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LR424 Department of Correctional Services Special Investigative Committee
October 10, 2014

[LR424]

The Department of Correctional Services Special Investigative Committee of the Legislature met at 9:00 a.m. on Friday, October 10, 2014, in Room 1524 of the State Capitol, Lincoln, Nebraska for the purpose of conducting a public hearing on LR424. Senators present: Steve Lathrop, Chairman; Les Seiler, Vice Chairman; Kate Bolz; Ernie Chambers; Bob Krist; Heath Mello; and Paul Schumacher. Senators absent: None.

SENATOR LATHROP: Good morning, everyone. Welcome to the LR424 committee hearings. Today is October 10; the time is 9:00. The committee...or most of us are here. We are going to have a number of witnesses today. Several have been subpoenaed and we have two gentlemen from the Ombudsman's Office who will testify initially and then go to our subpoenaed witnesses. Before we do that, however, I'm going to have the members of the panel introduce themselves, beginning with Senator Bolz. [LR424]

SENATOR BOLZ: Good morning, Senator Kate Bolz, District 29. [LR424]

SENATOR SCHUMACHER: Senator Paul Schumacher, District 22. [LR424]

SENATOR CHAMBERS: Ernie Chambers, District 11. [LR424]

MOLLY BURTON: Molly Burton, legal counsel. [LR424]

SENATOR LATHROP: Steve Lathrop, the Chairman of this committee and state senator from District 12. [LR424]

SENATOR SEILER: Les Seiler from District 33. [LR424]

SENATOR LATHROP: And we will be joined shortly by Senator Mello and Senator Krist

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who are, I think, having meetings or wrapping things up. Our first witnesses today will be James Davis and Jerall Moreland, both from the Ombudsman's Office. And, gentlemen, if you will stand and raise your right hand we're going to have you sworn in before you testify today. Do you solemnly swear that the testimony you will give this committee will be the truth, the whole truth, and nothing but the truth? [LR424]

JERALL MORELAND: I do. [LR424]

JAMES DAVIS: I do. [LR424]

SENATOR LATHROP: Okay. And let the record reflect that both gentlemen have indicated their agreement and are now under oath. And I will tell you that as a lawyer we are always very, very careful to make sure that we have a good record and today taking two witnesses at a time, I think, will be to our advantage so that the story flows that will...and the testimony flows, but it's going to be important that before you answer a question that you identify yourself. You can just say "Moreland" or "Davis" so that the record does reflect who is testifying and we don't end up with a mess for a record. Okay? And maybe I'll start with you, Mr. Moreland, and have you introduce both of you, if we can. And that is, tell us where you work and how long you've been there. [LR424]

JERALL MORELAND: Sure. Jerall Moreland, J-e-r-a-l-l, last name, Moreland, M-o-r-e-l-a-n-d. I'm an assistant ombudsman in the Ombudsman's Office and I've been in the office for six years. To the right of me is James Davis, J-a-m-e-s, Davis, D-a-v-i-s. Davis is the deputy ombudsman for Corrections and he has been in the office for, well, well over ten-plus. [LR424]

SENATOR LATHROP: Ten-plus years. [LR424]

JERALL MORELAND: Yes. [LR424]

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SENATOR LATHROP: So the two of you...tell us what the role of the Ombudsman is. For those that aren't familiar with what the Ombudsman does, you're attached, first of all, to the Legislature. Am I right? [LR424]

JERALL MORELAND: That is correct, yes. We are the...basically, an extension arm. We statutorily have legislative investigative oversight on state agencies. We investigate complaints coming from a range of inmates to staff of state agencies as well as the public. [LR424]

SENATOR LATHROP: And who is the Ombudsman? [LR424]

JERALL MORELAND: The Ombudsman is Marshall Lux, L-u-x. [LR424]

SENATOR LATHROP: And you are deputies in that office? [LR424]

JERALL MORELAND: Correct. James is the deputy of the office; I'm assistant ombudsman. [LR424]

SENATOR LATHROP: Okay. [LR424]

JERALL MORELAND: Yes. [LR424]

SENATOR LATHROP: And in that...in your capacity as deputy ombudsman, do you investigate complaints that relate to the conditions in the Department of Corrections? [LR424]

JAMES DAVIS: This is Davis. Yes, we do. [LR424]

SENATOR LATHROP: And how long have you been doing that? [LR424]

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JAMES DAVIS: I've been doing it approximately 15-plus years. [LR424]

SENATOR LATHROP: Okay. Mr. Moreland, you do as well? [LR424]

JERALL MORELAND: That is correct, yes. [LR424]

SENATOR LATHROP: That's part of your assigned duties? [LR424]

JERALL MORELAND: Yes, it is. [LR424]

SENATOR LATHROP: Okay. I want to visit with you today about your involvement in inmate Nikko Jenkins. And, first of all, did either of you have any involvement with Mr. Jenkins before February 25 of 2013? [LR424]

JAMES DAVIS: Davis. Yes. [LR424]

SENATOR LATHROP: Okay. So you were familiar with Mr. Jenkins before February 25, 2013. [LR424]

JAMES DAVIS: Davis. Yes, 2008, approximately. [LR424]

SENATOR LATHROP: Okay. When we had testimony a hearing ago or two, there was testimony from the witnesses that suggested that on February 25, 2013, there was an e-mail sent by Jerall Moreland to Bob Houston wanting to have some dialogue concerning Mr. Jenkins and his transition to a public or...transition to the community. Is that true? [LR424]

JERALL MORELAND: This is Moreland. It is true there was dialogue via e-mail sent directly to Director Houston. That e-mail was sent by Mr. Davis initially. [LR424]

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SENATOR LATHROP: Okay. And that was on February 25 of 2013. [LR424]

JERALL MORELAND: That was February 25, 2013. [LR424]

SENATOR LATHROP: And I appreciate that you had some involvement with Jenkins before that date, but I'd like to start with that date and maybe we can come back to some of your earlier interactions with the Department of Corrections and Mr. Jenkins before that date. [LR424]

JERALL MORELAND: Okay. [LR424]

SENATOR LATHROP: But we'll do that in a moment. Mr. Davis, you sent an e-mail to Director Houston asking to have some type of a meeting to discuss Mr. Jenkins and his transition into community? [LR424]

JAMES DAVIS: That's correct. That was at the behest of Senator Chambers. He was concerned with Mr. Jenkins' mental health status and returning back to north Omaha. [LR424]

SENATOR LATHROP: All right. And tell me what the concern was; what did you...what did you understand? This was in response to a concern that you'd heard from Senator Chambers? [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: And what was the concern? [LR424]

JAMES DAVIS: Well, the concern was that Nikko Jenkins wasn't getting the mental health treatment that he needed to transition back into north Omaha. Also, another concern was that his longevity on administrative confinement. He was on administrative

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confinement for quite some time. Approximately 60 percent of his time was served on administrative confinement. [LR424]

SENATOR LATHROP: Okay. And the...at least the two years before you made your first communication, February 25 of 2013, he'd spent, what, two years in administrative confinement? [LR424]

JAMES DAVIS: Approximately 3.5. [LR424]

SENATOR LATHROP: Three point five years on administrative confinement. [LR424]

JAMES DAVIS: Approximately, yes, correct. [LR424]

SENATOR LATHROP: And as I understand it, and I'm going to maybe take a shortcut here, as I understand it, the concern was twofold: one, that this gentleman was...this guy--I don't want to call him a gentleman--that Mr. Jenkins, this inmate, was spending 3.5 years in administrative confinement and, if nothing happened, would be released directly into his community in north Omaha. [LR424]

JAMES DAVIS: That was a major concern. [LR424]

SENATOR LATHROP: And the other was his behavioral health status. [LR424]

JAMES DAVIS: Correct. [LR424]

SENATOR LATHROP: Okay. So you send an e-mail asking for a meeting, or what happened after you e-mailed Director Houston on February 25, 2013? [LR424]

JAMES DAVIS: Well, the reason I'd sent the e-mail, because I wanted the heads to know what was going on and what we were asking. So I sent the e-mail to Randy Kohl,

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who is the medical administrator for the Department of Corrections; Bob Houston, who is director; George Green, who is the legal counsel; and Cameron White, who was the behavioral health administrator. Can you think of anybody else? And I think that was it. And those are the powers that be that could make a decision on Mr. Jenkins' welfare. [LR424]

SENATOR LATHROP: All right. Were you asking for a meeting or what exactly were you asking for when you sent the e-mail? [LR424]

JAMES DAVIS: I was asking for a meeting. And, also, I was asking them to provide me with all of Mr. Jenkins' mental health records and also his status. [LR424]

SENATOR LATHROP: Okay. And did you get a response to that? Did Director Houston respond to you or indicate that he would set a meeting up? [LR424]

JERALL MORELAND: This is Moreland. There was contact by the department in which Dr. Kohl was instructed to set a meeting up between the two offices. Unfortunately, that did not occur. So an additional e-mail was sent approximately March 7 requesting another meeting and requesting specific information about Nikko Jenkins' mental health assessments, as well as a possibility of a discharge plan. [LR424]

SENATOR LATHROP: Okay. So between February 25 and March 7, was there any communication with your office from the Department of Corrections? [LR424]

JERALL MORELAND: Not in regards to setting up a meeting between the two offices. [LR424]

SENATOR LATHROP: Okay. Who initiated...which of the two of you or who from the Ombudsman's Office initiated the March 7 e-mail that you just described? [LR424]

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JERALL MORELAND: This is Moreland. I did. [LR424]

SENATOR LATHROP: Okay. And what did you ask for? Who did you direct that to?
[LR424]

JERALL MORELAND: That particular e-mail was addressed to Dr. Kohl in which we requested a sit-down as suggested earlier to talk about Nikko Jenkins' situation to see if there was some kind of plan we could put in place prior to his upcoming release from Corrections. [LR424]

SENATOR LATHROP: And if I can ask, at this point in time, are you familiar with Jenkins? What do you know about Jenkins and the circumstances of his confinement by the time March 1 rolls around? [LR424]

JERALL MORELAND: Just briefly, without going back too far... [LR424]

SENATOR LATHROP: This is Moreland. [LR424]

JERALL MORELAND: Moreland, this is Moreland, pretty extensive. You know, we...Nikko first came to our office in 2008. And the reason to come to our office was based on the amount of time that he spent in a segregated status. One of the issues we're...that we have been facing with nationally is how long do we keep an inmate in a confined area, segregated from other interactions. And so Nikko was one part of the issues that we were working with, with the department as far as how it relates to segregation. [LR424]

SENATOR LATHROP: Okay. [LR424]

JAMES DAVIS: I just want to add one thing too. Also, we have... [LR424]

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SENATOR LATHROP: Davis. Yeah. [LR424]

JAMES DAVIS: Davis, I'm sorry. We go down to administrative confinement and we have eyes on and so we see what's going on with that particular individual. So not only do we just correspond with that person on the phone, but we go to the facilities, inside AC, to discuss or visit with that individual, and also visit with powers that be, like the mental health staff, the deputy warden, and also the warden. [LR424]

SENATOR LATHROP: At this point in time though, and maybe the question wasn't clear, at this point in time are you aware of his behaviors? [LR424]

JERALL MORELAND: This is Moreland. We are very aware of Nikko Jenkins' bizarre behavior. We are aware of several incidents that were very bizarre to us, yes. [LR424]

SENATOR LATHROP: All right. Are you concerned as Ombudsmen working on a transition plan or with Nikko Jenkins on your radar that he may have some mental health issues? [LR424]

JERALL MORELAND: Yes, we are. This is Moreland. [LR424]

SENATOR LATHROP: And do you, either of you, then request...at the meeting when you discussed Jenkins' transition plan, that you be given access to his mental health records? [LR424]

JAMES DAVIS: This is Davis. That's correct. We expect the department to turn over any and all information when we request information on Mr. Jenkins, so his mental health records and medical records. [LR424]

SENATOR LATHROP: So you're trying to set up a meeting with the department to discuss Jenkins and you have requested his mental health records. [LR424]

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JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: And I think I remember seeing an e-mail from Mr. Moreland directly saying, we'd like to see his last behavioral health assessments. [LR424]

JERALL MORELAND: This is Moreland. Yes, that's correct. [LR424]

SENATOR LATHROP: Okay. So you write on March 7 that you are following up with your request for a meeting. You send that to the head of health, right, Kohl? [LR424]

JERALL MORELAND: Head of medical and mental health, yes. [LR424]

SENATOR LATHROP: You send that to Dr. Kohl who is in charge of all the health, behavioral and otherwise. And does that meeting get set up? [LR424]

JERALL MORELAND: This is Moreland. March 7 we request a meeting. The meeting is set up. Shortly after, the meeting is cancelled. Several days later we make a request to Larry Wayne, the deputy director of Corrections, who Director Bob Houston had requested work with our department on this issue. The... [LR424]

SENATOR LATHROP: So there is an exchange sometime around the first week or so of March or from the...at least your initial contact where Houston, who you made the initial contact to, says, Larry Wayne is going to be the contact. [LR424]

JERALL MORELAND: Moreland. That is correct, yes. [LR424]

SENATOR LATHROP: Okay. And so after the scheduled meeting was canceled, you then communicate with Larry Wayne and tell him, we want to have a meeting. [LR424]

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JERALL MORELAND: This is Moreland. Yes, correct. [LR424]

SENATOR LATHROP: All right. Did you identify who you wanted present at that meeting? [LR424]

JERALL MORELAND: This is Moreland. We...at first, all the department heads were part of the meeting. We didn't...we expected the heads to be part of that meeting. [LR424]

SENATOR LATHROP: Why was it important to have the heads of those departments at this meeting when you were going to talk about Mr. Jenkins' transition plan? [LR424]

JERALL MORELAND: This is Moreland. We were faced with two things. One is Nikko was eventually going to get out. Two is the time frame was short for us. So we wanted to have at the meeting those individuals who could make decisions. [LR424]

SENATOR LATHROP: And so your request to have the department heads there, and that was back in February, your request to have the department heads there was to get the decision makers in the room so decisions could be made at that time regarding what his transition plan would look like. [LR424]

JAMES DAVIS: This is Davis. Yes. [LR424]

SENATOR LATHROP: Okay. And you also requested and had the expectation that his behavioral health records would be made available to you. [LR424]

JAMES DAVIS: This is Davis. Correct. [LR424]

SENATOR LATHROP: Okay. So does the meeting take place? [LR424]

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JERALL MORELAND: Eventually a meeting...this is Moreland. Eventually a meeting does take place on March 20. [LR424]

SENATOR LATHROP: Okay. And I know I've seen an e-mail from you, Mr. Moreland, on March 11 where you requested that you have access to Jenkins' behavioral health...latest behavioral health assessments. Is that true? [LR424]

JERALL MORELAND: This is Moreland. That's true, yes. [LR424]

SENATOR LATHROP: Okay. Who is at the meeting on March 20? And...well, first of all, where was the meeting held? [LR424]

JAMES DAVIS: This is Davis. The meeting was held at central office at the "Y" building at DCS on the grounds of the Lincoln Regional Center campus. [LR424]

SENATOR LATHROP: Okay. And that would be the central office for the Department of Corrections. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: And geographically...or just in terms of the lay of the land, where was this meeting in relationship to Director Houston's office? [LR424]

JAMES DAVIS: Basically, it was right next door to Director Houston's office. So in other words, he can just leave the office...I mean, the conference room and go right directly into his office. [LR424]

SENATOR LATHROP: Okay. And that was Davis. [LR424]

JAMES DAVIS: That's...I'm sorry, Davis. [LR424]

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SENATOR LATHROP: Okay, no, that's fine, I just want to make sure we got a good record. And who from the Ombudsman's Office attended that meeting? [LR424]

JAMES DAVIS: This is Davis. Myself, Jerall Moreland, Sean Schmeits from the Ombudsman's Office. [LR424]

SENATOR LATHROP: Okay. All three deputy ombudsmen. [LR424]

JAMES DAVIS: No, two assistants and one deputy. [LR424]

SENATOR LATHROP: Okay, forgive me. [LR424]

JAMES DAVIS: That's okay. [LR424]

SENATOR LATHROP: All three people that work for the Ombudsman's Office. [LR424]

JAMES DAVIS: This is Davis. Correct. [LR424]

SENATOR LATHROP: Okay. Did the three of you from the Ombudsman's Office arrive together? [LR424]

JAMES DAVIS: Davis. Correct. [LR424]

SENATOR LATHROP: And when you arrived at the conference room where this meeting was held, was there anybody in the room when you arrived? [LR424]

JAMES DAVIS: Davis. Yes. [LR424]

SENATOR LATHROP: Who was in the room when you arrived for this meeting

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concerning Nikko Jenkins? [LR424]

JAMES DAVIS: This is Davis. When we initially arrived, I noticed Larry Wayne, who is the deputy director. I noticed Sharon Lindgren, who is the legal counsel; Kathy Foster is a social worker; and Bob Houston. He was there for a few minutes. [LR424]

SENATOR LATHROP: All right. But he was in the room when you walked in. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: In other words, those people you've just identified were gathered in the conference room next door to Mr. Houston's office before the three from the Ombudsman's Office arrived. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: Okay. And the purpose of this meeting is to talk about Jenkins' transition plans and your expectation is you're going to see some behavioral health records? [LR424]

JAMES DAVIS: Correct. [LR424]

JERALL MORELAND: (Inaudible). [LR424]

JAMES DAVIS: Well, let me clarify. This is Davis. When we first initially arrived to the meeting, we expected to talk about like his mental health and also his transition plan. [LR424]

SENATOR LATHROP: Okay. [LR424]

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JAMES DAVIS: So I want to clarify that. [LR424]

SENATOR LATHROP: And you said Bob Houston was in the room. Did he stay there through the meeting? [LR424]

JAMES DAVIS: No, he only stayed there for a few minutes and then he exit. [LR424]

SENATOR LATHROP: All right. And that was Davis. Did Houston stay during any substantive part of the meeting? [LR424]

JAMES DAVIS: Davis. No. [LR424]

SENATOR LATHROP: So Houston gets up and leaves the room shortly after the three folks from the Ombudsman's Office arrive. [LR424]

JAMES DAVIS: Davis. We exchange some pleasantries, and then after that he left the office,... [LR424]

SENATOR LATHROP: Okay. [LR424]

JAMES DAVIS: ...I mean the conference room. [LR424]

SENATOR LATHROP: All right. What happened at this meeting? You're there to talk about Jenkins' mental health issues and you're there to talk about his transition into community. He's going to be...he's going to jam out July 30, 2013, only a few months down the road, six months down the road. What happened at the meeting? [LR424]

JERALL MORELAND: This is Moreland. [LR424]

SENATOR LATHROP: Move a little bit closer so we make sure we get you on the mike,

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if you don't mind. [LR424]

JERALL MORELAND: This is Moreland. Director Houston did exit the conference room. Shortly after, legal counsel, Sharon Lindgren, informed us that discussing Mr. Nikko Jenkins' mental health status was off the table. And so we still had another issue that we needed to discuss which was the discharge plan. And we must admit, we did discuss possibly leaving that meeting based on not being informed that the discussion of Nikko and his mental health status was going to be off the table. But we felt, again, at that time line, that time frame it was important that we at least discuss some kind of transaction from segregation back to the community, so we stayed. The purpose of that meeting from that point was to put together a plan that both offices agreed would happen in behalf of Nikko Jenkins. And so based on history, we know that it's important that those kind of decisions are made up top, that they are made by the decision makers. And so, ideally, we wanted to make sure each step in Nikko's process, each step in his transition plan was discussed and that we had a specific time line and that we knew exactly what actions would happen if he behaved in segregated status.

