum sentences under Section 28-105. That's where you have the classification of the various crimes. When you come to Class IC and ID felonies, you remove the mandatory aspect but you don't change the minimum. The minimum for the smaller offense, if you want to call it that, is 3 years to 50 years and that remains intact, except the 3 years is not a mandatory minimum. The other one, the range is 5 to 50 years. If a judge wants a person to stay in jail, then double the lower end of the sentence and the person is not even eligible for parole until half of that lower end is served; then, if a person does not get paroled at that point, you cut half off the top end also because you have to have a mandatory release date. So you take half off the bottom to determine when you're first eligible for parole. That doesn't mean you'll get it, but you can be considered by the Parole Board. If you've behaved and they required certain courses or other actions to be taken by the inmate and they've all been done, then that person can be paroled after five years. But the person is not guaranteed a parole. And I get many complaints, as some of you all may get them, because eligibility has existed for several years and they still are not paroled. So when prosecutors and people who are opposed to good time want to give the notion to the public that as soon as an inmate reaches the eligibility date parole occurs, that's false. And if you got as much mail as I do on that, you'd know that it's false. So what the mandatory minimums do is to increase the overcrowding, which prosecutors don't care about. Once they got their conviction, they're through with it. You don't ever hear them discussing a way to alleviate the overcrowding or how to deal with the problems generated by it. I'm bringing a bill of the kind which I ordinarily don't bring because...what do they call...I don't even...fiscal notes. Mine usually say nothing, but this

fiscal note says that it will save \$182,685. That's from the prison itself, a fiscal note, a bill that will not only make penological sense but it saves almost \$200,000. What difference should it make to a prosecutor if a person doesn't have to serve a three-year minimum, mandatory minimum, or a five-year mandatory minimum? For my part, I think that range is totally incomprehensible. How can the same act be so mild that it would warrant a sentence of three years or be so aggravated and heinous that it could merit 50 years? You do not have one offense; you have different actions taken that are more aggravated than those that precede it. But under the current system it says that an act can be so mild that it merits 5 years, the same act can merit 50 years. There is much that's irrational in the sentencing structure in Nebraska, in the good-time laws, because Legislatures, for various reasons, will alter the law. And when they alter sentencing laws, those laws apply only to the cases that occur after that law takes effect. So if the good time law has been changed ten times, then the person who was sentenced under the first one may still be serving time when the one sentenced under the tenth one will get out before this one under the first one gets out because the one sentenced under the first one is bound by what the law was at that time. Any amelioration or minimizing of the amount of time you have to serve before you can get out does not apply to the people who have been sentenced before. So you have this patchwork quilt of different calculations for good time. That was partly responsible for the scandal that occurred because it was difficult to make the calculations. Do prosecutors care about that? No. They don't even understand it. They don't have to understand it. But we as policymakers should be very concerned about it. The overcrowding endangers employees. It creates an unmanageable situation in the prisons. Now I'm going to wrap this up but I wanted to get those things into the record. If this bill is enacted into law--and in 2015 it was on the way to being enacted and the prosecutors ambushed it on Final Reading and that's why it didn't go across the finish line--we as policymakers have to forget about these prosecutors. How in the world are you going to have a 90-plus percentage success rate in criminal prosecutions? You stack up charges and create a situation so terrifying that there are men and women who know they didn't commit a crime in this instance, their attorney knows they didn't commit a crime in this instance, but because of this person having the reputation for being a bad actor, it's very likely that on that basis they will be convicted even though prior crimes and convictions are not to be used to prove that you committed this particular thing you're charged with, but human nature being what it is, they will come into play. How do you get prior convictions into the record? This is to show modus operandi and all these other things that they say it has to do with, but not to prove guilt in this case but they know that that's what's going to happen. Show some rationale that makes sense. Let's be rational. You know two guys who favor what I'm doing? You all know their names. You at least know the last name. Have you ever heard of the Koch brothers? They favor this. There are many conservative groups who favor getting rid of mandatory minimums and correcting the sentencing structures throughout the country including at the federal level. And some of the people who can't stand the Koch brothers will laugh on this situation and say this is where you have one of those odd couplings because we don't like the Koch brothers on anything else but we're with them on this and some people can't understand

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why. But the Koch brothers say that they're being true to their conservative principles and that's why these conservative groups all over the country favor this. You are not going to turn a lot of criminals loose. What these prosecutors are telling you: Don't trust the judges, don't trust the Parole Board, and give them what they want so they can be lazy and get these easy convictions. If you have any questions, I'm willing to answer them. [LB447]

SENATOR EBKE: Senator Baker. [LB447]

SENATOR BAKER: Thank you, Senator Ebke. Senator Chambers, clarify some things for me, maybe a little historical background. Why were Class IC and ID felonies the only ones that ever had a minimum? [LB447]

SENATOR CHAMBERS: Some of this stuff was done when I wasn't in the Legislature. [LB447]

SENATOR BAKER: Okay. [LB447]

SENATOR CHAMBERS: And I can't tell you exactly which ones were, but they did a lot of things that they never could get done while I was here. So during the four years that I was gone, they did a lot of changing of the law. [LB447]

SENATOR BAKER: So because...Class II felonies, which includes human trafficking, that didn't have any mandatory minimum. [LB447]

SENATOR CHAMBERS: Right. [LB447]

SENATOR BAKER: So... [LB447]

SENATOR CHAMBERS: It's irrational. That's why I said it's an irrational system. [LB447]

SENATOR BAKER: Okay. All right. Thank you. [LB447]

SENATOR CHAMBERS: It might have been one of those situations where some particular senator wanted to show toughness on crime and picked something out of the air like that and just said...oh, and that made me think of why I have to explain something. The statement of intent says certain selected felonies are not affected by this bill. There are some crimes, like against children and others, where the statute that creates the crime puts a punishment right along with

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it. It's not just called a Class III or a Class IV felony; it's called a felony and then it gives a specific sentence. Those are not touched by this bill because there could be a rationale given for something like that when you specify it. I couldn't tell you how many crimes are covered under the two categories that are being affected by this, but some of them are what you'd call piddling and that's why judges have said, let me be in a position to give probation because in many cases that's what I think should happen. But they cannot under this crazy system that exists now. [LB447]

SENATOR EBKE: Senator Pansing Brooks. [LB447]

SENATOR PANSING BROOKS: Thank you. Thank you, Senator Chambers. What I am interested in, do you know if any states have like a dual system so that the prosecutor--I know you wouldn't be in favor--but just where prosecutors could charge a mandatory minimum or they could choose not to? Is there anything like that, a dual system? [LB447]

SENATOR CHAMBERS: I don't know of that because I think the mandatory minimum, if it attaches...oh, you mean give...bring a different charge that wouldn't have a mandatory minimum. [LB447]

SENATOR PANSING BROOKS: Yeah. [LB447]

SENATOR CHAMBERS: Yeah, they can do that. They're the ones who have...it's like a potpourri for them. They can pick here, there, and anywhere on the table that they choose. [LB447]

SENATOR PANSING BROOKS: But I...okay, excuse...I'm sorry. I thought that if they choose...if they charge with a Class II felony it automatically has a minimum of one year. [LB447]

SENATOR CHAMBERS: If it has any classification that has a mandatory minimum, if they charge that, it has to carry the mandatory minimum. [LB447]

SENATOR PANSING BROOKS: Right. [LB447]

SENATOR CHAMBERS: They cannot say we're going to charge this but we're not seeking the mandatory minimum. The law requires that what is attached to it by the state has to be charged. For example, if there is a minimum, the minimum that a court imposes cannot be lower than the

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minimum that the statute says. If the statute says three to five, the court cannot say one to five. It cannot go below the minimum set by law; it cannot go above the maximum. [LB447]

SENATOR PANSING BROOKS: Right. [LB447]

SENATOR CHAMBERS: It's like parentheses. The court is bound to stay between those parentheses. [LB447]

SENATOR PANSING BROOKS: I know. I guess I'm just wondering if there would be a way to have, like, two sets of charges so that you would have some that have the minimums and some that don't. [LB447]

SENATOR CHAMBERS: I wouldn't... [LB447]

SENATOR PANSING BROOKS: There's no...I know you wouldn't be in favor of it, but I'm just...there's no way to charge for anything above a Class IV, correct, that...because that doesn't have a minimum at this...yeah. So there's no way to charge above a Class IV without having a mandatory minimum, correct? [LB447]

SENATOR CHAMBERS: Right, unless you jump, as Senator Baker pointed out, over those two. [LB447]

SENATOR PANSING BROOKS: And jump over them by... [LB447]

SENATOR CHAMBERS: So that there's a minimum but not a mandatory minimum. [LB447]

SENATOR PANSING BROOKS: Yeah, just the...well, just the Class III, right? IIIA. [LB447]

SENATOR CHAMBERS: And I'm not looking at the classifications now. [LB447]

SENATOR PANSING BROOKS: Yeah. [LB447]

SENATOR CHAMBERS: But you can look at them and see where the mandatory is required... [LB447]

SENATOR PANSING BROOKS: Right. [LB447]

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SENATOR CHAMBERS: ...and others where it's not. [LB447]

SENATOR PANSING BROOKS: I see what you're saying. [LB447]

SENATOR CHAMBERS: It also doesn't deal with those drunk driving matters either. Some of those are a matter of months or weeks or something. Those things are not touched, just the two classifications that are mentioned in the bill. [LB447]

SENATOR PANSING BROOKS: Thank you, Senator Chambers. [LB447]

SENATOR EBKE: Senator Halloran. [LB447]

SENATOR HALLORAN: Now don't scold me, Senator. [LB447]

SENATOR CHAMBERS: I won't, believe me. [LB447]

SENATOR HALLORAN: Okay. [LB447]

SENATOR CHAMBERS: Here's...look, if I'm the one bringing it, that gives you a protection you'll never be scolded by me... [LB447]

SENATOR HALLORAN: Okay. [LB447]

SENATOR CHAMBERS: ...when you're asking me about something that I'm doing. [LB447]

SENATOR HALLORAN: First a question about is...for the record, is this true that you and the Koch brothers are in agreement on something? [LB447]

SENATOR CHAMBERS: Yes, and I don't mind. [LB447]

SENATOR HALLORAN: Okay. Second question...well, first a statement. Clearly you don't have a lot of confidence in prosecutors but... [LB447]