[LR424]

SENATOR LATHROP: Okay. I want to follow up on some questions though...or ask some follow-up questions if I can. Was Director Houston in the room when Attorney Lindgren said we're not talking about Jenkins' behavioral health? [LR424]

JAMES DAVIS: This is Davis. No, he had already exited. [LR424]

SENATOR LATHROP: So Houston leaves and is the first thing that happens in this meeting Attorney Lindgren telling you that we're not talking about Jenkins' behavioral health? [LR424]

JAMES DAVIS: That's correct. I was surprised and shocked and very upset. [LR424]

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SENATOR LATHROP: That was Davis. [LR424]

JAMES DAVIS: Davis. [LR424]

SENATOR LATHROP: And at that point did the two of you or the three of you from the Ombudsman's Office discuss or have some conversation about leaving and rescheduling to a point in time when you would have access to the mental health records? [LR424]

JAMES DAVIS: Davis. That's correct. I conferred with my colleague, Jerall, about leaving. And he suggested that we stay and work on the transition plan for Mr. Jenkins. [LR424]

SENATOR LATHROP: When you arrived at that meeting on March 20, did you have authority to look at Jenkins' records? In other words, did you have a release or an ability? There wasn't a legal impediment, in other words, to seeing Jenkins' records? [LR424]

JAMES DAVIS: This is Davis. That's correct. We had a signed consent release to review all his medical and mental health records. [LR424]

SENATOR LATHROP: Were you given an explanation as to why Attorney Lindgren or the administration had just taken Nikko Jenkins behavioral health records off the table? [LR424]

JAMES DAVIS: Davis. Yes, later visited with Deputy Director Larry Wayne; he explained to me that mental health was tired of us beating up on them about Mr. Jenkins' mental health. [LR424]

SENATOR LATHROP: And that was their explanation for not sharing his behavioral

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health assessments? [LR424]

JAMES DAVIS: That's correct. They got tired of talking about it. This is Davis. [LR424]

SENATOR LATHROP: At this point in time, there is an assessment from Dr. Baker that is only one month old. And we talked about this at some length at the last hearing. In that report, Psychiatrist Baker concluded that Jenkins suffered from a mental illness; that he was an imminent danger; and that he should, quite possibly, be committed. And that report was supported by observations Dr. Baker had made of bizarre behavior by Mr. Jenkins. Were you aware of that report? [LR424]

JAMES DAVIS: This is Davis. Dr. Weilage had come into the meeting shortly after we had already started the meeting. So that's important to know that he did come in. [LR424]

SENATOR LATHROP: Okay, Weilage being a psychologist,... [LR424]

JAMES DAVIS: He is a psychologist. [LR424]

SENATOR LATHROP: ...deputy director of behavioral health. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: And what did he have to say? [LR424]

JAMES DAVIS: He was kind... [LR424]

SENATOR LATHROP: This is Davis. [LR424]

JAMES DAVIS: This is Davis. [LR424]

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SENATOR LATHROP: Okay. [LR424]

JAMES DAVIS: He was kind of quiet throughout the meeting. But we were not aware of Dr. Baker's assessment on Mr. Jenkins' mental health status at that particular time. I think she came out with the February 4 assessment that gave him an Axis I, and we were not aware of that. [LR424]

SENATOR LATHROP: Did anybody at that meeting ever share with you any information concerning Jenkins' behavioral health records? [LR424]

JAMES DAVIS: This is Davis. No. [LR424]

SENATOR LATHROP: Anybody ever share with you Dr. Baker's assessment or her report at that meeting? [LR424]

JAMES DAVIS: This is Davis. No. [LR424]

SENATOR LATHROP: So your choices, when they tell you we're not going to talk about his behavioral health, are either to get up and leave or to try to work out a transition plan without the benefit of the behavioral health information. [LR424]

JAMES DAVIS: This is Davis. That's correct. [LR424]

SENATOR LATHROP: Okay. What did you guys do? [LR424]

JERALL MORELAND: This is Moreland. We began putting together a plan and discussing the plan for Mr. Nikko Jenkins. At that time, I think it's important to understand that we were requesting first that Nikko be released from segregated status. That led up to that March 20 meeting. One of the requests we made is that Nikko go to

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LCC, Lincoln Correctional Center, under a different type of segregated status. So March 15, Nikko Jenkins was transferred to the Nebraska State Penitentiary prior to our March 20 meeting. But also, we were not aware of that transfer. We found out about that transfer on March 18, that Monday. [LR424]

SENATOR LATHROP: Gentlemen, just to be clear and for those people who haven't been watching these hearings all along, and to put some context into this, one of the concerns that you've expressed and the reason you wanted...one of the reasons you wanted a transition plan is the unease that you had, Senator Chambers had with somebody who spent 3.5 years in solitary confinement or administrative segregation, going from that circumstance into the community. There's some concern about what happens to a person who is involved in administrative segregation for 3.5 years and that's part of the motivation. [LR424]

JERALL MORELAND: This is Moreland. That is the motivation; that is correct. So based on that, we put together a four-step plan. The first step was for Nikko to move from TSCI to NSP Control Unit, which he did on March 15. The second was after 30 days Mr. Nikko Jenkins was to transfer and transition to the department's transition unit. And that's a step to allow the inmates to begin the process of interacting with others. The third was to have mental health treatment every 15 days. The fourth was after 30 days of being in transition, he was supposed to be reviewed for general population. The fifth was to have a social worker, Kathy Foster, continue to work with Nikko Jenkins as far as his transfer to the community. Unfortunately, those steps did not happen. Nikko Jenkins remained in a confined segregated status for 23 hours a day prior to walking out of the Nebraska State Penitentiary. [LR424]

SENATOR LATHROP: So the plan...in summary, the plan is to try to socialize, if I can use that term, socialize Jenkins who is coming out of 3.5 years of administrative confinement and to have him spend some time in what you call...or the department calls the transition program, and also to have him mix it up a little bit with some of the other

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inmates so that this guy that's been by himself for 3.5 years is involved with other human beings before he is discharged. [LR424]

JAMES DAVIS: That is correct. This is Davis. [LR424]

SENATOR LATHROP: And you expected some benefit to Jenkins from a transition plan that allowed him to mix it up or be in general population and participate in a transition program over at the penitentiary. [LR424]

JAMES DAVIS: This is Davis. That's correct. [LR424]

SENATOR LATHROP: And what ends up happening is he goes over to the penitentiary and he ends up remaining in some form of administrative confinement until he's discharged. [LR424]

JAMES DAVIS: Davis. Correct. [LR424]

SENATOR LATHROP: Did you go back and forth with anybody over at the department concerning the fact that the plan that you developed with the department was not being implemented in Jenkins' case? [LR424]

JAMES DAVIS: This is Davis. We had a two-part attack to it. Basically, Mr. Moreland had communicated with Deputy Director Wayne, while I visited with the administration at NSP, which would be the housing unit administrator, Mel Rouf, and then also the unit manager at the transition unit which would be Edison. [LR424]

SENATOR LATHROP: I know that I've seen e-mail exchanges. I'm not going to go through and read each one of them, but the two of you were expressing concern to Larry Wayne, among others, that the plan that had been arrived at and agreed to was not being implemented. [LR424]

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JERALL MORELAND: This is Moreland. Yes, essentially we were expressing to the department that the actions that they were taking was not in line with what we agreed to in our March 20 meeting. [LR424]

SENATOR LATHROP: And Jenkins is discharged to the community from segregation on July 30, 2013. [LR424]

JERALL MORELAND: This is Moreland. Correct. [LR424]

SENATOR LATHROP: At any time between February 25, 2013, and the time Jenkins was discharged, did anybody at the department share with you the report of Dr. Baker dated February 4, 2013? [LR424]

JAMES DAVIS: This is Davis. No. [LR424]

SENATOR LATHROP: And did anybody over at the department from February 25, 2013, until the time Nikko Jenkins was discharged ever share with you the report of Dr. Wetzel that was dated March 14, 2013? [LR424]

JAMES DAVIS: This is Davis. No. [LR424]

SENATOR LATHROP: Had you been provided...you've seen Dr. Baker's report dated February 4, 2013? [LR424]

JAMES DAVIS: This is Davis. Yes. [LR424]

SENATOR LATHROP: You are familiar with behavioral health issues and behavioral health records? [LR424]

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JAMES DAVIS: This is Davis. Yes. [LR424]

SENATOR LATHROP: And you are familiar with the diagnosis psychiatrists and psychologists make of patients. [LR424]

JAMES DAVIS: This is Davis. Correct. [LR424]

SENATOR LATHROP: And you...since you've seen the report and the report includes a diagnosis, which is Axis I or mental illness, it also includes Dr. Baker's judgment that he is an imminent danger to hurt someone and should likely be committed. Had you had that report before Jenkins' discharge from the state penitentiary, what would you have done? [LR424]

JERALL MORELAND: This is Moreland. Based on those reports that we did not see, I have no doubt that we would have insisted that Mr. Nikko Jenkins be civilly committed. [LR424]

SENATOR LATHROP: Were either of you ever advised before Jenkins' discharge that the Johnson County Attorney had been contacted concerning a civil commitment? [LR424]

JAMES DAVIS: This is Davis. No. [LR424]

SENATOR LATHROP: Did either of you know that Jenkins and his family had communicated with the Douglas County Attorney regarding an attempt to have Jenkins civilly committed before he was discharged July 30 of 2013? [LR424]

JERALL MORELAND: This is Moreland. No. [LR424]

SENATOR LATHROP: Earlier in your testimony you said that you had some

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involvement with Jenkins that predated February 25, 2013. Had either of you ever had a discussion with Larry Wayne concerning Nikko Jenkins before February 25, 2013?

[LR424]

JAMES DAVIS: I am quite sure I've had, because I've worked on this case in 2008 and Mr. Jenkins was on administrative confinement at that time. I had also communicated to Dr. Pearson, who is the psychologist at Tecumseh; also Dr. Lukin and also the warden. So usually when they stay on administrative confinement, I take the case to Deputy Director Larry Wayne and we discuss those issues. [LR424]

SENATOR LATHROP: All right. And tell me about the conversations you had with Deputy Director Wayne concerning Nikko Jenkins that predate the February 25, 2013, attempt to set up a meeting. [LR424]

JAMES DAVIS: Repeat the question. [LR424]

SENATOR LATHROP: Tell me about conversations you've had with Larry Wayne, Deputy Director Larry Wayne, that predate February 25, 2013. You said your involvement... [LR424]

JAMES DAVIS: Correct. [LR424]

SENATOR LATHROP: ...and your contacts with Deputy Director Wayne go back to 2006? [LR424]

JAMES DAVIS: Oh, further than that. [LR424]

SENATOR LATHROP: Okay. [LR424]

JAMES DAVIS: 2005. This is Davis. But my major concern is that we don't release

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individuals from administrative confinement directly into the community. Usually when these individuals stay on administrative confinement for long terms, they have some side effects, as Dr. Oliveto explained. They don't function properly if you just thrust them back into the community. So they need time to transition back into general population so they can assimilate or socialize with individuals and then move them back into the community. So those are the types of conversations I would have with the deputy director, Larry Wayne. And also asked him what type of transition or personalized plan they put together to help this individual return back into the community with some type of sanity. [LR424]

SENATOR LATHROP: All right. Mr. Davis, did you have a conversation with Deputy Wayne concerning Jenkins and having him released from administrative confinement and put in general population and his concern about his staff? Or did you express some concern about what's going to happen in the community when he returns there and he hasn't had any time... [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: ...in transition planning or in a transition program or spent any other...any time around other human beings? Have you had that conversation with Deputy Director Wayne? [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: When? [LR424]

JAMES DAVIS: This is Davis. I had Deputy Director Wayne come over to the Capitol to discuss Mr. Jenkins' transition back into the community. [LR424]

SENATOR LATHROP: When did that happen? [LR424]

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JAMES DAVIS: It was 2013. [LR424]

SENATOR LATHROP: Before or after the e-mail requesting a meeting? [LR424]

JAMES DAVIS: It was after the e-mail. This is Davis. [LR424]

SENATOR LATHROP: And so you have some conversation with Deputy Director Wayne and that takes place here in the Capitol? [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: Where did it happen? Whose office was that in? [LR424]

JAMES DAVIS: Davis. The cafeteria. [LR424]

SENATOR LATHROP: Okay. So in the cafeteria in 2013, you have a conversation with Larry Wayne where you express what kind of concern? [LR424]

JAMES DAVIS: This is Davis. Well, basically, I expressed concern that Mr. Jenkins was not getting his mental health treatment, nor were we moving towards a transition plan. And so my concerns were that he was going to be released to north Omaha without any mental health treatment and that he was going to carry through on his promise to murder citizens in the community. [LR424]

SENATOR LATHROP: And you told that to Deputy Director Wayne? [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: And what was his response, Mr. Davis or...go ahead, whoever

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was there? [LR424]

JERALL MORELAND: This is Moreland. In my view, the impression we received from Director Larry Wayne was that, what am I going to tell...his comments were, what am I going to tell the families of staff? What am I going to tell the families of inmates if we release Nikko in general population and he kills somebody? So my view...my opinion is that the...I'm not sure what the motivation is, but my opinion is that there was more emphasis on what Nikko would do within the facility than what he would do outside of the facility. [LR424]

SENATOR LATHROP: Let me make sure I understand that. So you're meeting with him in the cafeteria. Are the two of you present for this meeting? [LR424]

JAMES DAVIS: That's correct. And also, we had another colleague from the Ombudsman's Office which was Barb Brunkow. [LR424]

SENATOR LATHROP: Okay. And you're visiting with Deputy Director Wayne in the cafeteria in the Capitol and you express concern that if Jenkins goes straight from administrative confinement, where he has spent the last 3.5 years, to the population, which is in Senator Chambers' community... [LR424]

JAMES DAVIS: Correct. [LR424]

SENATOR LATHROP: ...that you were afraid he was going to get out and make good on his promise to murder. And the answer you got from Deputy Director Wayne was, well, what am I going to tell the families of the guards or the inmates if he hurts somebody when he's in general population? [LR424]

JAMES DAVIS: This is Davis. That's correct, because my question was, what are you going to tell Senator Chambers if he got out and murdered his constituents in District

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11? [LR424]

SENATOR LATHROP: And his answer was, what am I going to tell the family of the guards; like we're going to keep him in administrative confinement. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: Did you have a conversation with anybody at the department years previous after Jenkins started a riot in the yard? [LR424]

JERALL MORELAND: This is Moreland. That's correct, yes. [LR424]

SENATOR LATHROP: Tell us about the...Jenkins, what you understand to be Jenkins' involvement, where he was confined and what his involvement was in starting some kind of a...I'll call it a riot or a unrest at a Corrections facility. [LR424]

JERALL MORELAND: During this...this is Moreland. During this time, the department was having difficulties with the population at NCYF. There were several incidents that occurred. Eventually, there was a riot that occurred at NCYF. So a decision was made to move many of those individuals to LCC, Lincoln Correctional Center. [LR424]

SENATOR LATHROP: You're using...tell us what NCYF is and LCC so the people that don't know what those mean. [LR424]

JERALL MORELAND: NCYF is Nebraska Correctional Youth Facility located in Omaha, Nebraska. That is for those youth who have been adjudicated with a felony. LCC is Lincoln Correctional Center which is a medium/max facility located here in Lincoln, Nebraska. And so a decision was made that those individuals, part of that riot, would be transferred to Lincoln Correctional Center here in Lincoln. So eventually we had a conversation with Deputy Director Wayne and the comments... [LR424]

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SENATOR LATHROP: When and where was that conversation, Mr. Moreland? [LR424]

JERALL MORELAND: That conversation was in Director Larry Wayne's office. The time frame would have been shortly after the riot occurred at NCYF. [LR424]

SENATOR LATHROP: And what year would that be? [LR424]

JERALL MORELAND: That would have been 2005, 2006, I believe, one of those. [LR424]

SENATOR LATHROP: Okay. And tell us about the conversation. [LR424]

JERALL MORELAND: So the conversation went as follows. We're having difficulties with the population there; the young kids tend not to listen. We're having problems with them following direction. And so the comment was made that we will put them in a segregated status and keep them in that segregated status until we have to release them from Corrections. [LR424]

JAMES DAVIS: This is Davis. Jerall is being modest though. But Director Wayne said we would bury them on administrative confinement because they've caused so much problems up at NCYF. [LR424]

SENATOR LATHROP: So Deputy Director Wayne told you he was going to bury Jenkins for his involvement in the riot? [LR424]

JAMES DAVIS: He didn't specifically point out Jenkins. He said those individuals who were involved in the riot. [LR424]

SENATOR LATHROP: And that would have included Jenkins. [LR424]

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JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: That's all the questions I have. Gentlemen, you're going to remain here while you answer questions from some of the other panelists and we'll start, as we usually do, to my left with Senator Krist. [LR424]

SENATOR KRIST: Thank you both for coming. I have an observation before I ask my question. It's incredible to me that your memories are so vivid of the Nikko Jenkins dealings in the past few years. And I can only surmise that that's because you were involved with Mr. Jenkins, interested in what was happening to Mr. Jenkins, and that you're telling the truth about what's happened. So I thank you for being here and adding that bright light to this investigation. When Senator Lathrop asked you about your...I think it's an e-mail that was dated in February of 2013, you were trying to get a meeting set up. And he used the words "behavioral health concerns." Is that the wording that you used in that e-mail message? [LR424]

JAMES DAVIS: This is Davis. I'd probably have to review it, but I...to my recollection, it was mental health status. [LR424]

SENATOR KRIST: Mental health status. [LR424]

JAMES DAVIS: Right. Correct. [LR424]

SENATOR KRIST: So you being in administrative confinement and being around the system long enough and having the experiences that you have had, at some point, and I'll ask you both to give me your own opinions on that, at some point you determined that there was more than behavioral problems with Mr. Jenkins; there were mental problems that needed to be addressed. At what point, Mr. Davis, were you aware or did you think that those issues were present? [LR424]

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JAMES DAVIS: This is Davis. Back in 2008. [LR424]

SENATOR KRIST: 2008. [LR424]

JAMES DAVIS: So it wasn't just 2013. I had approached the MIRT team, which is the Mental Illness Review Team. I had talked to Dr. Lukin, Dr. Pearson, so those would be psychologists, to try to get Mr. Jenkins over to the mental health unit at Lincoln Correctional facility. [LR424]

SENATOR KRIST: Okay. And it's important, I think, that that 2013 memo and e-mail...and I think we can probably resurrect that, establishes that concern and that we've also established on the record here today that you had that concern and presented that concern for mental health issues. Mr. Moreland, would you like to comment? [LR424]

JERALL MORELAND: Sure. Senator, it goes back to 2008. In fact, in 2012, we asked a question: Was the department considering civilly committing Nikko Jenkins? And so we felt, through our experience with working with that type of population and segregation, that where his situation as far as being in segregation for a long period of time was not unique to just Nikko, it was unique to how Nikko Jenkins was acting. And so, in my opinion, in my view, he was acting differently than those that we have seen in segregation. And so that's why we felt there was more than just mental health. And we felt that there were some very bizarre behavior from this gentleman. [LR424]

SENATOR KRIST: And what year was that for you, Mr. Moreland? [LR424]

JERALL MORELAND: That would have started in 2008. We also worked with Nikko Jenkins in 2010. In fact, Nikko Jenkins, at one time, he stopped talking to our office. And so you never knew what you're going to get from Nikko Jenkins. He came back to our

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office later. And so examining all the information we have out of those...from those five years led us to the conclusion that there was something seriously going on with Nikko Jenkins. [LR424]

SENATOR KRIST: Is there any doubt in either of your minds that you presented your concerns adequately, being part of our legislative structure, that you presented your concerns on behalf of the Legislature to the Department of Corrections, which exists in the Executive Branch? [LR424]

JAMES DAVIS: This is Davis. That's correct. I've communicated with Director Bob Houston. I communicated with Medical Director Randy Kohl. We communicated with Dr. Weilage. We have communicated with Dr. White, Dr. Pearson, Dr. Geiger. [LR424]

SENATOR KRIST: So for the record, let's make sure we understand, as early as 2008, this legislative branch, through your efforts, made it very clear that the Department of Corrections had a problem and that problem...hate to say the person was the problem, but by name it was the treatment and the care and the confinement structure of Nikko Jenkins. [LR424]

JAMES DAVIS: This is Davis. That's correct. Every answer or response that we got from the doctors was that Mr. Jenkins does not have a mental illness but a behavior problem. [LR424]

SENATOR KRIST: And was that consistent with the physicians, the psychologists, and the administrative...and the directors level? Is that consistent communication? [LR424]

JERALL MORELAND: This is Moreland. It is consistent. However, we did see a shift. Prior to 2009, prior to Nikko attending a funeral, there was some treatment for Nikko for mental health issues. Nikko was being treated with some psychotropic medications. Now, we can't say that he was being treated with those psychotropic medications for

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any particular diagnosis, but we did see that in our records. After the funeral, we noticed that there was a shift. No, it's more behavior, it's Axis II, and that was the consistent theme from all within Corrections. [LR424]

SENATOR KRIST: Okay. Thank you, Mr. Chair. [LR424]

SENATOR LATHROP: Les. Senator Seiler, you're recognized. [LR424]

SENATOR SEILER: I would like to direct my question to Jerall Moreland. [LR424]

JERALL MORELAND: Yes. [LR424]

SENATOR SEILER: There's a time frame that I'm kind of lost on. When Nikko was at Douglas County, what year was that, do you remember? [LR424]

JERALL MORELAND: Nikko Jenkins spent several time frames in Douglas County. If you're referring to the time he spent after the funeral, after the attempted escape, that attempted escape occurred December of 2009. [LR424]

SENATOR SEILER: Okay. [LR424]

JERALL MORELAND: Approximately February, January, late January, February 2010 is when Nikko went to Douglas County for approximately 18 months. [LR424]

SENATOR SEILER: And during that period of time was what you referred to as receiving some medications and some treatment? [LR424]

JERALL MORELAND: This is Moreland. Yes, that is a time where Nikko was successfully within general population. He was being treated for...with some psychotropic medications, but many times he refused to take it. So it was one of those

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things where they did two approaches. In fact, we spoke with Denise and Denise testified here before. The plan was to use medication, as well as one-on-one therapy. [LR424]

SENATOR SEILER: Right. Then let's go to the point, was the NYCF incident a triggering point to bring Nikko back to either here or Tecumseh, Lincoln or Tecumseh? [LR424]

JERALL MORELAND: My impression with the records that I've examined and conversations I've had, yes. [LR424]

SENATOR SEILER: And at that point he went straight into administrative confinement. [LR424]

JERALL MORELAND: If I recall, when Nikko was transferred to LCC, Lincoln Correctional Center here in Lincoln, it was based on that initial riot. He did get out at some time and then he went back in; so he had some movement. [LR424]

SENATOR SEILER: How then did he get from Lincoln, at that time point you're talking about now, to Tecumseh? Was there something that triggered that move? If so, what? [LR424]

JERALL MORELAND: This is Moreland. Records are going to indicate that there was some space issues at Lincoln Correctional Center. In other words, many times when an incident happened, they have to make room for other people because of the last incident that occurred. [LR424]

SENATOR SEILER: Right. [LR424]

JERALL MORELAND: So records are going to indicate that Nikko Jenkins was

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transferred there for that...to make room. [LR424]

SENATOR SEILER: So it wasn't something he did. It was just a fact that they were beginning to fill up and they needed space. [LR424]

JERALL MORELAND: That's what records indicate. [LR424]

SENATOR SEILER: Okay. [LR424]

JERALL MORELAND: But during that time, Nikko had many incidents at LCC as well. [LR424]

SENATOR SEILER: Okay. Was he ever out of administrative confinement from the time he got back to Lincoln over to Tecumseh and back to Lincoln? [LR424]

JERALL MORELAND: This is Moreland. I would say yes. Approximately 60 percent of his incarceration was in segregated status. But he did spend some time at both facilities in general population. [LR424]

SENATOR SEILER: Okay. Thank you. [LR424]

JERALL MORELAND: Sure. [LR424]

SENATOR LATHROP: Senator Bolz, do you have any questions? [LR424]

SENATOR BOLZ: Just one. Good morning. [LR424]

JERALL MORELAND: Good morning. [LR424]

JAMES DAVIS: Good morning. [LR424]

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SENATOR BOLZ: Can you describe or explain to me what you think the programming that would have been appropriate for Nikko Jenkins should have been? [LR424]

JERALL MORELAND: This is Moreland. Nikko Jenkins is in front now. But the issue that we're facing with and working with the department on is how appropriate is it to send an inmate in a segregated status, how do we do that? How long do we keep that inmate in segregated status? And if we are going to keep that person in for long durations, what kind of plan do we have to transition him out of that status? So that's what we were looking at. And Nikko met...fell into that. So when we talk about appropriate programming, it really...we had to get to a point where they would offer programming because when an inmate went to segregated status, programming did not follow. And so we were working on the issue of what kind of programs can we put in, in place for those individuals that the department felt needed some kind of behavioral shift. Second is, then we looked at many, if not the majority, of the inmates that are placed in AC, they at least need some kind of anger management, the highest type of programs that the department have--violence reduction program. So it would...I would suggest that it would be important that anyone that is placed in some kind of segregated status needs the extent of all the programming that the department has to offer. [LR424]

SENATOR BOLZ: And in your understanding of these programs, these are evidence-based programs. These are programs that have been proven in facilities that are approved to make a difference in the behavior of individuals. Is that correct? [LR424]

JERALL MORELAND: This is Moreland. I have a problem, I guess, sometime with defining "evidence based," but essentially yes. Some of the things we see, however, in institutions is you may bring on an evidence-based program, but are you working that program the way it was initially based? So in other words, it grows there or conforms to the institution that it's in. [LR424]

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JAMES DAVIS: This is Davis. Also, we haven't seen the data on how successful these programs are or the recidivism rate. Mental health provide these programs, but we don't know how successful they are. [LR424]

SENATOR BOLZ: So...and I don't want to put words in your mouth, but what I'm hearing is that there are two levels of concern. One is the access to programming, period. And the next level of concern is the adequacy of those programs and the outcomes that may or may not be occurring because of those programs. Is that fair? [LR424]

JERALL MORELAND: This is Moreland. I believe that's a fair statement, yes. [LR424]

SENATOR BOLZ: Okay. Thank you. That's helpful. [LR424]

SENATOR LATHROP: Senator Schumacher. [LR424]

SENATOR SCHUMACHER: Thank you, Senator Lathrop. A follow-up on Senator Seiler's questions, I'm a little mixed up on the time line here. He goes up to Douglas County for a funeral, attempts an escape, there are charges filed. He's kept, basically, at Douglas County where he gets...he's kind of in the general population. He gets along, comparatively, much better than he does in the Lincoln facilities. Then at some point, he is sent back to the Lincoln facilities. [LR424]

JAMES DAVIS: That's correct. Davis. [LR424]

SENATOR SCHUMACHER: Okay. Thank you, Mr. Davis. And that occurs at about what time, what year? [LR424]

JAMES DAVIS: It was approximately 2010. [LR424]

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JERALL MORELAND: It's...well, 2010 is when...this is Moreland, 2010...early 2010 is when Nikko Jenkins is transferred back to Douglas County. He stays there for approximately 18 months. So 2012, I believe, or late 2011, is when he returns back to Tecumseh. So what we're dealing with is he was able to maintain himself in general population while at Douglas County, but when he comes back to the department, he goes right back into the same segregated status, which I believe was 2012, maybe February or so, in that area. [LR424]

JAMES DAVIS: Approximately...Davis, approximately. [LR424]

SENATOR SCHUMACHER: Okay. And once back from Douglas County to either Tecumseh or Lincoln, is he ever out of administrative segregation? [LR424]

JAMES DAVIS: This is Davis. Not that I recall. [LR424]

SENATOR SCHUMACHER: Okay. So, basically, from the time he gets back from the Omaha incident, he's locked up by himself. [LR424]

JAMES DAVIS: This is Davis. This is correct. [LR424]

SENATOR SCHUMACHER: And in Omaha he was in general population and, more or less, responding within some norm. [LR424]

JAMES DAVIS: This is Davis. Yes. He was working with Dr. Oliveto and Denise Gaines and they, basically, were taking a two-prong approach to his treatment. One was treating psychiatry and the other was mental health, so they maintained him in general population. [LR424]

SENATOR SCHUMACHER: And then back in the non-Omaha facilities, he's locked up in solitary and degenerates to the point where Mr. Wayne indicates that they can't even

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trust him in general population at all immediately prior to release because he's so dangerous. [LR424]

JAMES DAVIS: That's correct. This is Davis. That's correct. The reports will reflect that on Addendum A. Addendum A is a history of the incidents of...which inmates or offenders have had issues with the rules. And so it's a history that follows them. So if you look at his Addendum A it shows a history of assaults and threats to staff members at the Department of Corrections. [LR424]

SENATOR SCHUMACHER: Now you mentioned that...at one point, I believe it was Wayne said, we will bury them in solitary, or something to that effect. [LR424]

JAMES DAVIS: This is Davis. That's correct. That's after the 2005 incident up at the Nebraska Center for Youth in Omaha. [LR424]

SENATOR SCHUMACHER: Okay. [LR424]

JAMES DAVIS: There was a riot that occurred up there and then they transferred those guys to LCC, which is the Lincoln Correctional Center in Lincoln. [LR424]

SENATOR SCHUMACHER: And Mr. Jenkins was one of those people that was supposed to be entombed. [LR424]

JAMES DAVIS: I believe so. That's correct. [LR424]

SENATOR SCHUMACHER: Are there any people now there that are entombed as a result of that incident, do you know? [LR424]

JERALL MORELAND: This is Moreland. I am not sure, no. [LR424]

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SENATOR SCHUMACHER: Okay. So what I struggle with is that the facts seem so clear that something should have been done in the Jenkins' case prior to his release that there has to be a powerful motivator to act so irresponsibly. And is it...I mean, does it go back to this riot in 2005? Is that the seed of this cancer? [LR424]

JERALL MORELAND: This is Moreland. After all the documentation that I have examined, after the conversations that I've had, in my view, I agree. It seems that there's a motivation out there. I tend to tie it back to the funeral, as well as NCYF. I think those are two critical points with what we're seeing in this case. [LR424]

SENATOR SCHUMACHER: If Wayne was so worried about somebody being killed in the penitentiary, did you have any discussions with him of, well, what's going to happen when we turn this guy loose on the streets? [LR424]

JAMES DAVIS: This is Davis. Once again, that's correct. We had several meetings, but the last meeting I recall was the one at the State Capitol in the cafeteria. [LR424]

SENATOR SCHUMACHER: Did...was there any discussion then or amongst yourself about possibly going over their heads and going straight to a county attorney as to get this before a mental health board? [LR424]

JAMES DAVIS: This is Davis. Basically, we talked to the highest person in the Department of Corrections, which is Bob Houston, and we let our feelings be known about Mr. Jenkins and his mental health status and how he's going to be released from administrative confinement. It is my opinion that Mr. Houston didn't want to deal with this, so he deferred it to Larry Wayne. [LR424]

SENATOR SCHUMACHER: Are you lacking in your office then a mechanism, a fire bell thing you can pull and say, wait a minute, whatever this is going on, this cannot happen; we cannot turn this guy loose on the street? Do you have any avenues of emergency

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access to a county attorney...a county attorney's office? [LR424]

JAMES DAVIS: This is Davis. Yes, we do. Had we received that report from Dr. Weilage, that would have occurred. [LR424]

SENATOR SCHUMACHER: And, basically, from what I understand in your testimony, the reason that was given to you why you weren't discussing Jenkins' mental health status is they were just tired of talking about it. [LR424]

JAMES DAVIS: This is Davis. That's correct. [LR424]

SENATOR SCHUMACHER: And that came after a meeting...a submeeting before the meeting you were supposed to have in which the director was personally present with the attorney who then delivered that message to you. [LR424]

JAMES DAVIS: The director was present, but he left. So when the meeting started, that's when Sharon Lindgren had told us that they're not there to discuss Mr. Jenkins' mental health. [LR424]

SENATOR SCHUMACHER: And was there ample opportunity from what you could observe for a discussion or a strategy discussion, prior to your meeting, between Ms. Lindgren and the director? [LR424]

JERALL MORELAND: This is Moreland. All what we know is when we arrived for the meeting, Director Houston and Sharon Lindgren were both in the conference room. So we don't know how long or...so we're not sure about what they discussed. [LR424]

SENATOR SCHUMACHER: But the very first thing Lindgren says is, look, we're not talking about mental health because we're sick of it. [LR424]

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JERALL MORELAND: This is Moreland. That is correct. But if I can share,... [LR424]

SENATOR SCHUMACHER: Okay. [LR424]

JERALL MORELAND: ...with the case of Nikko, one of the issues we ran into is we had different opinions from the experts, professionals in there. So where the department opinion that he was not mentally ill, it was more personality kind of stuff, we had Dr. Oliveto, Douglas County, who differed in that. And so as we were going through the process, early on it was, is Nikko Jenkins deteriorating based on his extended amount of time in segregation? And taking that off the plate, if he's not deteriorating, how long is enough time to be in a segregated status? And so our goal was to work with let's transition him out. As we moved closer to Nikko's release time, and I must tell you that Nikko spent the majority, from 2012 on, I believe Nikko was on good time. Nikko was not taking his...serving his regular time. So from 2012 for a period of time, the department could have given Nikko back all of his good time. So there was a sense of urgency that we need to start putting together some kind of transition plan so we wouldn't get to the point where a facility would make a request or recommendation to the director that we give Nikko all of his good time back, which meant that that July 2013 really isn't a set time for Nikko. It could have occurred anywhere between 2012 to when he was released. [LR424]