SENATOR CHAMBERS: Well, let me put it like this. I think that prosecutors misuse the system to make their job easier. [LB447]

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SENATOR HALLORAN: Okay. [LB447]

SENATOR CHAMBERS: There are prosecutors that I respect more than I do others. [LB447]

SENATOR HALLORAN: What's your opinion on the level of uniformity of judges and their rulings? [LB447]

SENATOR CHAMBERS: That's hard to determine also because a judge in the...the specific judge may take two cases that are very similar--seldom will they be exactly the same but you could say they're the same--and wind up handling it differently and if you go to Douglas County and see how white people are sentenced and black people are sentenced under the same fact situations, you'll see the same judge treating them differently. And there are even people in the criminal justice system who will point that out that these kind of things are going to impact the communities of color more than the white population. So judges are hit and miss also. [LB447]

SENATOR HALLORAN: Right. I couldn't agree with you more that I don't believe criminals take into account what the, you know, what the potential sentence is when they... [LB447]

SENATOR CHAMBERS: Can I make a confession here? [LB447]

SENATOR HALLORAN: Sure. [LB447]

SENATOR CHAMBERS: With all of the offenses that there are, I don't even know. You could pick one out and say, what is it? I couldn't even tell you. [LB447]

SENATOR HALLORAN: Right. [LB447]

SENATOR CHAMBERS: But remember, they don't expect to get caught, so... [LB447]

SENATOR HALLORAN: Right. From...and I understand and appreciate that. And clearly there are people in prison that shouldn't be in prison. It happens. [LB447]

SENATOR CHAMBERS: I believe that's true. [LB447]

SENATOR HALLORAN: It happens and it's extremely unfortunate. The other side of that equation though is, and it's just as obtuse as anything else I've said, but there...for the protection of the citizenry, if someone is a repeat offender and they're in prison, maybe wrongly so with

these mandatory sentences but they're in prison, there is at least...there is that safeguard that they won't be committing that crime during the term that they're in prison. [LB447]

SENATOR CHAMBERS: I understand what you're saying and I'm with you on that. But here's what I have to look at as a policymaker: Am I going to be so upset with something one bad person did that I'm going to change the law so that it now applies to everybody based on what that one wrongdoer did? Now when I saw that list of whatever this guy had done that we were shown, that never should have been possible because he could have been handled in such a way that would have kept him off the streets. So somebody was entering plea bargains with him so he could get out again and again and again. But here's what I will say. Despite the fact that judges can be unjust and unfair, I would still rather have flexibility in the sentencing phase where judges are instead of our trying to create a rock-ribbed boilerplate that has to fit everybody and shackle the judges. There is what they call the judicial temperament which means this person will be able to look at the circumstances, the individual who committed the crime, the crime itself, who was hurt, how much was the person hurt. For example, if somebody went upside Senator Hansen's head with that laptop, that's one thing. But suppose we had an elderly woman who couldn't hurt a fly if she wanted to and somebody punched her. That's what we ought to look at if we're going to enhance punishments--what is the damage done, how vulnerable was the person, and so forth--yet we don't have people saying let's have more protection for the elderly. They'll say let's have more protection for cops. And I was talking to a cop and he said, we carry guns. And if you talk to Senator McDonnell, he'll give you his view on giving special protection to these kind of people who are in a position to protect themselves but not look at the public as a whole. I admit, Senator Halloran, crime and punishment are very difficult areas to deal because if a guy is very handsome, very suave, and he did bad things, pretty people get away with a lot. [LB447]

SENATOR HALLORAN: I'm in trouble. [LB447]

SENATOR CHAMBERS: Okay, and there's no way to get away from that. I'd never get that benefit. That's what I was worried about. [LB447]

SENATOR HALLORAN: I guess one thing I am surprised about is the range--you know, 5 to 50 years. [LB447]

SENATOR CHAMBERS: I think that something ought to be done about that. [LB447]

SENATOR HALLORAN: Well, I mean, they seem so broad for all the reasons that you gave. I mean, every crime has its different level of detail. [LB447]

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SENATOR CHAMBERS: Um-hum. [LB447]

SENATOR HALLORAN: Anyway, thank you, Senator. [LB447]

SENATOR CHAMBERS: See, he's starting to see, and sometimes you have to come with a clear, fresh mind to look at that and it jumps out and grabs you and you say this big a range. [LB447]

SENATOR HALLORAN: It's been a long time since my mind has been fresh, just so you know. [LB447]

SENATOR CHAMBERS: He's modest also. [LB447]

SENATOR EBKE: Any other questions for Senator Chambers right now? We're good. [LB447]

SENATOR CHAMBERS: Thank you. May I retake my seat? [LB447]

SENATOR EBKE: Please do. Yeah, go right ahead. [LB447]

SENATOR CHAMBERS: Thank you. [LB447]

SENATOR EBKE: Other proponents or any proponents. [LB447]