SENATOR SCHUMACHER: Was there any difference from what...I take it there's a fair number of complaints that come from people in administrative detention or solitary confinement, whatever the buzzword is for it today, and they contact your office seeking some type of review. Was Jenkins' case different in attitude than these others? Is this something directed toward Jenkins or is it a systemic approach to inmate control by the Department of Corrections? [LR424]

JAMES DAVIS: This is Davis. I have worked a lot of administrative confinement cases over the years and some have been successful. We've been able to move some

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offenders to transition and then they're released into general population. I had one difficult case where an offender was moved from administrative confinement...I mean, moved to transition and then released to the community because, basically, he could not cope in general population. I'd worked with Director Houston directly on that. So this is a bizarre case because when we work with individuals who have been on long-term administrative confinement, we tend to get them moved to transition, that's what transition was made for, and to help them assimilate back into general population. In this case, Mr. Jenkins was moved to transition, but he was not able to participate in transition. [LR424]

JERALL MORELAND: This is Moreland. And I guess one of the unique things with Nikko outside of the similar issues that all inmates face when in segregation is that he was requesting to be civilly committed. He was requesting to go to Lincoln Regional Center. He was not requesting what others usually request which is, just get me out of segregation so I can go to general population. So many aspects of his case were treated differently because they were different issues coming to our office. [LR424]

SENATOR SCHUMACHER: I don't have any further questions at this time. Thank you. [LR424]

SENATOR LATHROP: Senator Chambers usually...our cleanup hitter. Senator Chambers, you're recognized. [LR424]

SENATOR CHAMBERS: And for the record so that there will be complete disclosure, Mr. Davis and Mr. Moreland, I had had numerous conversations with both of you individually and together about Nikko Jenkins' case over a period of years. Is that true? [LR424]

JAMES DAVIS: Davis. That's correct. [LR424]

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SENATOR CHAMBERS: And Mr. Moreland? [LR424]

JERALL MORELAND: This is Moreland. That's correct. [LR424]

SENATOR CHAMBERS: And there was a period of time when, because of term limits, I was not in the Legislature. Do you recall me making a contact with the Ombudsman's Office during that period when I was not back in the Legislature? [LR424]

JAMES DAVIS: Davis. That's correct. You had communicated with me and also you had communicated with Director Houston about Mr. Jenkins' welfare. [LR424]

SENATOR CHAMBERS: And when I communicated with you, did you contact Mr. Houston about that communication you and I had at any point? [LR424]

JAMES DAVIS: Davis. That's correct. [LR424]

SENATOR CHAMBERS: And did Mr. Houston acknowledge that he had had conversations with me about Nikko Jenkins? [LR424]

JAMES DAVIS: Davis. That's correct, because I reminded him also that I talked to you about Mr. Jenkins and he was aware of it. And also he acknowledged, basically, talking to you about Mr. Jenkins. [LR424]

SENATOR CHAMBERS: And based on the types of conversations we had, and this is before I got back into the Legislature, was there concern on the part...not just of me but friends and family members of Nikko Jenkins about what was happening to him while he was locked up, such as the self-mutilation and other--the term that people have used is bizarre--bizarre happenings with reference to him that caused concern to friends and family members of Nikko Jenkins? [LR424]

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JAMES DAVIS: Davis. That's correct. Not only friends and families, but also Ms. Gaines up at CCS. [LR424]

JERALL MORELAND: This is Moreland. Also from other inmates who recognized and would tell us about these incidents. [LR424]

SENATOR CHAMBERS: Now both of you have worked in the Ombudsman's Office for at a minimum of at least five years, correct? [LR424]

JAMES DAVIS: Davis. That's correct. [LR424]

JERALL MORELAND: Moreland. Correct. [LR424]

SENATOR CHAMBERS: During all of that time, can you remember a case of any inmate where this kind of concern was expressed across the spectrum, so to speak, about what was happening to him, the kind of treatment that he was receiving, and the concern about the fact that bad things seemed to be happening and nothing was done by the institution to properly address that situation? Now I'll ask the question: Does either one of you or do both of you know of any other case during your experience that was the same or similar to this one? [LR424]

JAMES DAVIS: Davis. No. [LR424]

JERALL MORELAND: Moreland. We are aware of secondary...the depart...it's the belief that many times the actions of the inmates are for secondary gain. So that is similar. What wasn't similar is, I've never heard of a secondary gain of wanting to go to Lincoln Regional Center. [LR424]

SENATOR CHAMBERS: And were you, either of you, aware of Nikko Jenkins around the month of March, before the July date when he was to be released, of him making it

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clear that he did not want to be released to the community, but he wanted to be committed to the regional center? [LR424]

JAMES DAVIS: Davis. That's correct. [LR424]

JERALL MORELAND: Moreland. That was a consistent theme from Nikko Jenkins. [LR424]

SENATOR CHAMBERS: And when we had conversations, did I make it crystal-clear--and I'm using that term, you don't have to agree with it--that I was greatly concerned about what would happen, and I used the term, when he's returned to my community? [LR424]

JAMES DAVIS: Davis. That is correct. [LR424]

SENATOR CHAMBERS: And did I make it clear that...or did I indicate that if nothing was done to deal with his situation, my opinion would be, because he's a black man, he would come to a black community and if he did anything it would be done to black people? [LR424]

JAMES DAVIS: Davis. That's correct. [LR424]

SENATOR CHAMBERS: We had, as members of this committee, access to e-mails and various documents that were given to us by way of response to subpoenas. And I had counted at least 38 occasions when Nikko Jenkins, either by way of a grievance or a report written by somebody who is commenting about his situation, so these are documented instances, 38 where he requested mental health treatment, and it was denied in every instance. There were at least six instances, documented, where he specifically requested, and the terms used in these reports, psychiatric hospitalization. There were at least three instances, documented, where he requested civil

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commitment. Are you aware of any inmate making that consistent type of request for mental health treatment during the time either of you has been working in the Ombudsman's Office? [LR424]

JAMES DAVIS: This is Davis. No. [LR424]

JERALL MORELAND: This is Moreland. No. [LR424]

SENATOR CHAMBERS: And for the record, even though it was established, did you both say that you did not know of Dr. Baker's diagnosis of mental illness at the time this meeting occurred where Lindgren said, we're not going to talk about Nikko Jenkins' behavioral or mental health issues? [LR424]

JAMES DAVIS: This is Davis. Had we known, we would insist on a civil commitment, but that's correct. [LR424]

SENATOR CHAMBERS: Now, that would mean that...well, let me not put it in that...it would be a leading question. I'm going to ask it this way. Were you aware of attempts being made by Nikko himself and his family to have civil commitment proceedings initiated while he was at Tecumseh? [LR424]

JERALL MORELAND: This is Moreland. No. We did eventually, some time in...he...Nikko contacted many people. Nikko...so we were aware of many places Nikko contacted for help. So we were aware that Nikko was reaching out to many different entities, many different places for some kind of help, yes. [LR424]

SENATOR CHAMBERS: Were you aware...well, I...let me not have to do it all with questions. I'll give the context. There had been a communication with the Johnson County Attorney's Office from Nikko Jenkins' mother requesting the commencement of civil commitment proceedings. The Johnson County Deputy Attorney, Richard Smith, I

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believe was his name, had contacted the officials at Tecumseh and mentioned not only this communication from Nikko himself and his mother, but he included a letter that Nikko had written and sent to the Johnson County Attorney. Dr. Weilage and Dr. White were aware of this back and forth with the deputy county attorney's office because each of them had had those discussions. Dr. Weilage had indicated to the county attorney that they were not...there was no need to initiate any such proceedings at that point and that he was going...he was being given monitoring and treatment. "Treatment" was the word that Dr. Weilage used. But based on documentation we had, and Dr. Weilage acknowledged this under oath, there was no counseling being given Nikko Jenkins. The only programming that was recommended by this committee at Tecumseh was violence reduction programming. But that was given only at NSP in Lincoln. So since he was in Tecumseh, he could not get into that violence reduction program. So he could not get into the only program that was recommended. He was not receiving the counseling. So the facts are...the fact is he was receiving no treatment. So when Dr. Weilage had told the county attorney that he was being given treatment, Dr. Weilage lied to the county attorney. Under questioning, Dr. Weilage acknowledged that he had not shared the report of the psychiatrist, Dr. Baker, making the diagnosis of mental illness. He had not shared that report. He, more or less, bottled it up. Under questioning with reference to specific conduct of Nikko Jenkins--the drinking of urine, the self-mutilation, writing with his blood on the wall, and the ingesting or the snuffing...sniffing, or any other way, of his own semen--Dr. Weilage was asked on each of those points, if that had been communicated to the Johnson County Attorney, do you think that would have been sufficient for him to initiated the proceedings for a civil commitment? And although it was like pulling a hound...a hen's teeth, he acknowledged it was. That if he had shared with the Johnson County Attorney's Office Dr. Baker's diagnosis of mental illness, would that have been sufficient? He acknowledged that it was. You stated, I believe, Mr. Davis, that...or maybe it was Mr. Moreland, but that the time that Nikko Jenkins was serving toward the end was good time. [LR424]

JERALL MORELAND: That's correct, Senator. [LR424]

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JAMES DAVIS: That's correct. [LR424]

SENATOR CHAMBERS: So rather than the good time law itself being why Nikko Jenkins was out, the real reason and the Governor with all of his fulminating...I can say this because I'm a member of the committee, the attacks he made on the Chairman of this committee I think were unwarranted; I think they were unprofessional; I think they were politically motivated. The asinine, almost criminal demand by the head of the Republican Party that our Chairman resign angered me. The name of the head of the Republican Party is Spray. And I think that name is appropriate because that is the action, that is the description of the action by a certain squat little beast with a white stripe down his back when he is in the defensive mode against a predator. He will spray. So the head of the Republican Party is properly named. And I'll tell you why I'm saying this. This committee has spent many hours sifting through information, conducting hearings that went into the night. And for the Governor and others to attack Senator Ashford--his role in all of what we're talking about is irrelevant--about being responsible somehow for what Nikko Jenkins did was more than disingenuous. It was immoral. The reason Nikko Jenkins was released was because the people whom the Governor appointed had people under their direct supervision who withheld information which would have resulted in Nikko Jenkins being civilly committed, and that would be his status right now. So if the Governor is going to somehow link Senator Ashford to what happened, I would make the Governor directly responsible because it was his administration that deliberately withheld information which if the Johnson County Attorney would have had at his disposal, the deputy, Nikko Jenkins would not have been released. He was not released because of the good time law. He was released on the public rather than civilly committed because the Governor's people withheld the information, and the media have not emphasized this enough. And I'm also resentful that they have not pointed out that I, not Senator Lathrop, not Senator Ashford, said I will stop any attempt to change the good time law because that is not the problem. I said repeatedly that the politicians are going to jump on good time to deflect attention

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from the fact that the Governor has insisted on cuts in the budget of the Department of Corrections. The fact that the Governor will not allow his people when they come before the budget committee of the Legislature, on which sat members asking, is more money needed for this or that, and that person could not tell the truth and say we need the money, because his boss, the Governor, had given directions. And for that hypocritical Governor to now say that somehow this committee or Senator Ashford or even the Legislature is responsible for what Nikko Jenkins did is reprehensible. He is dishonest and he is the liar because he knows the truth and he did not tell it. And the truth is that the Governor was so interested in cutting here and cutting there and cutting everywhere that there was no money for programming, no money for adequate staff, nothing in the way of a concerted long-range plan to deal not only with overcrowding but the proper management of the prison system, the proper provision of what inmates are entitled to by the state. That's the Governor's responsibility. I am the one who stopped the legislation on the good time law. And as for that hypocritical colleague of mine, that pompous Senator Lautenbaugh, and I'm not talking behind his back, I said this on the floor, jumped into the fray initiated by Spray and said, well, yes, they're wrong because I offered the Governor's bill. But Senator Lautenbaugh did not prioritize that bill. If, as he's trying to suggest now, along with the Governor and Lee Terry, that the issue of good time was so important and Senator Lautenbaugh was trying to deal with this very important issue and was so intent on doing something that he offered the Governor's bill, why did he not prioritize it? The Governor ridiculed the Legislature by saying they have time to discuss novelty lighters but not good time. Well, his water carrier, Senator Lautenbaugh, didn't have a feeling that the bill was important enough to be prioritized, the good time bill, but he thought a constitutional proposal to allow betting on dead horses was important and that's what a lot of time of the Legislature was taken up with discussing. And you know why I'm putting it on the record here? Because it's not going to be printed in the media like this. I don't know whether the editors have determined it, if the reporters don't have sense enough to see what has really happened. But I even offered one reporter copies of the articles where it pointed out my opposition to the good time law. When the Mayor and the police chief and whoever else they trotted down here

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to say change the good time law, they left there with a clear understanding that I was going to do all I could to stop it. And my colleagues know that...and everybody knows I won't throw a rock and hide my hand. I frankly let them know, this is a short session and how much of it do you want to spend on this nonsensical stuff of the Governor and Senator Lautenbaugh, because neither of them and none of them were concerned about good time until Nikko Jenkins' rampage. And because of the action by the Governor's administration and those people he employed and appointed, Nikko Jenkins was not civilly committed. So what then they have to do? They had to deflect attention from the culpability of the Governor's administration to the Legislature and individuals by saying, it's the good time law. Well, it was not the good time law. The good time law is administered by the Governor's people who run the Correctional Department. Nothing that the Legislature would have done about the good time law would have changed what Nikko Jenkins did. My final point, and by the way this a prerogative that I take advantage of because my job is not, with all due respect and no anger toward any of my colleagues, not to make my colleagues feel that I'm a team player because I won't take a lot of time. It's not to be friends with anybody. It's not to show fear or favor and certainly not to let the Governor off the hook because the media...let me say this, some of the people in the media have written what the Governor has said but they deprived me of my role in dealing with what the Governor tried to do to the Legislature. But where are the editorial writers? Why won't the World-Herald point out through the editorial page that Nikko Jenkins was not in a position to do what he did because of the good time law? He did not do what did because of anything Senator Ashford did or anything my Chairman said or did but because people in the Governor's administration withheld information from the Johnson County Attorney's Office which would have resulted in Nikko Jenkins being civilly committed. And what Dr. Weilage admitted under my gentle prodding and interrogation, that if that, first of all, people may not be aware of this. The Johnson County Attorney and no other attorney, county attorney can just say, well, somebody does bad things. Somebody is dangerous so we're going to seek civil commitment. There has to be a finding of mental illness, and you can also add the dangerousness. Bad people go to prison. Mentally ill people are committed. What the

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Johnson County Attorney's Office needed and was denied was a declaration from the Corrections people in Tecumseh that there is a basis to consider this man mentally ill. So we're going to give you that information and you determine whether or not it's sufficient to initiate the civil commitment proceedings before the mental health board. The county attorney was not going to commit anybody. The Tecumseh prison officials were not going to commit anybody. It would be up to the mental health board. But the board could not act unless presented a case by the county attorney, and the county attorney could not act without that information from the prison officials. And Mr. Kenney, whom the Governor appointed and the Legislature confirmed, Mr. Wayne, Mr. Kenney's deputy, who's in charge of all these different facilities, had a person on staff who's a psychologist named Mark Weegle (phonetic), Weedle (phonetic). I can never remember his name.

SENATOR LATHROP: Weilage. [LR424]

SENATOR CHAMBERS: ...who intentionally withheld information which would have led the Johnson County Attorney to initiate civil commitment proceedings. Nikko Jenkins is described by the one word that Dr. Oliveto used and they say it caused him to be fired: crazy. I use that term in talking to Mr. Davis, in talking to Mr. Moreland, and in talking to people in the community because that's the term that ordinary people use to describe a situation like that. There did not have to be four murders. Those people did not have to die. But they didn't die because of Brad Ashford or Senator Lathrop or the Legislature but because of the Governor's administration. There are people charged with crimes of aiding and abetting who wouldn't have to be charged with those crimes. There would not be a three-judge panel wondering what in the world they're going to do if this man who was allowed to plead no contest to four counts of first-degree murder without representation, evidence that he is mentally ill, indications that he was incompetent not only to go to that sentencing hearing, not only incompetent to represent himself, but probably incompetent to even stand trial. Those judges wouldn't have to worry about that. Judge Battalion would not have had to be the target of my broadsides about his

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craziness, his making a mockery of the judicial system. He is sitting up there as a judge and has a man before him with a record documented of bizarre behavior, self-mutilation, and is going to have to do something like this (sound effect) to make him shut up in the courtroom. What kind of a travesty is that? And that's at the doorstep of the Governor. The Governor of this state politicized a politicized situation. As soon as that black man, who had been prodded while he was in solitary, provoked, dehumanized, and then they stood aside and opened the cage door and said, go out there and kill your own kind of people. But he killed a white woman in a white community and that politicized the case. There was more coverage by the World-Herald and the television people in Omaha of the killing of that woman than any killing in Omaha, even when the person killed was a small child. And then the Governor politicized it by saying, he ought to get the death penalty. Then like Mr. Sir Echo, County Attorney Don Kleine said, I think I'm intending to seek the death penalty. And the only way a person would be eligible for the death penalty is to be found mentally competent. So the quackers led by Y. Scott Moore, the employee of the state, said, well, he's competent. He was like Svengali. And the one who followed behind, his tagalong, Klaus Hartmann went along and echoed what the echo echoed that the Governor wanted. So Nikko Jenkins is a tale told not by an idiot, but fashioned and contrived by the Governor and members of his administration. And I say these things publicly for the record and I welcome any attack of any kind from anybody because I can defend myself. Why would not the Governor say, Chambers is responsible for that good time bill not moving? Because Chambers will stand up to the Governor and the Governor doesn't want to deal with Chambers. And that's why when I wrote a 42-page document on him, he said he's not going to respond because there's no response he could make and he knew that would have been right in the part of my court where I wanted him. Now I have a question or two that I want to ask. But the Chairman of this committee has conducted the hearings in my opinion with respect toward everybody, competently, with dignity. If anybody stepped outside the lines, I'm the one. He has stood above the fray and behaved differently from the way I would. I wish those ignoramuses, idiots, and "Repelicans" would have come after me the way they came after my Chairman. And I have to say that I felt...look, a hard life makes a

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hard man. But as hard as I am, I felt what I might call a little twinge of pride when I read in the newspaper the response of my Chairman. And you know why I keep using that term? To show the respect that I have for him and the role, difficult as it is, that he is assuming and handling this very difficult situation. There might be times he feels like saying what I say. Maybe other members of the committee feel like it. But they show that restraint. They don't do it. But all of us will conduct our business in the way we think it should be conducted. And there are things I think need to be said. We're behaving. We're operating in a political setting. And when the Governor is going to play dirty pool and hardball and the head of the "Repelican" Party is going to jump in and spray, and Lee Terry, who when I see his picture on television, I'm wondering if maybe he is a little tipsy and he doesn't trust himself to say anything other than, my name is Lee Terry and I approve this message. I may seem to be going off the subject, maybe a train that's off the rails. But I'll tell you what. If you take the time when this is transcribed, you'll see that I'm very much on target and the reason: This is justified. We have four people moldering in the grave who should not be there. And then people like Lee Terry and Governor Heineman and the "Sprayer" converting those tragedies into a political issue to try to get somebody into the House of Representatives. Aren't they the ones who talk about family values? Aren't they the ones who talk about the public's safety, looking after the citizens? And then this one where they show Senator Ashford, they say, Senator Ashford says we're--something to the effect--imprisoning people beyond what we need to. All of us have said that. There are people going to prison who shouldn't be in prison, that this issue is not the most important one that we have, this good time, and that's true. Lautenbaugh didn't think so. And the bills that Senator Ashford did deal with that dealt with prisons, punishment, juveniles, the Governor signed them all. When they attacked my colleague, Senator Ashford, the Chairman of the Judiciary Committee on which I sit, my other Chairman, for wanting to put taxes on all these different entities, that wasn't what he was doing. He was supporting the Governor's tax bill where in order to cut taxes for these rich people, you got to take away some of these sales tax exemptions. That was the Governor's plan. Spray doesn't criticize that. The Governor doesn't have the manhood, the integrity, the self-respect to stand up and say, wait a

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minute, you're wrong on that. Senator Ashford was supporting my bill. That's what we're dealing with. But I keep coming back to the fact that four people died who didn't have to die. Nothing I say can change that. Nothing the Governor can say will change it. And those family members, those victims I don't believe are happy about what the Governor and Lee Terry and Spray are doing with their departed family members. And that's why I'm saying what I think needs to be said here. My final question to both of you, when...let me just ask Mr. Moreland this question, was there a point at which Director Houston expressed in no uncertain terms concern about a person going straight from solitary, as I call it, back into the community? [LR424]

JERALL MORELAND: Senator, I guess I'd have to respond this way. Over time, Corrections has changed in the area of segregation. And so one of the common themes we talked about is, does a person deteriorate while on segregated status? And at that time the department felt, no. And so we had to really address that question that, no, there are behavioral changes; there are impacts for those who we place in a segregated status. I think nationally, as that question was out there and as facilities and Corrections started discussing that, they started shifting to, there may be a problem and we do need to make changes. So I'm aware that Director Houston was a part of those changes. I'm aware that he was on a national committee to look at making changes on segregated status. So it's difficult for me to address what was in his mind. But I would say that we have had discussions that the movement Corrections was moving toward making some meaningful changes in segregation, who's on it. [LR424]

SENATOR CHAMBERS: Let me rephrase the question so that it might be more accurate in what I'm trying to get across. Did Mr. Houston come around to the position of recognizing that it was not wise, it wouldn't be wise to release Nikko Jenkins straight from solitary into the community, that they needed some kind of discharge plan that would be different from just letting him go from segregated confinement into the community? [LR424]

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JERALL MORELAND: Director Houston did reach that point. In fact, I believe we have response to that effect. Yes. [LR424]

SENATOR CHAMBERS: And if that really were his position, he could have observed or informed himself of Nikko Jenkins' circumstances and realized that the way he was being treated was not in conformity with what he had indicated about it not being wise to just let him out. In other words, if Nikko Jenkins was not in the type of transition program that the director indicated would be appropriate, the director could have corrected that, couldn't he? [LR424]

JERALL MORELAND: That is correct, Senator. In fact, when we brought it to the attention of Larry Wayne that they were not following the transition plan that we agreed to, Director Houston was copied on that e-mail. [LR424]

SENATOR CHAMBERS: And did Director Houston ever to your knowledge intervene to ensure that the agreements reached at that March meeting or whenever it was, as to this type of discharge plan? Maybe I'm making the question too involved with all of that. Are you aware of anything he did by way of intervention to see that this type of discharge plan, transition plan would be implemented? [LR424]

JERALL MORELAND: This is Moreland. I am not aware of any intervention that was shared with me. [LR424]

SENATOR CHAMBERS: Are you aware of any intervention by Mr. Wayne to see that this type of plan for Nikko Jenkins was carried out? [LR424]

JERALL MORELAND: The response from Mr. Wayne is that he felt the department was appropriately handling Nikko's transition plan. So we disagreed. [LR424]

SENATOR CHAMBERS: And there was no plan. What...okay, let me ask you this, was

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there a plan being followed that could be called a plan to transition him from tight, segregated confinement, gradually by steps to resocialize him and release him into the community with having...after having received some kind of treatment? [LR424]

JERALL MORELAND: There was a plan drafted in a short period of time. Ideally, that plan needs to be a year or two. So if we...to be an appropriate transition plan. Based on the time frame, we had to make do with what we had. [LR424]

SENATOR CHAMBERS: Now, Mr. Davis, you indicated from your body language that you wanted to add something to that, so feel free. [LR424]

JAMES DAVIS: This is Davis. My conversation with Director Houston is that he did not intervene in the transition plan for Mr. Jenkins to transition back into general population. He would always defer it to Larry Wayne and then he would e-mail me and say, well, we have a probation officer and a social worker that would assist him when he gets out. And in that case, he doesn't need a social worker or a probation officer because he is no longer under the jurisdiction of the Department of Corrections. And I expressed that. [LR424]

SENATOR CHAMBERS: But nothing in terms of how or what kind of treatment he would receive while he still was locked up and they had some control over him. [LR424]

JAMES DAVIS: No. From Mr. Houston, No. Davis. [LR424]

SENATOR CHAMBERS: Do you know if, and I'm asking for your opinion and maybe it's unfair, whether any of the higher-ups were aware of Dr. Baker's diagnosis of mental illness or do you think that report...? It's not really a fair question because you wouldn't have any way of knowing what they knew. Did anybody indicate to you that they were aware of it? Mr. Moreland, do you have any comment on that? [LR424]

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JERALL MORELAND: I would express it this way. Systemically, there is a way that information passes up through Corrections. And for those persons placed in the segregated status, not only is the facility...have a review process, but the director has a review process as well. And so when decisions are made to keep a person on segregated status or remove a person on segregated status, there are safeguards that the department has provided. One of those safeguards is to allow the inmate to appeal decisions that are being made at certain levels. And so it is difficult to see where those within Corrections wouldn't have the knowledge and the background of Nikko Jenkins considering the tremendous amount of time we've worked on this case and the different issues we've worked with since 2008. [LR424]

SENATOR CHAMBERS: Now if the director or Mr. Wayne or anybody at NSP, to get it away from Tecumseh, no longer could the Johnson County Attorney's Office do anything about a civil commitment. They at NSP, had they chosen to do so, could have contacted the Lancaster County Attorney since he now is in Lancaster County and present to them the behavior of Nikko Jenkins, any reports by their psychologist or their psychiatrist to the Lancaster County Attorney and you can't be shown them, but there are e-mails where people were expressing concern about what Nikko Jenkins would do when he got out. That information could have been presented to the Lancaster County Attorney to see whether or not there would be a determination as to whether a civil commitment could be sought in Lancaster County. That was possible, wasn't it? [LR424]

JAMES DAVIS: This is Davis. That's correct, but I want to add on to this, Senator. When Mr. Jenkins arrived at Nebraska Penitentiary, they had Dr. Cheryl Jack, who is a psychiatrist, review him. And then she made a diagnosis that it was behavior. [LR424]

SENATOR CHAMBERS: That leads me to...I said that was the last question. Who was she employed by if you know? [LR424]

JAMES DAVIS: By the Department of Correctional Services. [LR424]

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SENATOR CHAMBERS: The way it appears to me, every person, whether a psychologist or a psychiatrist, in the employ of the state said that Nikko Jenkins was not mentally ill. And yet all of them were aware of his self-mutilation, the other bizarre behaviors. But the nonstate-connected psychiatrists said that he was mentally ill. And a psychiatrist who was a contract employee for the state, Dr. Baker, made a diagnosis of mental illness. And the judge who found Nikko Jenkins to be mentally incompetent to appear at the sentencing panel was not hired by the state, was not a state employee. And I was at the hearing and the judge had indicated that if it was determined by the people in whose custody Nikko Jenkins is under the state would come back with a determination that he now was competent, he would look at what Dr. Gutnik would determine. And that opinion would be the one that he would accept which to me indicated he was rejecting as not credible, not objective, not medically or psychiatrically indicated the kind of opinions being expressed by those mental health practitioners paid by the state. And now I am going to say that I don't have anything else to ask. Thank you. [LR424]

SENATOR LATHROP: Senator Krist, I think, has a question. [LR424]

SENATOR KRIST: Thank you for your courtesy, Chair. It's been referred to many times, so I want to put it in the record. Mr. Davis, do you recognize the e-mail that the page just brought before you? [LR424]

JAMES DAVIS: This is Davis. That's correct. [LR424]

SENATOR KRIST: Could you read the addressees? And this e-mail was from you to several. Could you read the addressees on that? Do you need to borrow some glasses? [LR424]

JERALL MORELAND: This is Moreland. This is an e-mail from James Davis to Dr.

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Randy Kohl, head of medical, CC'ing Cindy Grandberry. [LR424]

SENATOR KRIST: And who is that? [LR424]

JERALL MORELAND: Cindy Grandberry works for Senator Chambers; Director Bob Houston, former Corrections director; myself; and Frank Hopkins, deputy director over adult institutions. [LR424]

SENATOR KRIST: Could you read that paragraph for us, please, into the record?
[LR424]

JERALL MORELAND: Okay. Dr. Kohl, I am requesting a meeting with you, Deputy Director Frank Hopkins, and Dr. White in regards to Mr. Nikko Jenkins' transition plan and mental health status. [LR424]

SENATOR KRIST: The last three words were... [LR424]

JERALL MORELAND: Mental health status. [LR424]

SENATOR KRIST: Thank you very much. Please proceed. [LR424]

JERALL MORELAND: Mr. Jenkins has a tentative release date of July 2013. However, it appears at this time being served is because of a lost...his time is being served because of a loss of good time. [LR424]

SENATOR KRIST: Could you repeat that sentence, please? [LR424]

JERALL MORELAND: It appears that his time being served is because of a loss of good time. [LR424]

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SENATOR KRIST: Okay. Please continue. [LR424]

JERALL MORELAND: It is our understanding that Mr. Jenkins could have mandatory jammes February of 2012. The concern with Mr. Jenkins' case is that he may pose a safety risk to the community of District 11 without providing him with the necessary tools to succeed in the community. I have discussed this matter with Senator Chambers and he would like to know what treatment plans have been made for Mr. Jenkins to return to the community instead of being released directly from administrative confinement to the community. I am requesting a meeting to take place at the State Capitol no later than March 7, 2013. Please bring all materials and documents to discuss Mr. Jenkins' case in detail. [LR424]

SENATOR KRIST: And what was the date on that e-mail? [LR424]

JERALL MORELAND: The date on this e-mail was February 25, 2013. [LR424]

SENATOR KRIST: Thank you very much, and I'd like to have that put into the record. [LR424]

JERALL MORELAND: Senator, if I can make a point here. One of the reasons we brought the issue of serving good time, again, is that there is a system in the department which allows them to give good time back. So we're faced with the situation that Mr. Nikko Jenkins could have been released at any time. [LR424]

SENATOR KRIST: And you make a good point. Thank you. [LR424]

SENATOR LATHROP: Senator Schumacher. [LR424]

SENATOR SCHUMACHER: Thank you, Senator Lathrop. Just a couple questions. I believe you testified that ideally this transition period would be a one- to two-year

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transition period where they worked in programs to design an inmate to get back into society. Is that correct? [LR424]

JAMES DAVIS: This is Davis. If we're talking about the VRP, that's a 12-month program. It works on anger. So that's a year. That's correct. [LR424]

SENATOR SCHUMACHER: Okay. [LR424]

JAMES DAVIS: But if you're talking about transition, that's so many months. I think it's... [LR424]

JERALL MORELAND: I think getting to your question, Senator, is the department has a transition design. And so that's why they have max, medium, minimum, community. So ideally, we'd like to see an inmate go through that...those transitions prior to being released. In Nikko's case, there was, my opinion, several steps that we were not able to send Nikko through. So at community right now...and there's differing opinions, but one to three years is about that opinion you would like to see somebody transition from community corrections back to the community. [LR424]

SENATOR SCHUMACHER: So if you were going to follow that format then, basically, when he was returned from Douglas County, he would have been put in that program rather than in solitary. [LR424]

JERALL MORELAND: This is Moreland. Yes, we would want to see some kind of transition in his return. [LR424]

SENATOR SCHUMACHER: From what you've seen in living with this case for as long as you have, is there any indication that there ever was a conscious decision to turn Mr. Jenkins loose without even attempting a commitment? Was that a conscious decision? [LR424]

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JERALL MORELAND: This is Moreland. We have several tracts here and differing opinions. I think that we are aware of many in Corrections that were afraid of Jenkins. They were aware of his bizarre behavior and they expressed that through their levels through staff. But then we had a group of professionals that felt it was more behavior. And so when we were working on a transition plan for Mr. Jenkins, we also worked with the facility that Mr. Jenkins was at. And I believe that the impression from the facility is Mr. Jenkins was not going to be let out of segregation. In fact, I think there was several documents that referred that we believe Mr. Jenkins is going to be released directly from segregation. [LR424]

JAMES DAVIS: This is Davis. Too, visiting with staff at NSP where he was at in transition but not participating in transition, had communication with the frontline staff that said that they don't think he's going to be integrated into the transition plan. [LR424]

SENATOR SCHUMACHER: That they were... [LR424]

JAMES DAVIS: In other words, their words were, we're not going to allow this devil to participate. [LR424]

SENATOR SCHUMACHER: We're just going to open the door and let him go. [LR424]

JAMES DAVIS: Correct. This is Davis. Correct. [LR424]

SENATOR SCHUMACHER: With that situation, knowing at least at some levels that there is a diagnosis of serious mental illness, this weird, weird, behavior, this fear on the part of the staff and psychiatrists, just to open the door and let him go, isn't that a wanton and reckless disregard for public safety? [LR424]

JAMES DAVIS: This is Davis. That's correct. [LR424]

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SENATOR SCHUMACHER: Thank you. [LR424]

SENATOR LATHROP: I have a couple of questions. In your work with Mr. Jenkins...by the way, when you say, he came into our office, just so that we're clear, he doesn't walk into your office. There's not an office at the penitentiary. This is, he shows back up on your radar through some means or another. [LR424]

JERALL MORELAND: This is Moreland. That's correct, yes. [LR424]

SENATOR LATHROP: Okay. And did either of you ever have conversations with Director Houston where you laid out your concerns and expressed your concerns over Jenkins' mental illness? [LR424]

JAMES DAVIS: This is Davis. That's correct. Basically, I would visit with Senator Chambers then I would go call Houston. Matter of fact, I called him on his cell phone to discuss Mr. Jenkins' mental health status and a plan to transition him back into the community. I usually talk on my speaker phone so other people in the office could hear the conversation. [LR424]

SENATOR LATHROP: All right. Tell us what you told Director Houston in...how many conversations do you think you had with Director Houston where you discussed Jenkins' mental issues and his transition? [LR424]

JAMES DAVIS: I probably had approximately two or three conversations. [LR424]

SENATOR LATHROP: Okay. And did you...oh, I'm sorry. Mr. Moreland. [LR424]

JERALL MORELAND: This is Moreland. I wanted to suggest that every case is not brought to the higher-level staff at Corrections. So with this case here, it was high

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priority. So it would seem to me that when we were discussing these issues here, those who needed to know about it did. [LR424]

SENATOR LATHROP: Okay. I appreciate from the conversations we've had, the testimony we've taken, and the e-mails that I read, you contact Director Houston and he sends you over to Larry Wayne so he extracts himself from... [LR424]

JAMES DAVIS: This is Davis. This is correct. [LR424]

SENATOR LATHROP: ...the task. Then you're dealing with Larry Wayne. But you also have some personal conversations with him where you express to Houston over the phone in phone conversations the concerns that you've expressed today. [LR424]

JAMES DAVIS: Yeah. That's correct. This is Davis. Usually when I contact central office, I visit with either Director Houston or Frank Hopkins or Larry Wayne. I deal with those individuals who can make a decision rather than go to the frontline staff. [LR424]

SENATOR LATHROP: Okay. And when...did you explain to...or in your conversations with Director Houston, did you tell him what you were concerned with regarding Jenkins' behavior and your desire to get to the bottom of what his mental status was? [LR424]

JAMES DAVIS: To get to the bottom of his mental status, I was more concerned with him being released back into the community without any mental health treatment. Those were my concerns... [LR424]

SENATOR LATHROP: And this is Davis. [LR424]

JAMES DAVIS: I'm sorry. This is Davis. [LR424]

SENATOR LATHROP: And, Mr. Davis, did you express that to Mr. Houston? [LR424]