KENNETH ACKERMAN: (Exhibit 3) Good afternoon again. My name is Kenneth Ackerman, K-e-n-n-e-t-h A-c-k-e-r-m-a-n. I'm in favor of Senator Chambers' simple bill of eliminating mandatory minimum sentences. I would offer removing all mandatory minimums would help. Mandatory prison minimums by legislation take away the judge's discretion to evaluate each case to its merits and its needs. Does a first-time offender need a mandatory three-year or five-year sentence? One change needed to reduce our overcrowded prison problem is to trust our judges and allow them to treat each case as they hear testimony and sentence accordingly. Allowing the problem-solving courts to include more offenders and find other ways to help people deal with offenses through community programs will help too. This keeps first-time offenders from learning the wrong skills in prison. I suggest Senator Chambers and Senator Schumacher consider combining their two bills for an effective way to reduce our prison population. The alternative is to spend greater amounts of our limited tax resources and build more prisons, creating greater burden for all. Thank you. [LB447]

SENATOR EBKE: Thank you, Mr. Ackerman. Any questions? [LB447]

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SENATOR CHAMBERS: I just want to clarify something. That was done in 2015, I believe was the year. We did put the two together, habitual criminal plus this one. They were separate bills. We combined them in the Judiciary Committee. We had been on that LR34 Committee and we looked at all of this with the Council for State Governments and there were reams of national information. We got testimony from judges, prosecutors, even other people, and decided that instead of having two bills they'd be put together and the subject matter of this bill that I'm having here was kept in committee and its contents were put in the bill that dealt with habitual. Well, as I said, that bill was ambushed on Final Reading and they emphasized the habitual aspect; even Senator Harr jumped the bill. It got to Final Reading. We couldn't get it across the finish line. So I decided I would just let this aspect of it stand alone. And then, if we make progress here, if Senator Schumacher's bill doesn't go this time, then we'll work that next time. But that's why they're not combined this year. [LB447]

KENNETH ACKERMAN: Thank you, Senator Chambers. Obviously whatever goes before, the legislation, the general body, I will work as hard as I can to support because the prison overcrowding is an atrocious thing and it's causing us taxpayers too much money. And unfortunately there will be efforts to build more prisons. Hopefully, that will fail. [LB447]

SENATOR EBKE: Any other questions? Thank you, Mr. Ackerman. Next proponent. [LB447]

APRIL O'LOUGHLIN: Do you need me to identify myself again? [LB447]

SENATOR EBKE: Please do, yes. [LB447]

APRIL O'LOUGHLIN: Okay. My name is April O'Loughlin, O-'L-o-u-g-h-l-i-n. I'm here on behalf of the Nebraska Criminal Defense Attorneys Association. And as I stated earlier, thank you, Madam Chairperson and members of the committee. As I indicated earlier, I'm a former prosecutor. I'm currently a public defender. I come at this from a unique perspective having seen both sides of the system. I was a prosecutor for six years. I've been a defense attorney in private practice for a number of years as well as a public defender for six, almost seven years now. I understand the carrot and the stick approach. I understand the purpose of what prosecutors are trying to accomplish with this. But I think the very nature--I agree with what Senator Chambers says--the very nature and fundamental nature of our system is based upon discretion and justice tempered with mercy. This, when you have the mandatory minimums on a IC and a ID, what you are in effect saying is that we are placing those crimes of a drug nature on the same caliber as those mandatory minimums that we deem to be so heinous and so violent that we have, within those contained statutes, we have put a sentence. And I think that is not the purpose of what our society and what our Legislature intended. When you have...I agree with what Senator Chambers said. When you have such a broad range as a 3 to 50 years, it's a tough sell both for society and

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the judiciary, as well as the prosecutors. I think from a practical, in-the-trenches standpoint, when you have...if a judge deems that a sentence is...should be on the mandatory minimum side of three years, and my client in that particular situation is already incarcerated, he cannot serve that three-year sentence because the mandatory minimum that he must serve is the three years. In a normal range, if that sentence was three years, he would get...that sentence would be cut in half and maybe given a year and a half potentially, minus the credit that he already has. But in this particular case the judge would have to go and do a different sentence than what he normally do. In order for him to serve that mandatory three years, he might give him a higher end of the sentence, of a six to eight or something like that, and fashion it so that he would get credit for the time that he's already served since he's been in custody but not have that sentence cut in half. That, from a practical standpoint, there's been a number of testimony regarding discretion, but that from a practical, day-to-day, in-the-trenches point of view, frustrates the very nature of why we have the system. Of course I understand the prosecutors' viewpoint that they would like that stick more than the carrot, but we trust our judges, that's why we have them, and to take away that very discretion says in a...it's the white elephant in the room. Then we don't trust the judges and I don't think that's what this legislative...I don't think that's what our society intends. I don't think that's what the Legislature intends, and I certainly don't think that that serves as the very foundation of our legal system. So I would urge you that our system is not based in absolutes, that's not what we intended, so I would urge support of this bill and the opportunity and the discretion that a judge can temper justice with mercy if he deems it appropriate. Thank you. Any questions? [LB447]

SENATOR EBKE: Any questions? Guess not. Thank you for being here. [LB447]

APRIL O'LOUGHLIN: Thank you. [LB447]

SENATOR EBKE: Next proponent. [LB447]