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JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: In other words, you told the director, listen, this is about Jenkins and I'm concerned about him being released into the community and I have concerns about his mental status. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: Did you tell him about the bizarre behavior that Jenkins was demonstrating while incarcerated at Tecumseh? [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: Tell us what you told him. I don't want to put a conclusion in the record without giving you a chance to tell us what you told him. [LR424]

JAMES DAVIS: No, that's fine. Basically, we...this is Davis. I receive a lot of correspondence from Mr. Jenkins. And basically, his behavior, his writing, his letters, I would tell basically how he would triangulate and also basically what he was planning to do when he got out into the community was to murder citizens in north Omaha. [LR424]

SENATOR LATHROP: Mr. Davis, was Nikko Jenkins writing to you directly or to your office? [LR424]

JAMES DAVIS: This is Davis. He was writing to me and Jerall. [LR424]

SENATOR LATHROP: And was he also expressing to you what we know is in the record, that when he gets out of Corrections that he was going to go on a murderous rampage? [LR424]

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JAMES DAVIS: This is Davis. That's correct. [LR424]

SENATOR LATHROP: And did you share that with Director Houston? [LR424]

JAMES DAVIS: Not only did I share it with Director Houston, I shared it with Deputy Director Larry Wayne. [LR424]

SENATOR LATHROP: And you did that in personal visits or by telephone? [LR424]

JAMES DAVIS: With Director Houston, it was by phone. With Deputy Director Wayne, it was by phone and also in person. [LR424]

SENATOR LATHROP: And the meetings...or the phone conversations you had with Houston, was there one or were there more than one phone conversations you had with the director? [LR424]

JAMES DAVIS: It would have been more than one conversation because of... [LR424]

SENATOR LATHROP: And can you...pardon me, can you give me a time frame, Mr. Davis, when those conversations would take place with the director? [LR424]

JAMES DAVIS: When I sent off the February 25 e-mail of 2013. [LR424]

SENATOR LATHROP: Okay. That e-mail was sent to Director Houston? [LR424]

JAMES DAVIS: It was sent to... [LR424]

SENATOR LATHROP: Well, a number of people including Director Houston. [LR424]

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JAMES DAVIS: Right, he got CC'ed on it. [LR424]

SENATOR LATHROP: Okay, and did you follow it up or did you call Director Houston before that e-mail or after the e-mail? When in relationship to that February 25 e-mail when you're trying to get a meeting to talk about Mr. Jenkins did you call Director Houston? [LR424]

JAMES DAVIS: After the e-mail because we didn't have any action. I was concerned about the meeting taking place, which it didn't take place. I was concerned about getting the materials so we could review it. So it revved me up to call Director Houston on that. [LR424]

SENATOR LATHROP: And you called him on his own cell phone, Mr. Davis? [LR424]

JAMES DAVIS: That's correct. I used a state phone. [LR424]

SENATOR LATHROP: And at that point, did you advise Mr. Houston that Jenkins was threatening to get out of prison and go on a murderous rampage? [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: From the letters that you were getting from Mr. Jenkins, did you...was he writing to you as many of us have seen these letters where he's writing geometric... [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: ...all I can say is he wasn't writing on lines or like most of us would expect to read communications. They're designs, geometric designs in his letters. [LR424]

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JAMES DAVIS: This is Davis. It's like a diamond. So you...basically the first part is where he starts. And then you move to the second one, the second point, third and fourth. And then you just have to read in. So I got used to his writing because I read a lot of his letters and materials, especially on the envelope also. [LR424]

SENATOR LATHROP: In addition to advising you in his communications with you that he was going to murder people when he got out, did he also make a plea to you that he wanted to be committed to the Regional Center or otherwise get mental health treatment? [LR424]

JAMES DAVIS: That's correct. Davis. [LR424]

SENATOR LATHROP: Did he tell you that he wanted to be committed to the Regional Center in those communications with you? [LR424]

JAMES DAVIS: Davis. That's correct. [LR424]

SENATOR LATHROP: And did you share that with Mr. Houston when you talked to him on the telephone after February 25 e-mail where you got no response? [LR424]

JAMES DAVIS: Davis. I don't think I talked to him about committing him to the Regional Center, but basically, we had conversations about a civil commitment. [LR424]

SENATOR LATHROP: You did with Director Houston? [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: And what was the basis for your concern over whether he should be civilly committed? [LR424]

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JAMES DAVIS: Well, my concern was that he would get out and carry through on his threat and then go into north Omaha and murder constituents of Senator Chambers and then other constituents here. So that was my concern. I was frustrated because I couldn't get a response from him because I kept getting deferred to the deputy director. [LR424]

SENATOR LATHROP: And no meetings were being scheduled. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: You would appreciate at the time that to get a commitment you have to have not just someone that's dangerous, but someone who is mentally ill and likely to cause some injury to themselves or another person. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR LATHROP: Did you have anything...you obviously didn't have the Baker report which would have given you what you needed. But did you have anything that suggested to you or caused you concern that Nikko Jenkins had a mental illness when you were talking to Bob Houston about committing him instead of releasing him? [LR424]

JAMES DAVIS: That's correct. It spans from 2008 all the way up to 2013. Like I explained earlier, I personally visited with the doctors. We personally hashed it out in Warden Britten's office at the Institution Classification Committee where I was advocating for him to go to MIRT. Can you hear me? [LR424]

SENATOR LATHROP: MIRT being M-I-R-T, the mental... [LR424]

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JAMES DAVIS: That's correct, that's correct. And then basically they denied that because they said it was a behavior problem. Then I worked to...I took another path by trying to get him to transition. At one point in time I got him set up to go to transition unit at NSP. But the mental health staff along with security came back and said he was making some threatening language and acting bizarre so they took him off the transition list. So I was trying every way to get him off of AC into transition, but that didn't occur. And we're talking about 2008. [LR424]

SENATOR LATHROP: Okay. [LR424]

JAMES DAVIS: So it brings us up to 2012. So this has been really ongoing to try to get this man some help. [LR424]

SENATOR LATHROP: And you expressed in your phone conversation with Director Houston when you called him on his own cell phone that you were concerned that he was going to be getting out inside of six months or perhaps sooner if they just decided to release him, that he needed a transition plan, and you had some concern about whether he should be committed. [LR424]

JAMES DAVIS: That's correct. And during my conversation, he would listen but wouldn't respond and take into consideration. And then he said he would get back to me on that. [LR424]

SENATOR LATHROP: And that was going to be my next question: What was his response to...? [LR424]

JAMES DAVIS: He would get back to me. [LR424]

SENATOR LATHROP: Did he ever get back to you? [LR424]

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JAMES DAVIS: At one point he sent me an e-mail from his cell phone and it indicated that we have a social worker and a probation officer. And then shortly after that conversation, I e-mailed Senator Chambers' office and I sent him a...Cindy in his office an e-mail, basically the contents of our conversation. [LR424]

SENATOR LATHROP: Okay. I think that's all the follow-up questions I have. Senator Seiler. [LR424]

SENATOR SEILER: I just have an overall question. We've been talking a lot about Nikko here this morning. But I'd kind of like to know, do you have knowledge of how many people are in administrative confinement at the prison system right now? [LR424]

JAMES DAVIS: I was just recently down there last week and I asked that question to the warden. And I think he gave me a number of 213. Basically, you have to take in consideration you have some that are on PC which is protective custody. And also I think the number would probably be 183, somewhere in that neighborhood. [LR424]

SENATOR SEILER: Okay. Now are you aware of, of that 183, of anybody on extended administrative supervision, you know, like more than a year, two years? [LR424]

JAMES DAVIS: That's a hard question. [LR424]

SENATOR SEILER: I know it is. [LR424]

JAMES DAVIS: Basically, you would have to look at each case individually and determine if they had been continued because basically, when they come...when they are placed on administrative confinement, they start out with a 45 day. And then from 45 days they might continue it for four months and then another four months. And so Mr. Moreland talked about that process of reclassification. And that goes from the warden to the ASRB, which is the Administrative Segregation Review Board, to the Director's

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Review Committee where you have two or three deputy directors sit on that and review it. And then from there it would go to the director. [LR424]

SENATOR SEILER: Okay. [LR424]

JAMES DAVIS: So it would be difficult to say how many are on extended unless I'm working the case and I can tell you from that number. [LR424]

SENATOR SEILER: Right. And the purpose of asking that is if there are side effects from extended care, are we creating more "Nikkos" in the system by these extended cares? [LR424]

JAMES DAVIS: It's my opinion that we are because whenever you have these guys on long-term seg, solitary confinement, those walls start to close in on them. And then the worst thing is they start to think. They start hearing voices. They start acting out because void of human contact. And then some of them start smearing feces on themselves, on the walls, and blood. They start cutting themselves. And some cases I observed where you had people or an individual that ate his flesh. And I brought that to Dr. Pearson's attention and she... [LR424]

SENATOR SEILER: So we have some that are acting out like Nikko did. [LR424]

JAMES DAVIS: That's correct. [LR424]

SENATOR SEILER: Thank you. I have nothing further. [LR424]

SENATOR LATHROP: It does bring me to one more question though. Do we have enough mental health staff at Tecumseh or in the prison system? [LR424]

JAMES DAVIS: That's a good question, Senator. Well, we just had two, Dr. Gibson and

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Dr. Pearson, resign. We have three LMHPs at Tecumseh. We have Dr. Weilage filling in. So the question is, do we have enough? No. And also, early on, we had some fights between mental health staff, psychologists that would physically fight one another. So that was an issue, too, at one point in time down at Tecumseh. [LR424]

SENATOR LATHROP: I can see where that would be an issue. (Laughter) I think...well, Senator Chambers. [LR424]

SENATOR CHAMBERS: Just one. We're talking about this diagnosis of behavioral problem as opposed to mental illness. As long as he was deemed to be merely misbehaving, they could keep him in--they want to call it administrative confinement or whatever--I say solitary. They could have kept him there indefinitely if it's all behavioral. But if it was determined to be mental illness, then treatment would have to be provided and that would consist of more than just being kept in solitary in the way Nikko Jenkins was. [LR424]

JAMES DAVIS: That's correct, Senator. If I was able to get the MIRT team to diagnose him with a mental illness, then they would have transferred him probably over to the mental health unit at Lincoln Correctional Center and then where he could have been on the mental health unit receiving treatment. [LR424]

SENATOR CHAMBERS: And for the record, would you tell what those letters M-I-R-T stand for? [LR424]

JAMES DAVIS: Mental Illness Review Team. [LR424]

SENATOR CHAMBERS: Thank you. That's all that I have. [LR424]

SENATOR LATHROP: I don't see that we have any more questions. We thank both of you for coming down here today and for the work that you do in the Ombudsman's

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Office and for the work you do for the Legislature. You are free to leave. Thanks, guys.
[LR424]

JERALL MORELAND: Thank you, Senators. [LR424]

SENATOR LATHROP: It is now about 11:20. And this question is directed at my colleagues. Our next witness would be Larry Wayne. I expect him to take more than 40 minutes or 45 minutes. Do we want to take an early lunch break and come back at 12:30 and start with Mr. Wayne? Everybody all right with that? Okay. You okay with that, break now for lunch and then come back at 12:30? [LR424]

SENATOR CHAMBERS: Lunch? I ate yesterday. You mean I'll eat again today?
(Laugh) [LR424]

SENATOR LATHROP: You'll have a chance to eat. We are going to take a break until 12:30. We will resume our hearing at 12:30 promptly. And, Mr. Wayne, we'll expect to see you at that point in time. Thank you. [LR424]

BREAK

SENATOR LATHROP: Good afternoon, everyone. This is the LR424 Committee. We are resuming the hearing. The time on the clock here is 12:35. So we have a couple of senators that look like they're going to join us in a few moments. This afternoon we're going to hear from next Larry Wayne. Deputy Director Wayne, would you come forward? And before you have a seat, I'd like to swear you in. Sir, would you raise your right hand? Do you swear the testimony you're about to give this special investigative committee will be the truth, the whole truth, and nothing but the truth? [LR424]

LARRY WAYNE: Yes. [LR424]

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SENATOR LATHROP: Thank you, sir. Have a seat. And let's have you begin by reciting your name and spelling it for us, please. [LR424]

LARRY WAYNE: My name is Larry, L-a-r-r-y, Wayne, W-a-y-n-e. [LR424]

SENATOR LATHROP: And by whom are you employed, Mr. Wayne? [LR424]

LARRY WAYNE: I am employed by the Nebraska Department of Correctional Services. [LR424]

SENATOR LATHROP: Okay. And can you give us a little bit of your educational background and your work experience that brings you here today? [LR424]

LARRY WAYNE: Yes. I was...received a bachelor's degree from the University of California at Fullerton in 1974. I started with the department a few months after that in August 1975, as a counselor. And I worked progressively responsible positions at the penitentiary, Diagnostic and Evaluation Center, Nebraska Correctional Center for Women, and central office. I have been deputy director over the Division of Programs and Community Services for a little over 11 years. [LR424]

SENATOR LATHROP: Tell us what that position involves. In terms of the Department of Corrections, what are your job duties and your responsibilities? [LR424]

LARRY WAYNE: I have oversight for inmate classification, work release centers also known as community correction centers, the Work Ethic Camp, parole administration, inmate education programs, recreational and law libraries, and the agency's reentry initiative. [LR424]

SENATOR LATHROP: Agency reentry initiative. [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Is that something new? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: How new is that? [LR424]

LARRY WAYNE: Funding and resources were created by the Legislature in 2014.
[LR424]

SENATOR LATHROP: Okay. So that's something from the Ashford reform bills. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: Okay. Tell us what an inmate classification means. What's that?
Tell us what that's all about, inmate classification. [LR424]

LARRY WAYNE: Inmate classification is the process by which risk factors involving an
inmate's placement are considered along with their needs for programming. And a
decision is made with respect to where the inmate will live, where she or he will work,
and what custody or supervision level they will be assigned. [LR424]

SENATOR LATHROP: So in the Department of Corrections, the attempt is to take
people from the highest level of security down to the least restrictive level of security
consistent with their behavior. [LR424]

LARRY WAYNE: That's correct. [LR424]

SENATOR LATHROP: Okay. It's gets cheaper in other words to house people with less

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security needs. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And so in the Corrections system, and you're in charge of these different assignments for the entire Department of Corrections. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Men's, women's, all the institutions that we've talked about in our time here. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: Okay. In your...what's your role in inmate classification? [LR424]

LARRY WAYNE: I review decisions that are made by wardens and come up through the Administrative Segregation Review Board or through the Director's Review Committee and make decisions, final decisions on those. In the event that an inmate appeals to the director, I also give the director information about that classification appeal. [LR424]

SENATOR LATHROP: So if I'm an inmate in a...let's say I'm in administrative confinement and I want out of administrative confinement, do I file some petition to be placed in a less restrictive environment? What's that process? [LR424]

LARRY WAYNE: You would, first of all, let the staff know at the institutional level why you feel you should be released to general population. The staff would consider what you had to say in relation to the risk issues involved with that placement and make a decision. If you were dissatisfied with that decision, you could appeal to central office and ultimately to the director. [LR424]

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SENATOR LATHROP: So I first start by staff. So if I'm in administrative confinement, somebody that maybe stops by my cell every day, I would say, hey, you know what, I'd really like to get to general population. That would be the first step. [LR424]

LARRY WAYNE: Actually you would be scheduled for a formal classification review. [LR424]

SENATOR LATHROP: And before whom is the formal classification review? [LR424]

LARRY WAYNE: That is conducted by unit staff assigned to the living location where the inmate is housed. [LR424]

SENATOR LATHROP: Okay. And if I...now what information are they going to be given? Will they have my entire file? [LR424]

LARRY WAYNE: They'll have the information relevant to the placement. If we're talking about segregation, how an individual came to be placed on restrictive housing, what are the...how they've adjusted to that placement, what are past placements for, what's the disciplinary record look like for the individual, how are they adjusting aside from disciplinary issues on restrictive housing, all of those will be considered. [LR424]

SENATOR LATHROP: If I have or am suspected of having a behavioral or a mental illness, will that information be available to the team that would review my placement? [LR424]

LARRY WAYNE: Yes, it should be. [LR424]

SENATOR LATHROP: And if I don't like the decision made by the unit folks, what's my next stop in the appeals process? [LR424]

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LARRY WAYNE: From the unit, it will go to the Institutional Classification Committee still at the facility level. From there it will go to the warden for her or his review of the decision. [LR424]

SENATOR LATHROP: Okay. Now how many steps into the process are we by the time we get to the warden? [LR424]

LARRY WAYNE: Three. [LR424]

SENATOR LATHROP: Okay. And if there is suspected to be behavioral or mental illness issues, will the warden have access to the behavioral or mental illness treatment notes? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And assessments? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And if I don't like the decision made by the warden, am I out of appeals or is there another avenue for me as an inmate appealing my confinement in segregation beyond the warden? [LR424]

LARRY WAYNE: No. You could then appeal, if it's again a decision concerning restrictive housing, to the Administrative Segregation Review Board. That is a committee of people not assigned to that facility who review the decision made by staff at the facility and make a recommendation. [LR424]

SENATOR LATHROP: Is that group made up of wardens from other institutions?

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[LR424]

LARRY WAYNE: Primarily assistant wardens, associate wardens, deputy wardens.