ANDY POLLOCK: Chairwoman Ebke and members of the Judiciary Committee, again, my name is Andy Pollock. It's spelled A-n-d-y; Pollock is P-o-l-l-o-c-k. As before, I am here on behalf of a group called Families Against Mandatory Minimums. It's a national group that has expressed concern and worked to reform mandatory minimums across the country. I won't repeat what I said with respect to LB53 but I would say thank you to Senator Chambers for introducing this bill. It's an important topic and it's unfortunate that it met a late demise in 2015. Families Against Mandatory Minimums, while I don't know that there's any affiliation with the Koch brothers, they are a more conservative group and they do understand the need and the reasons for reform and changing the mandatory minimum requirements. They come from two perspectives. One is the cost of mandatory minimums, the overcrowding and the cost with the prison systems and the judicial system. The other one is what it does to families across the country for relatively

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minor, nonviolent offenses. In that regard, a couple comments. One that Senator Schumacher made during his closing and one that Mr. Eickholt made on LB53 as well come to mind and they relate comments about the judges, and I think Senator Chambers may have mentioned this, too, comments from judges who said that these sentences in many cases tie their hands and are unfair. Families Against Mandatory Minimums is a group that I said before includes 70,000 members and supporters. It was started by a woman by the name of Julie Stewart. She was with a group which is not known for its leftist policies or principles called the Cato Institute. Her brother was arrested for growing marijuana. He pled guilty to the offense. He was sentenced to five years in federal prison by a judge who said at the time that he found the sentence unduly harsh given all of the circumstances. That led Ms. Stewart to form this organization and take on this as a cause nationwide. With that, again I would thank Senator Chambers and I would ask the committee to advance at least some version of this bill. [LB447]

SENATOR EBKE: Thank you, Mr. Pollock. Any questions? Okay, thank you. [LB447]

ANDY POLLOCK: Thank you. [LB447]

SENATOR EBKE: Next supporter, proponent. [LB447]

JOHN KREJCI: (Exhibit 4) I'm John Krejci, K-r-e-j-c-i. I'm representing Nebraskans for Peace. I'll read the second half of my prepared testimony. I'm in support of LB447 and I might say that it was...mandatory minimums were critiqued by the Council of State Governments, LR34, the Vera Institute. Most people, studies show that it's not really volitional. Rather than talk about abstract things, I worked with a young man. He was in Lincoln Correctional Center. I visited him every week. He was from western Nebraska. He was kind of a handful as a teenager. He spent five trips in Kearney before he was 15. When he was 15, somehow he purchased a hand gun which was to his detriment. He was playing around and with his girlfriend and shot her, killed her, was convicted at a bench trial of second-degree murder, sentenced to something like 10 to 20 years. He served, he was always trying to get appeal. Now he was in Omaha at the youth facility for a while and then in LCC. Finally he got a postconviction appeal. He was resentenced to manslaughter and then he was let loose because he had time served, 11 years. So he went back home, stayed with his family--again, he grew up in prison, 15 to 26 years old--got a job, was even going to school but it was really difficult for him to adjust. You know, he was just wasn't...he was a fish out of water. He had a little brush with the law in his hometown, ended up in a halfway house in Omaha where he, being very naive with regard to women, he got set up and a narc busted him for buying drugs. Now, since he had that conviction of a violent crime 11 years ago as a youth, he was subject to mandatory minimum. The guy who sold him the drugs got off real short, you know, not very much of a sentence. But he went to federal prison. They sent him to Arkansas, far away from his family. He was good at serving time because he had

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grown up in prison, so he worked his way finally and he's now in Kearney at a halfway house but again lost five years of his life. It didn't do him really any good and it was that he had that violent crime and mandatory minimum, you know, 11 years before. So that's an example of the inequity and the injustice of mandatory minimum in specific cases. So I'm hoping he's going to make it this time. You know, you always keep your fingers crossed. And I think he got some...the five years, he at least got some drug treatment and so we hope he'll do well. So I would say, you know, that's an example of bad sentencing and bad law and I hope you...and everybody says, Senator Chambers, we go straightforward, simple, and, you know, let's get rid of them. Thank you very much. [LB447]

SENATOR EBKE: Thank you, Mr. Krejci. Any questions? Guess not. Thank you for coming. [LB447]

FRAN KAYE: Thank you very much. My name is Fran Kaye, F-r-a-n K-a-y-e. I'm one of Senator Baker's constituents. I would like to see Senator Schumacher's bill. It's better than nothing. But I really, I'm here to testify for Senator Chambers' bill. I volunteer at the prisons and I have a pretty good insight, in over 20 years of talking to people who are incarcerated, as to how these things work. I would like to see the abolition of all mandatory minimums and all habitual criminal designations. Mandatory minimums are feel-good. They don't...they just are supposed to look good so that offenders will not be let off with a slap on the wrist. But sentences that are too short are not our problem. Sentences that are too long are our problem and mandatory minimums only result in sentences that are longer than necessary to punish offenders or to deter others from committing similar crimes. Minimums should allow judges to use their best judgment, weighing punishment versus rehabilitation. When we talk about sentencing, we talk about punishment but we very rarely take into account that people who are incarcerated for too long are much less likely to be successful in working their way back into society. So mandatory minimums that keep people in too long actually lead to more crime and more recidivism. Habitual criminal laws are not the focus here and so I shan't say anything about them, but I see them also as working really, really badly. And both mandatory minimums and habitual criminal laws have their own contradictions in them. If it didn't work the first time, why would we assume that it is going to work the second time? Doing the same thing over and over again and expecting different results is considered to be a sign of insanity, but it seems to me that certainly habitual criminal laws and many mandatory minimums do exactly that, so I would like to ask people to support LB447. And thank you very much. [LB447]

SENATOR EBKE: Thank you for being here today. Are there any questions? Thank you for being here. Any other proponents? How about opponents? [LB447]

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COREY O'BRIEN: (Exhibit 5) One last time today. Chairman Ebke, Chairwoman Ebke, members of the Judiciary Committee, my name is Corey O'Brien, C-o-r-e-y O-'-B-r-i-e-n, and I'm here on behalf of the Nebraska Attorney General's Office in opposition to LB447. Before I get too deep into my remarks, I want to appreciate the dialogue that's occurred here today because I do think that it is a productive dialogue. And while we disagree in the ways that we proceed with our criminal justice system, I do find value in that. I (inaudible) have to protest though that generalization of Senator Chambers' as indicating that prosecutors don't care. Prosecutors do care what happens in our facilities. I do care and I know Mr. Masteller cares about the overcrowding situation and we are sensitive to those matters. We don't want these offenders to come back. And if I didn't have a job to do, I'd be the happiest man on the planet. I want to provide just a little bit of perspective. First, for some perspective, according to statistics obtained this morning from the Bureau of Justice Statistics, in calendar year 2015, Nebraska incarcerated a fewer number of people per 1,000 residents than every state it borders, and in some cases appreciably less. That's right. We incarcerate less people in the state of Nebraska than every state around us. So why do we have overcrowded prisons? And the reason is because we also have the fewest number of beds of any of those states that surround us. Only one need to look to our southeast in Missouri where the percentage of individuals incarcerated for every 1,000 residents is more than double Nebraska's percentage. For purposes of LB447, it is important to note that the number of inmates admitted for Class IC and D felonies are relatively small in terms of the percentage of incarcerated each year. Over the last eight years, it averaged between 2 and 5 percent of the population. The reason I bring up these numbers is because in the past and even today I've heard a number of claims made which indicate that these mandatory minimums were the culprit for many of the past and current troubles in our correctional system and that elimination of mandatory minimums would solve many of these correctional woes. While certainly elimination of mandatory minimums could potentially alleviate some of the current overcrowding, it's clear from the numbers I just gave that this would do...this would amount to nothing more than a drop in the bucket. And for what benefits the elimination of these did yield, whatever benefits they did yield, would be drastically offset by the additional threats to public safety that the potentially earlier release of these inmates can now pose. As part of my testimony today I've distributed a handout that lists the offenses under current Nebraska law which are classified as Class IC and Class ID felonies. As you can see, this list consists of some of the most societal plaguing and egregious crimes one can commit. It includes crimes against innocent children, crimes of extreme violence, crimes committed by repeat offenders, crimes involving firearms, crimes endangering the health and safety of law enforcement and large segments of the public, and crimes committed in the name of hatred based on the victim's race, gender, ethnicity, religion, and sexual orientation. As a prosecutor I believe one of my obligations is to protect society from offenders who are apt to repeat their crimes and in the process of doing so to discourage would-be offenders from engaging in similar types of criminal behavior in the first place. It's my belief that classifying these particular egregious offenses as Class IC and D felonies presents the best opportunity to fulfill this obligation. First, mandatory

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minimums ensure the person who is convicted of these particular crimes will be at least temporarily restrained from committing additional crimes because they'll be incarcerated and have no opportunity for probation. It is my opinion that a sentence of probation from one of these crimes listed on the list that I gave you substantially undermines the seriousness of these offenses, would diminish the public confidence in the justice system, and could actually embolden an offender who has committed one of them to repeat their crime or commit an even more heinous criminal act. Second, I do believe that would-be offenders ponder the possible consequences at least on some occasions and I nonetheless maintain at least some would-be offenders are deterred from committing an offense or escalating their conduct because of these penalties. What fortifies this belief is that I've read at least a couple of transcripts over the years of on-line sexually explicit communications with minors by adults who say as much when they decide not to meet the underage girl for sex. Additionally, I have watched at least two officers, two police interviews where a suspect decided not to pick up a gun because he was a convicted felon and knew what the consequences would be. Members, in 2015 the Nebraska Attorney General's Office and County Attorneys Association committed and remains committed to working with this body and all other parties on much needed justice reinvestment. At the outset of this endeavor we were told and have been led to believe that we would do so without compromising public safety. In the Nebraska Attorney General's Office's opinion, LB447 does do that. Thank you and I'd be happy to entertain any questions you might have. [LB447]

SENATOR EBKE: Okay. Senator Chambers. [LB447]

SENATOR CHAMBERS: Mr. O'Brien, we each have our opinion. I'm not going to change you; you're not going to change mine. So my question is for the purpose of the record. [LB447]

COREY O'BRIEN: Yes, sir. [LB447]

SENATOR CHAMBERS: With a range of 2 to 50 years with one of the classifications, a range of 5--I meant 3, whatever--of 5 to 50 years, a judge could fashion a sentence without a mandatory minimum that would require that person to stay in jail longer than the mandatory minimum, isn't that true? [LB447]

COREY O'BRIEN: It is true. Can I answer that though? [LB447]

SENATOR CHAMBERS: Sure. [LB447]

COREY O'BRIEN: Okay. You know, I think the biggest fear that I have as a prosecutor is that one of these people that commit one of these egregious offenses listed there, that a judge is going