[LR424]

SENATOR LATHROP: Okay. And again, if I'm suspected as having mental illness or behavioral issues, my mental illness or behavioral file will accompany me at each level of these appeals. [LR424]

LARRY WAYNE: There will be an information packet, a classification packet that contains that information in it as opposed to the entire master file. [LR424]

SENATOR LATHROP: Okay. Where do you fit in the appeals process, if you're involved in it at all? [LR424]

LARRY WAYNE: If an inmate is dissatisfied with the decision, once again, a segregation or, excuse me, restrictive housing inmate is dissatisfied, they can appeal the recommendation of the Administrative Segregation Review Board to the Director's Review Committee. And that's where I would look at the appeal. [LR424]

SENATOR LATHROP: Who sits on that committee besides yourself? [LR424]

LARRY WAYNE: Deputy Director Hopkins who has oversight for institutions, also people working with it. In the absence of Deputy Director Hopkins and myself are the programs administrator or the parole administrator. [LR424]

SENATOR LATHROP: Okay. So the director doesn't actually sit on that one. [LR424]

LARRY WAYNE: No. [LR424]

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SENATOR LATHROP: But if I'm dissatisfied with that, then I'm up to the director himself. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: That's the final level of appeal. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And when you hear these appeals, you have access to the inmates' entire file. [LR424]

LARRY WAYNE: I can. I generally refer to the classification packet that's provided for me. [LR424]

SENATOR LATHROP: Who puts the classification packet together? [LR424]

LARRY WAYNE: Facility staff at the...where the inmate is housed. [LR424]

SENATOR LATHROP: When we had Cameron White here a couple weeks ago, he said that from his desktop he could access the entire file of an inmate. Do you have access to inmates' entire files? [LR424]

LARRY WAYNE: Not from my desktop computer. I generally utilize the master file if I wanted to see the entire file. [LR424]

SENATOR LATHROP: Is that a hard copy or are you talking about something you access from your computer? [LR424]

LARRY WAYNE: That's hard copy. [LR424]

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SENATOR LATHROP: Okay. And is that maintained in central office? [LR424]

LARRY WAYNE: No. The master file is maintained where the inmate is housed.
[LR424]

SENATOR LATHROP: Okay. [LR424]

LARRY WAYNE: So if I wanted to look at that, I'd have to have it brought up from whatever facility the inmate is at or I would have someone, more likely, scan and send me the documents I wanted to see rather than have the whole file sent to me. [LR424]

SENATOR LATHROP: Okay. So if someone is at Tecumseh and you want to look at their health records, all you have to do is make a call over to Tecumseh. They scan them and they show up in your inbox. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: That simple. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: I have a number of topics to visit with you about as you might expect. We have more topics the further into this investigation we get. And I want to start with the whole Castillas decision. As I recall, that was decided in I think it was February of 2013--yeah, February of 2013. Does that sound right or consistent with your recollection? [LR424]

LARRY WAYNE: Yes. [LR424]

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SENATOR LATHROP: And we did as you...I don't know. Did you watch the hearing where Mr. Poppert testified? [LR424]

LARRY WAYNE: I did. [LR424]

SENATOR LATHROP: Okay. So you saw Mr. Poppert's testimony that he had some conversation with you about the Castillas Opinion somewhere close in time to its release and its coming to his attention. Did you hear him testify to that? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. Did you have a conversation with Mr. Poppert or do you recall ever having a conversation with Mr. Poppert about the Castillas Opinion back when it was...shortly after it was decided and released by the Nebraska Supreme Court? [LR424]

LARRY WAYNE: I do not believe I had a conversation with him about that. The reason I don't believe that is I think an issue of that magnitude would have been pretty high up on my consciousness. I don't think something like that would be easily forgotten. [LR424]

SENATOR LATHROP: We have talked about your duties on inmate classification, but we have not really had you or given you an opportunity to talk about the fact that you supervised the records guys. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: Okay. So Kyle Poppert worked for you in the Department of Corrections? [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: So we have Jeannene Douglass at sort of the administrative level, and by administrative, I mean administrative assistant level, a records II person, is that right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: She takes direction or someone provides her with a formula for how to determine how long a person has to remain incarcerated because of good time statutes and the sentence they've been given, is that right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And Jeannene Douglass in turn has to have some direction from the people above her. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And the person above Jeannene Douglass would be Kyle Poppert. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: And the person above Poppert would be you. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And Kyle Poppert has told us he did have a conversation with you about it and I appreciate you've just testified that you don't remember such a

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conversation. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: If you had a conversation with Mr. Poppert where he told you the Supreme Court just decided the Castillas case and we are determining the mandatory release date on those who have mandatory minimum sentences incorrectly, would you have done something? [LR424]

LARRY WAYNE: Yes, I would have thought that to be extremely significant. [LR424]

SENATOR LATHROP: All right. Would you have spoken to the director, Bob Houston about it? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And what you're telling us today is not that you didn't have a conversation with Poppert, you just don't remember it. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: There was a time, and I think it was October 16, 2013, and by the way, there's a book in front of you that has documents in it. They're paginated, Mr. Wayne, so that if we refer to a page number you're...this isn't a test of your memory, in other words--or not all of it will be. And on page 212, Poppert sends you an e-mail October 16, 2013, and tells you that he's setting up a Sentence Review Committee. Do you remember that e-mail? Did I say 212? Okay. [LR424]

LARRY WAYNE: I don't remember it. If you would allow me a moment to... [LR424]

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SENATOR LATHROP: Sure, sure, sure. [LR424]

LARRY WAYNE: Thank you. Okay, thank you. [LR424]

SENATOR LATHROP: You've had a chance to read the e-mail and your response.
[LR424]

LARRY WAYNE: My response is I don't remember receiving it, but obviously I'm listed
as the addressee. [LR424]

SENATOR LATHROP: And you responded too. At the top of the page appears to be
your response. Well, first, let's talk about what Mr. Poppert sent. And that is he's telling
you that they're setting up a sentencing committee to review sentencing orders that may
need clarification due to policy, Attorney General Opinions, changes in state statutes, or
court rulings. Will be inviting a member of the legal team to sit in as well. And then he
says in the second paragraph, our first meeting will be October 28, 2013. An agenda will
be forthcoming. Topics will include a recent Supreme Court ruling on sentence
calculations regarding mandatory minimums, the statutory language of at least being
treated as mandatory minimum, pulling cases on LexisNexis, and any other issues that
may come up before the meeting. He's communicating that to you in the e-mail, that
they're setting up this Sentencing Review Committee. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And he's telling you that among other things, they're going to
talk about what we now know to be the Castillas Opinion. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And your response was, well done, Kyle. Thank you.

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[LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. When Mr. Poppert told you that he was setting up a Sentence Review Committee to try to bring some clarity and some...some clarity to AG Opinions, Supreme Court rulings, statutes with respect to sentencing, did you feel like you should be at that meeting where they were going to try to bring clarity to, among other things, the Castillas Opinion? [LR424]

LARRY WAYNE: I should have been at that meeting. I don't know what I was doing on October 28, 2013. I would have had to look back at my calendar. I expect it was probably something that seemed pretty urgent at the time. And in retrospect, you can go back. But this is the sort of thing I would have generally tried to attend, yes. [LR424]

SENATOR LATHROP: And you can't give us a reason today why you didn't? [LR424]

LARRY WAYNE: I wish I knew my calendar, what it looked like that day. [LR424]

SENATOR LATHROP: Do you know if you followed up with Mr. Poppert on what the Sentencing Review Committee came up with? [LR424]

LARRY WAYNE: I do from watching this testimony. [LR424]

SENATOR LATHROP: What was that? [LR424]

LARRY WAYNE: Essentially, very little, some meeting minutes but not a whole lot with regard to substance and with respect to Castillas. [LR424]

SENATOR LATHROP: Did you see the meeting minutes that came out as a result of

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that? [LR424]

LARRY WAYNE: Not until this hearing. [LR424]

SENATOR LATHROP: Okay. And so at...and just to refresh people's recollection because we went through those meeting minutes at some length in the last hearing. But in the meeting minutes from the October 2013 Sentencing Review Committee meeting, the only meeting that committee ever held, they talk about the Castillas Opinion and say, we haven't been given direct orders from the Supreme Court, or something to that effect, right? [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: You never saw that before the World-Herald reported that the Department of Corrections was not following up on Castillas? [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: Is there any reason you wouldn't have been given copies of those minutes? [LR424]

LARRY WAYNE: No, I can't think of any. [LR424]

SENATOR LATHROP: Are you sure you weren't given copies of the minutes? In other words, are you telling us that you didn't get copies of the minutes, or if you did, you don't recall? [LR424]

LARRY WAYNE: I'm telling you if I received copy of those minutes, I don't recall. [LR424]

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SENATOR LATHROP: And if you got copies of those minutes, it didn't prompt you to walk into the director's office and tell him we were improperly calculating the good time available to those who were serving mandatory minimum sentences. [LR424]

LARRY WAYNE: That's the question that I've pondered a lot because, once again, it seems to me that a decision from the state Supreme Court accompanied by an Opinion from the Attorney General's Office was a very big deal. So when I say I can't recall getting the minutes, I suspect I did not because, once again, I would have thought that was a very significant event. [LR424]

SENATOR LATHROP: Okay. And before I go on to the next topic and I'm going to, I just want to be clear, that you're not sure that Poppert didn't talk to you close in time to the Castillas Opinion. He may have given you, he clearly sent you notice that he was having a meeting to discuss, among other things, the Castillas Opinion and you didn't attend. And you don't know whether you got the minutes, but if you did, you would have recognized that as a significant event that deserved to be an issue put in front of the director. [LR424]

LARRY WAYNE: Or I at least would have sought clarification from our general counsel. [LR424]

SENATOR LATHROP: And none of that happened. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: I want to talk about your involvement with Nikko Jenkins next. We heard testimony this morning and I think the e-mails that we've looked at reflect that on February 25 two things happened. One is that an e-mail came from, or some communication came from the Johnson County Attorney regarding Jenkins' interest in being committed to the Regional Center or being committed where he could get mental

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health treatment. And the Ombudsman's Office was also contacting the department to try to get some meeting set up to discuss Jenkins' transition. Do you remember both events? [LR424]

LARRY WAYNE: I remember being contacted by the Ombudsman's Office through Director Houston to set up this meeting, yes. [LR424]

SENATOR LATHROP: Okay. And initially, that contact was from the Ombudsman's Office with Director Houston himself. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And I don't want to try to mischaracterize it, but Director Houston basically handed off the responsibility for dealing with the Ombudsman's Office to you. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. In other words, he communicates back to Mr. Moreland or Davis or both that you're going to be the point man and that they should take up Jenkins with you. [LR424]

LARRY WAYNE: That's correct. [LR424]

SENATOR LATHROP: And you knew that they wanted to set up a meeting for that purpose. [LR424]

LARRY WAYNE: I did. [LR424]

SENATOR LATHROP: Okay. Now let me pause in this time line for a minute and ask

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you, had you ever reviewed the confinement, an appeal from Jenkins about his confinement before this point in time? [LR424]

LARRY WAYNE: I don't believe... [LR424]

SENATOR LATHROP: You just explained the appeals process and your involvement in that process. Had you ever been involved in reviewing Jenkins' records or Jenkins' circumstances before February 25, 2013? [LR424]

LARRY WAYNE: It's possible, but I don't recall that specifically. [LR424]

SENATOR LATHROP: Do you know if you ever reviewed or participated in an appeal by Jenkins concerning the circumstances of his confinement between February 25, when the Ombudsman got a hold of you, and the time he was released? [LR424]

LARRY WAYNE: I don't believe so, no. [LR424]

SENATOR LATHROP: Okay. You are contacted...Houston puts you in charge of dealing with the Ombudsman and the Ombudsman have clearly requested that they have a meeting with you or with specific individuals, decision makers in the room to discuss Jenkins' transition and his mental health issues. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And you knew that from their initial communication to you, is that right? [LR424]

LARRY WAYNE: That's correct. [LR424]

SENATOR LATHROP: Now, when they write you February 25, are you aware of the

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report of Dr. Baker dated February 4, 2013? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: When do you become aware of Dr. Baker's report? [LR424]

LARRY WAYNE: Sometime in the fall of 2013. [LR424]

SENATOR LATHROP: So you're going to tell the committee that the report prepared by Dr. Baker that said Jenkins was mentally ill, an imminent danger, and probably needed to be committed was something you never saw until he had been on the rampage? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Mr. Wayne, I've got to talk to you about some of the opportunities you had, the red flags that I think should have been going off that should have led you to at least look. And we can agree, as you sit here and testify today, you had every opportunity in the world to put your hands on Dr. Baker's report or to further investigate Nikko Jenkins' mental illness. All you had to do is call over to Tecumseh and they would have scanned his records and sent them to you, is that true? [LR424]

LARRY WAYNE: If I knew they existed. [LR424]

SENATOR LATHROP: You were here this morning when the two gentlemen from the Ombudsman's Office testified? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And their testimony led at least me to understand that

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while they tried to set up a meeting with specific people who were decision makers to discuss Jenkins' transition, that didn't happen right away, would you agree with that? [LR424]

LARRY WAYNE: No, not really. I believe the people who could make decisions were present when we sat down to meet. [LR424]

SENATOR LATHROP: That would have been on March 20. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And before that happens, you have...I'm going to direct you to page 146. Do you see an e-mail there? Now we're about a week out from the meeting with the Ombudsman's Office, are we not, March 12, 2013? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Do you see that e-mail from Kathy Foster? [LR424]

LARRY WAYNE: I do. [LR424]

SENATOR LATHROP: And that was in response to an e-mail you sent on the same date when you said, Kathy, will there be a final discharge plan for him? Him being Jenkins. That's on the top of 147. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And your response...you get a response from Kathy Foster, am I right? [LR424]

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LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: So you write her, just to be clear, at 9:00 in the morning on March 12, and at 10:36 on March 12, she writes back. It depends--this is Kathy Foster writing--it depends, since he's not going to be paroled. I typically help with discharge planning that a high-needs inmate wants. Mr. Jenkins does not want to be discharged to the community. He wants to go to LRC. Do you know what LRC refers to when she says, he wants to go to LRC? [LR424]

LARRY WAYNE: It refers to the Lincoln Regional Center. [LR424]

SENATOR LATHROP: Tell me what the Lincoln Regional Center is. Why would anybody want to go to the Regional Center? [LR424]

LARRY WAYNE: The Lincoln Regional Center is the state hospital for individuals who have a severe mental illness. [LR424]

SENATOR LATHROP: Yeah. It's where we commit the people we can't treat in the community, isn't it? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And so you knew when you got this e-mail from Kathy Foster, that Jenkins who is, I'll just use the maybe Bob Krist analogy: He's on the final approach to getting discharged to the community. And instead of wanting to be discharged, he's telling Kathy Foster that he wants to go to the Lincoln Regional Center. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: And Kathy relates that to you on March 12. [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Did you ask Kathy Foster, why does this guy want to be sent to the Lincoln Regional Center instead of liberated and freed and allowed to go back to his community? [LR424]

LARRY WAYNE: No. I felt the more appropriate person to discuss that with would be Mark Weilage. [LR424]

SENATOR LATHROP: Okay. Did you call for the records of Nikko Jenkins to see what was going on? [LR424]

LARRY WAYNE: No. I knew we were going to be having a meeting. And I expected at some point at the meeting or prior to that meeting to be apprised of Dr. Weilage's assessment of Nikko Jenkins' mental stability. [LR424]

SENATOR LATHROP: Okay. Now, you would have been familiar with the mental health professionals over at Tecumseh at the time, would you not? [LR424]

LARRY WAYNE: I wouldn't probably know them by name. They've turned over some, but I know they have them, certainly. [LR424]

SENATOR LATHROP: Okay. And you if anybody is getting medication in an institution, there has to be a psychiatrist involved. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: These psychologists cannot administer medication, true?
[LR424]

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LARRY WAYNE: True. [LR424]

SENATOR LATHROP: So there has to be a psychiatrist involved, right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: So you're going to talk to Mark Weilage, who we've been introduced to last time we had a hearing. But did you ever ask anyone what Nikko Jenkins' psychiatrist was saying about Nikko Jenkins before you met with the Ombudsman? [LR424]

LARRY WAYNE: I did not. [LR424]

SENATOR LATHROP: Okay. And in addition to having Kathy Foster tell you that Nikko Jenkins wanted to be sent to the Regional Center, you also got an e-mail from Jerall Moreland. And now I'm going to direct your attention to page 148 in the book. You see that e-mail from Jerall Moreland? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And you would agree that e-mail is directed to you? [LR424]

LARRY WAYNE: It is. [LR424]

SENATOR LATHROP: And I want to draw you attention. It's dated March 11, 2013, at 3:53 in the afternoon. It comes from Jerall Moreland to you. And halfway through the second paragraph Moreland writes: Additionally, it's my understanding that a member of behavioral health and social worker has met with Mr. Jenkins last week. Would you be able to meet to discuss Mr. Jenkins' last assessment? Do you remember getting that

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e-mail? [LR424]

LARRY WAYNE: No, but I'm sure that I did. [LR424]

SENATOR LATHROP: Okay. You knew that the Ombudsman wanted to meet to discuss Jenkins. You had Kathy Foster tell you that he wants to go to the Regional Center. And you have the Ombudsman asking you for his latest assessments and all of this happens before you meet on March 20, is that true? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Did their request for the latest behavioral health and social worker assessments prompt you to look at Nikko Jenkins' file? [LR424]

LARRY WAYNE: No. It would be my practice to discuss that, issues with respect to Mr. Jenkins' mental health or mental status with the assistant administrator for behavioral health, Dr. Weilage. [LR424]

SENATOR LATHROP: You have access to the records and you have inmates whose records you've looked at, would that be true? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. But in Jenkins' case you were going to rely upon Mark Weilage. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: All right. You get to the hearing or the meeting on March 20, that would be the next in the time line, am I right? [LR424]

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LARRY WAYNE: That's correct. [LR424]

SENATOR LATHROP: The director has put you in charge of the Nikko Jenkins transition plan. Are you keeping him in the loop? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Are you telling the director that Jerall Moreland asked to see the latest assessments? [LR424]

LARRY WAYNE: I probably would have given Director Houston an overview of the March 20 meeting after it occurred and that...well... [LR424]

SENATOR LATHROP: How about beforehand? We were told this morning that Director Houston was at the meeting at the very beginning of the meeting. Before that meeting took place on March 20 in the conference room right next to his office, did you tell Director Houston that Jerall Moreland wanted to see the behavioral health assessments? [LR424]

LARRY WAYNE: I don't believe so. [LR424]