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to take a chance on him and give him probation, and that terrifies me and I know it terrifies the judges too. And there are certain offenses in my opinion that are not worthy of a probationary sentence. And you talked earlier about the fact that we have 93 counties and 93 different systems and that really bugs me in this sense, and you also touched upon it when you go to Douglas County and you say, you know, certain white defendants get treated differently than black defendants. I worry about that, too, and I worry about the guy out in Sidney, Nebraska, who commits one of these offenses and he may be rich and may have a wealthy lawyer and the judge says, you know what, I'm going to take a chance on you and give you probation; the same guy in Omaha who might be African-American that has the public defender that commits the same offense that has all the same background, he gets sentenced to six to eight years in prison. And I do worry about the fact that there is an inconsistent treatment for them and I think that that's the one benefit to me of mandatory minimums is that there is some consistency there in evaluating what that offender did. And it doesn't matter who they are or what they are, they get treated the same for their same egregious conduct. [LB447]

SENATOR CHAMBERS: But if that is it, if that's what you're looking at, a mandatory minimum of...that is so small, it's inconsequential. A mandatory minimum of three years or a mandatory minimum of five years, those are so small that they're inconsequential. That's why I say the only thing they can do is increase the overcrowding because people who shouldn't get any time are going to have to serve the three or the two. And if they've committed a worse offense, they're going to get a sentence that's more than the mandatory minimum and it can be structured in such a way that more time will be spent in prison than would be the case under the mandatory minimum. But those people who get those long sentences without a mandatory minimum can start getting good time as soon as they go into prison. It's like saying we're going to put \$30 in your account. It's up to you to have the full benefit of that, but you're going to diminish that every time you commit an infraction. And that's how even people with long sentences behave better if they're getting good time, because they have an incentive. When you have a mandatory minimum of five years, there's no incentive to do anything. And if you think that it doesn't have an impact, talk to some of the guards at the prison. People with a mandatory, they...it's not going to do them any good. And they're not people who think a long distance from where they are or they wouldn't do some of the things they do. So you might say, but look, when the...you serve that five, you don't want to have a bad record of having gotten a lot of write-ups and on and on. He always looking at, or she, what they're doing to me now, and that's what I as a policymaker have to consider. And I'm conceding that what you do as a prosecutor is different from what I do. That's why I have to try to put a constraint on prosecutors. By the way, I don't think every prosecutor is venal, either. I couldn't say that. In fact, I told--I shouldn't tell this, but he'll tell it--Don Kleine that if I were ever charged with an offense, I'd want him to prosecute me even though he's a very good prosecutor because, first of all, he would have to be shown facts that convinces him that I really am involved in something. He's not going to look at how unpopular I am or my color and go after me on that basis. Somebody in his office might. And also, he's going

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to play hard but he'll play fair. So if I had to be prosecuted, I'd rather be prosecuted by a prosecutor who has pride in what he or she does. I don't plan to get prosecuted, period, but I say that to let people know that I make a distinction between prosecutors based on how they function. I'm not upset that you come here today, not really. [LB447]

COREY O'BRIEN: Everybody else is, probably, but (laughter)... [LB447]

SENATOR CHAMBERS: I'm through but I want us to end on that note. [LB447]

COREY O'BRIEN: Don Kleine was my mentor, just like it is Jim's mentor, so. [LB447]

SENATOR CHAMBERS: You said...I'm through. [LB447]

COREY O'BRIEN: I'm just letting you know. [LB447]

SENATOR CHAMBERS: (Laugh) Thank you. [LB447]

SENATOR EBKE: Any other questions of Mr. O'Brien? Thank you for being here today. [LB447]

COREY O'BRIEN: Thank you. [LB447]

JIM MASTELLER: Good afternoon. My name is Jim Masteller, J-i-m M-a-s-t-e-l-l-e-r. I'm here to testify in opposition to LB447 on behalf of the Nebraska County Attorneys Association. I'm not going to replot all the ground Mr. O'Brien went through, but I think there's just a couple things I want to bring out. One is apparently, at least since I've always been a prosecutor, since 2001, we've had these mandatory minimums. I understand we didn't always have them and maybe they were put into place in the '80s or '90s, but apparently at some point the Legislature made a determination that in their opinion certain crimes were so serious that they wanted to treat them differently from other crimes and they created these mandatory minimums. And as Senator Chambers pointed out, we treat these crimes differently in two respects: (1) you don't get good time on that mandatory minimum period; and (2) you're ineligible for probation. And so there's a difference between minimum sentences and the mandatory minimum sentences and Senator Chambers' bill just gets rid of the mandatory minimum sentences on ID and IC felonies. So for example, assault on an officer in the first degree, that's a ID felony; and use of a deadly weapon to commit a felony is a IC felony. So if someone were to shoot a police officer, cause a serious bodily injury, under the current law, the...if convicted of both charges, the absolute lowest sentence that person could receive would be a total of eight to eight years for...and would receive

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no good time on those. If this bill passes, then the minimum sentence would be a probation sentence because, as there is no change to subsection (4) of 28-105, if you...if it's not a mandatory minimum, then you are eligible for probation. And I do think that that does send the wrong message. If I rob a bank and I use a gun to do so, if you use a firearm to commit a felony--that's a IC felony--you are not even a possible candidate for probation. Under this bill, you would be. And I think we would all agree that judicial discretion is a good thing; however, we've also spent a lot of time talking about the problems, the potential problems that can go along with that discretion. The more flexibility that a judge has increases the potential for unequal treatment under the law. Less discretion in this sense, with mandatory minimums where everyone convicted of a ID, we know that they're going to have relatively consistent sentences, that being no probation and no sentence of less than three years, I think we would all say that consistency, uniformity, and equal treatment under the law are all worthy goals of our criminal justice system. And so I think it's a balancing of those two considerations--judicial discretion versus consistency and uniformity--that we need to talk about here. And I'm happy to answer any questions if anyone has any for me. [LB447]

SENATOR EBKE: Senator Chambers (inaudible). [LB447]

SENATOR CHAMBERS: Again, not contesting, when you and Mr. O'Brien mentioned the mandatory minimum so that maybe some of these other favored people are going to have to serve some time, what you do at the same time is say that this guy who is on the underside, who shouldn't have to serve that mandatory minimum, is now going to be punished more in order that you can get this guy who usually gets away. That's not fair. That's the first point. Secondly, unless they change the law, which I doubt, gun crimes require the sentencing and the punishment for the gun crime to be consecutive to whatever else. So you're not going to get probation where there's a gun crime if you shot a...first of all, if you shot a cop, you're not going to get probation anyway. So there's a difference between what is possible under the law and what in the real world is going to occur. So some of these horrendous examples that you all give, it's really theoretical and hypothetical. Judges stand for retention and I don't believe there is a judge in this state who, if a person raped a little girl, would give that person probation; shot at a cop and didn't hit the cop, would give probation. I'd concede that it's possible but it's highly unlikely that those things would occur. And what I have to do as a policymaker is look at the generality of what occurs. As Senator Halloran pointed out, there are so many variations where you're going to use the same classification but within that classification the variations are so great that we can only speak in general terms, so that's why I say some of the examples that are given are not going to occur. And you all as prosecutors wouldn't be hindered in terms of keeping intact your 90-plus percent conviction rate because you can stack up so many other charges. This just makes you even lazier. Now you don't have to stack these up, just put this out there, and then sit back, prop your feet up on the table, and look at the guy. Hey, I'm not saying that to disparage but to let us

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end on a note where people know that because you're on one side of the issue, I'm on the other, that doesn't make us enemies. [LB447]

JIM MASTELLER: Certainly. And I would tend to agree with you that you would certainly hope and expect that a judge would not impose a sentence of probation in cases like that. And I do agree that a use of a deadly weapon conviction does have to be served consecutively to the underlying conviction. But if it's not a mandatory minimum, the judge in theory could impose a sentence of probation on the original count and that a consecutive sentence of probation on the use count. [LB447]

SENATOR CHAMBERS: That is possible but unlikely. [LB447]

JIM MASTELLER: Theoretically possible. (Laughter) [LB447]

SENATOR CHAMBERS: Okay. I don't have any more. [LB447]

SENATOR EBKE: Okay. Any other questions? Senator Pansing Brooks. [LB447]

SENATOR PANSING BROOKS: Just I just find the discussion so interesting about judges. There's this tendency to sort of think that the prosecutors are the harbingers of justice and that if not for the prosecutors the judges would never be able to exact justice or decide something fairly. Yes, there could be a variation from Scottsbluff to Omaha, but clearly I trust our judiciary system. [LB447]

JIM MASTELLER: I do as well. [LB447]

SENATOR PANSING BROOKS: Okay, good. [LB447]

JIM MASTELLER: I can tell you that in Douglas County we have 16 district court judges and, just because they're all human, they treat their cases differently. And so if you can almost think about them as a spectrum, and so if I'm a particular defendant, if I'm at one end of the spectrum, I'm going to be treated quite a bit differently than I'm at the other end of the spectrum. And so the concern would be reducing something that promotes uniformity and consistency would only tend to increase the difference in outcomes of differently situated people. [LB447]

SENATOR PANSING BROOKS: Thank you. [LB447]

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SENATOR EBKE: Anyone else? Thank you for being here today. [LB447]

JIM MASTELLER: Thank you. [LB447]

SENATOR CHAMBERS: Just one question. [LB447]

SENATOR EBKE: Oh, Senator. [LB447]

SENATOR CHAMBERS: You work with Don Kleine? [LB447]

JIM MASTELLER: Yes. [LB447]

SENATOR CHAMBERS: Tell him how nice I was to you. (Laughter) [LB447]

JIM MASTELLER: You're always nice to me, so thank you. [LB447]

SENATOR EBKE: Any other opponents? Do we have anyone testifying in the neutral capacity?
Senator Chambers. [LB447]

SENATOR CHAMBERS: From Bob Seger: The cards never did him wrong / The trick was don't
play the game too long. (Laughter) I'm...I don't have anything else to say. Thank you. [LB447]

SENATOR EBKE: (Exhibits 1 and 2) Okay. We have a couple of letters. We have one in support
from Spike Eickholt, representing the ACLU of Nebraska; one from Anne DeVries, on behalf of
herself, in support as well. This ends the hearing on LB447 and this ends our hearing for today.
Thank you for being here. [LB447]