SENATOR LATHROP: Did you tell the director that Kathy Foster had told you in an e-mail that Jenkins didn't want to be released, he wanted to go to the regional center? [LR424]

LARRY WAYNE: I did not. [LR424]

SENATOR LATHROP: Do you think those things would have been important to the director? [LR424]

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LARRY WAYNE: No. I think we would have deferred to Dr. Weilage's assessment of Mr. Jenkins. [LR424]

SENATOR LATHROP: Okay. Then let's talk about that. The meeting takes place and before three members of the Ombudsman's Office arrive, they tell us this morning that Director Houston is in the room, in the conference room, Sharon Lindgren is in the room, and you're in the room. Would that be true? [LR424]

LARRY WAYNE: I don't remember specifically but I wouldn't dispute that neither. [LR424]

SENATOR LATHROP: Okay. How soon before the ombudsmen arrived did the three of you gather in the conference room? [LR424]

LARRY WAYNE: I don't recall. [LR424]

SENATOR LATHROP: Well, could it have been a half hour before? [LR424]

LARRY WAYNE: My guess is if we were there when the Ombudsman's representatives arrived, it probably wasn't more than a few minutes. [LR424]

SENATOR LATHROP: Okay. But there was some conversation about what are we going to do when they get here, true? [LR424]

LARRY WAYNE: I can't remember. [LR424]

SENATOR LATHROP: Well, before this meeting started and before the ombudsmen arrive, you had Sharon Lindgren sitting in the room, right? [LR424]

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LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: You had to ask Sharon what are you doing here. [LR424]

LARRY WAYNE: I knew what she was doing there. [LR424]

SENATOR LATHROP: You knew she was going to insist that no one talk about Jenkins' mental health records. [LR424]

LARRY WAYNE: No, I knew that she'd been asked to attend by Dr. White. [LR424]

SENATOR LATHROP: Cameron White. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: Why do you know that? [LR424]

LARRY WAYNE: Because Sharon Lindgren told me that. [LR424]

SENATOR LATHROP: What purpose was she to serve in a meeting when they were going to discuss Jenkins other than shutting the Ombudsman's Office off of the mental health records of Nikko Jenkins? [LR424]

LARRY WAYNE: I didn't ask Ms. Lindgren why Dr. White wanted her there nor did I ask Dr. White why he had asked her to be there. [LR424]

SENATOR LATHROP: Okay. The ombudsmen testified this morning that once they arrive, the three of them, three members from that office arrived at the meeting, that Bob Houston got up and left. Do you agree with that? [LR424]

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LARRY WAYNE: I do. [LR424]

SENATOR LATHROP: So Bob Houston wasn't around for what happened other than pleasantries that might have taken place at the very beginning. [LR424]

LARRY WAYNE: That's correct. [LR424]

SENATOR LATHROP: And after Bob Houston left, the ombudsmen testified this morning that Sharon Lindgren said, before the meeting got rolling, that we aren't going to talk about Jenkins' behavioral health or his mental illnesses. Do you agree with that? [LR424]

LARRY WAYNE: I don't remember it specifically, but I do agree with it because I, insofar it's hard for me to put things together because we don't have written minutes of that meeting, it was our nature to handle things and remains our nature to handle things with the Ombudsman's Office rather informally. [LR424]

SENATOR LATHROP: I can appreciate that. The question was you...the question related to the Ombudsman's testimony that Sharon Lindgren began the meeting by saying we're not talking about Jenkins' behavioral health or mental health records or his circumstance, and you would agree that took place. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. Do you have an explanation for why? If the Ombudsman's Office, dispatched by Senator Chambers, came to a meeting to talk about Nikko Jenkins' transition, a guy who had been in administrative confinement for a long stretch and a guy who had a demonstrated history of, we'll call it, bizarre behavior, and he's told Kathy Foster that he doesn't want to get out, he wants to go to the regional center, can you tell us why Sharon Lindgren or any lawyer over at the Department of Corrections

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would start a meeting out on a guy that's this troubled by saying we're not going to talk about mental illness and we're not going to talk about his behavioral problems? Why did that happen? [LR424]

LARRY WAYNE: I can. Because at some point, I don't remember when, Dr. Weilage had informed, I believe, Sharon Lindgren and I that it was his clinical opinion that Mr. Jenkins was not significantly mentally ill, that he was in fact manipulating and malingering. [LR424]

SENATOR LATHROP: All right. That would have been Weilage's position. We heard it over and over again two weeks ago and I can appreciate that. That's not an answer for why we're not going to talk about his behavioral health, because even if he's manipulative, even if these are all behaviors, why would we take it off the table? [LR424]

LARRY WAYNE: We shouldn't have. We should have put it right out there. [LR424]

SENATOR LATHROP: Weilage knew about Baker's report and he took this off the table by telling Lindgren that he was manipulating and it was a behavior. [LR424]

LARRY WAYNE: I don't know what Dr. Weilage's motivation was, but...and I should have said, wait a minute, Sharon, why can't we talk about Dr. Weilage's estimation of his mental health and his mental status. [LR424]

SENATOR LATHROP: But, Mr. Wayne, why wouldn't we? I have to tell you, I sat and listened to the testimony this morning and while I'm listening to the testimony, I'm thinking the ombudsmen are there thinking this guy has got some issues, he's been in confinement, he's going to go out into the community. And from Corrections' point of view, from Corrections' point of view I know what was in their file now. I'm surprised you guys weren't running around like your hair was on fire. And to bottle up Dr. Baker's

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report and no one opens the file? I mean, I've got some more and we'll talk about them, but you had like five good flags waving in your face to go over and open his file, have somebody from Tecumseh send over his mental health assessments. And this is a guy with six months left--six months left. Senator Chambers is worried about it. People in the community are worried about it. Everybody is worried about what's this guy going to be like when he gets out. And by the way, he's threatened to go on a rampage. And we won't talk about his behavioral health or his mental illness and that's how we start a meeting off? Whose idea was it to shut off the ombudsmen from the mental health records? [LR424]

LARRY WAYNE: I don't know. [LR424]

SENATOR LATHROP: You have an idea. Did that come from the director? [LR424]

LARRY WAYNE: No. Well, I don't know. My guess, if you're asking me to guess,... [LR424]

SENATOR LATHROP: Well, I want you to give me your best judgment. [LR424]

LARRY WAYNE: My best judgment was that it came from either behavioral health and/or our general counsel. [LR424]

SENATOR LATHROP: Why would your general counsel care? I'm not seeing...if you're talking about George Green, I'm not seeing his name on much of this stuff. [LR424]

LARRY WAYNE: I shouldn't have said general counsel. I correct that. Sharon Lindgren. [LR424]

SENATOR LATHROP: Why would Sharon Lindgren care about shutting the Ombudsman's Office off from mental illness evaluations? [LR424]

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LARRY WAYNE: She would care if Dr. Weilage asked for advice on whether or not this should be discussed at that meeting. [LR424]

SENATOR LATHROP: But isn't that the whole point of the meeting? It was crystal-clear to you what we were going to talk about at that meeting, that they wanted to talk about a transition plan and whether it was behavioral or mental illness. Those would be like at the top of the list of things to talk about as a transition plan is developed. Would you agree with that? [LR424]

LARRY WAYNE: A transition plan was what I wanted to talk about at the meeting. [LR424]

SENATOR LATHROP: But the mental illness or the behavioral issues of an inmate would be top on the list. What do we need to do for treatment? What do we need to do to straighten this guy out before we turn him loose because he's going to jam out in July? [LR424]

LARRY WAYNE: I was told he was not mentally ill. [LR424]

SENATOR LATHROP: And that was by Weilage. [LR424]

SENATOR LATHROP: Correct. [LR424]

LARRY WAYNE: Did Weilage tell you that he was cutting himself in his room? [LR424]

LARRY WAYNE: No, he did not. [LR424]

SENATOR LATHROP: Did he tell you that he was writing with his own blood on the walls of his cell? [LR424]

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LARRY WAYNE: No. [LR424]

SENATOR LATHROP: Or drinking his own urine? [LR424]

LARRY WAYNE: He did not. [LR424]

SENATOR LATHROP: Or engaging in other bizarre behavior that included running around his cell compulsively exercising naked? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: So this all comes back to Mark Weilage, as far as you're concerned. Because the Governor said the other day that he didn't do anything that he thought should get him fired, so is somebody else responsible for it or am I missing something? [LR424]

LARRY WAYNE: Well, on some level if he's not mentally ill, Nikko Jenkins is responsible for it. [LR424]

SENATOR LATHROP: Oh, trust me, nobody on this committee feels sorry for Nikko Jenkins. This is not a place to...for any one of us on this panel to feel bad for Nikko Jenkins. Okay? We're not here to defend that guy or to try to suggest that he didn't...that he's not responsible for his own behavior. Okay? We'll start at that place. I'm talking about the people that had a chance to stop him from walking out the front gates of the penitentiary on July 30 and into Senator Chambers' community only to commit the crimes and the murders that he promised he was going to do. You have to have looked back at this, Mr. Wayne, and said here's the failure. Where is it? Tell this panel where the failure was. Why did Nikko Jenkins get out instead of committed to the regional center, where he asked to go instead of getting out, being free to kill, which he promised

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to do? Tell us what your conclusions are. [LR424]

LARRY WAYNE: My conclusions are that failure occurred by someone in behavioral health not advising me that there were diverse opinions concerning...amongst clinicians about Nikko Jenkins' mental status. I heard one version until after the fall of 2013, when I heard there's these other clinical perspectives that suggest he's significantly mentally ill. That was a big breakdown. [LR424]

SENATOR LATHROP: Do you develop on this March 20 meeting, 2013, did you develop a transition plan with the Ombudsman's? [LR424]

LARRY WAYNE: We discussed a tentative arrangement wherein during the short amount of time we had left before July 30 we might try to address some of the issues Mr. Jenkins has prior to his discharge. But if you ask about breakdowns and when I've looked back, that was another big one--huge. Should have happened way before March 20, 2013, way before. That was way too late to make a significant impact on an individual presenting the sort of challenges, whether people thought he was mentally ill or not. [LR424]

SENATOR LATHROP: Isn't that all the more reason for him to have been committed at the end of his term to the regional center for care and treatment and evaluation? [LR424]

LARRY WAYNE: The problem is, given the opinions I had before me, he didn't meet criteria for commitment to the regional center if he was dangerous but not mentally ill. [LR424]

SENATOR LATHROP: Well, you've committed people to the regional center who are Axis II, have you not? In other words, you've put people in the regional center who are dangerous and are Axis II. You didn't need just Axis I. By the way, you had Axis I in

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Baker's report that Weilage wasn't showing you. But you've put people in the regional center, or committed them, with an Axis II diagnosis. True? [LR424]

LARRY WAYNE: I believe so, yes. [LR424]

SENATOR LATHROP: Okay. So we didn't need the mental illness part, we needed Axis I, Axis II, dangerous, and he's threatening to go on a rampage when he gets out. I think we've checked the boxes, haven't we? [LR424]

LARRY WAYNE: The last box wasn't checked with me. I didn't... [LR424]

SENATOR LATHROP: The dangerous part? [LR424]

LARRY WAYNE: I didn't know that he was planning, talking about killing people until the fall of 2013. [LR424]

SENATOR LATHROP: All right. Well, this wasn't your last chance to be apprised or to see a red flag, and I want to direct your attention to page 173. Now to give this some context, it's dated April 27, 2013. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And what we have on page 173 is a communication from Bob Houston to you. Am I right? [LR424]

LARRY WAYNE: At the bottom of 173... [LR424]

SENATOR LATHROP: You see where Bob Houston... [LR424]

LARRY WAYNE: Yes, I do. [LR424]

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SENATOR LATHROP: Okay. He's sending a response back to somebody named M.T. Richards in the Douglas County Attorney's Office, and he's copying you and Cameron White and Kathy Foster, Brenda Beadle, and Nissa Jones. And it's referenced Nikko Jenkins. Am I right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And in that he's essentially acknowledging the receipt of an e-mail that came from the amity in the Douglas County Attorney's Office and he's sending you a copy of it, is he not? [LR424]

LARRY WAYNE: Is this page 173? [LR424]

SENATOR LATHROP: One seventy-three at the bottom. [LR424]

LARRY WAYNE: It says: Larry, Kathy, and Cameron, for your consideration as we prepare for Jenkins' release. Yes. [LR424]

SENATOR LATHROP: Okay. So for your consideration are the attachments to that e-mail. Right? [LR424]

LARRY WAYNE: Right. [LR424]

SENATOR LATHROP: Did you open it? [LR424]

LARRY WAYNE: Are the attachments here? It might be helpful. [LR424]

SENATOR LATHROP: Yes. Yes, they are there. They are the next 20 pages. Now we've moved a month further down the tracks, a month closer to Jenkins' release, and

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Bob Houston has just sent you an e-mail that he received from the Douglas County Attorney's Office that includes 20 pages of attachments from Nikko Jenkins. Do I got that right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. In that attachment, and for your benefit and my colleagues', it's page 175 to about 195, we have some typed out information. Names and addresses of psychiatric doctors are found on page 175. Do you see that? [LR424]

LARRY WAYNE: I do. [LR424]

SENATOR LATHROP: Okay. Now this is the information that Bob Houston sent to you that he got from the county attorney's office, 20 pages of stuff Nikko Jenkins has been writing or somebody in his family has been. And here on page 175 is a list of psychiatrists that have been involved in his care. Am I right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And in there it says the name and address of psychiatric doctors and in includes Dr. Baker and Dr. Oliveto, does it not? [LR424]

LARRY WAYNE: It's hard for me to read some of the fine print here. I usually don't need reading glasses. [LR424]

SENATOR LATHROP: Do you need to fetch them? If they're in your briefcase or something I'll wait while you get it. [LR424]

LARRY WAYNE: I don't have reading glasses. [LR424]

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SENATOR LATHROP: Okay. [LR424]

LARRY WAYNE: I would take your word for it, Senator. [LR424]

SENATOR LATHROP: Okay, okay. On the list of information that you got is an indication that Natalie Baker at the Tecumseh State Corrections Center is involved in the care and treatment of Jenkins. That's one of the people we can talk to. And by the way, Houston sent this to you and said for your consideration in developing the discharge plan for Jenkins, right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. Did you read this stuff? [LR424]

LARRY WAYNE: I believe so. [LR424]

SENATOR LATHROP: Okay. It indicates on the next page, it gives a...has two things as a probable cause, including number 2, and I'm going to read the third sentence: which is the reason for our petition for immediate emergency removal from Tecumseh Corrections 23-hour confinement to another facility to receive proper mental health needs. That would have been some of the information you had. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Then below that it says specific behaviors, and it lists several suicide attempts. Do you see that? [LR424]

LARRY WAYNE: What page are you on? [LR424]

SENATOR LATHROP: We're still on 176. [LR424]

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LARRY WAYNE: I'm going to have to take your word for it I'm afraid. [LR424]

SENATOR LATHROP: Okay. It does, and that would have been...now, I appreciate that you're having trouble reading it. The room isn't particularly well lit perhaps at the witness table, but you wouldn't have had trouble reading this stuff in your office when Bob Houston sent it to you. [LR424]

LARRY WAYNE: Not at all. Correct. [LR424]

SENATOR LATHROP: Okay. And then in the pages that follow we see an envelope from...on page 177 from Jenkins, legal mail, addressed to Nissa Jones in the county attorney's office in Douglas County. Am I right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And on the next page, 178, we see some bit of correspondence. Do you see that? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And would it be fair to describe that as on a slip of paper with the words written diagonally? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Now, that's a little weird, don't you think? Well,... [LR424]

LARRY WAYNE: It's certainly different. It's not weird in my world, Senator. [LR424]

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SENATOR LATHROP: Okay. Maybe that part isn't. Let's keep going. The next page is 179. Do you see page 179? [LR424]

LARRY WAYNE: Yes, I do. [LR424]

SENATOR LATHROP: Okay. More writing by Jenkins in a geometric fashion, in the diamonds that the Ombudsman described. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: The next page, 180, would be another document that Mr. Houston would have sent to you on April 27 that he received from the county attorney, and at the top of it, it says: hospitalization emergency, please help. And it has Bob Houston's name and Director on it and indicates that it's coming from Jenkins and he's at the Tecumseh State penitentiary or facility. [LR424]

LARRY WAYNE: Page 182? [LR424]

SENATOR LATHROP: One eighty, sir. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Some writing, can you read that on page 180? [LR424]

LARRY WAYNE: Yes, I can. [LR424]

SENATOR LATHROP: That would appear to be a plea from Mr. Jenkins to Bob Houston or someone, whoever this was directed to, a copy of which was attached, for emergency hospitalization. Is that right? [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: The next page, 181, why don't you tell us what that looks like.
[LR424]

LARRY WAYNE: (Laugh) It looks like a lot of writing, crossing over other writing.
[LR424]

SENATOR LATHROP: Illegible? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: We're getting to weird even your world, are we not? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: All right. Then there's another envelope on page 182, again from Jenkins to Nissa Jones, who apparently works in the county attorney's office in Douglas County,... [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: ...followed by more writing, pages of more writing that are written in a geometric fashion. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: I won't ask you to read all of it because I don't think you can, but that's sort of the point. Right? He's sending this stuff. On page 190, it looks like chemical compounds are written out in longhand. [LR424]

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LARRY WAYNE: It does. [LR424]

SENATOR LATHROP: Okay. So these would be the 20 pages that Bob...well, let's stop at page 191. I got ahead of myself. This would be a grievance form, step 2, to the central office. And this was answered by Frank Hopkins on March 11, 2013. Right? [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: And Frank Hopkins writes in March of 2013: you contend you're in need of immediate admission to a psychiatric hospital because of your rapidly deteriorating physical, psychological, and emotional state. Your concerns have been forwarded to the institution. Do you remember reading that document? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: You remember getting this though. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And you remember...I'm not going to ask you if you remember that specific document because it's 1 of 20, and the writing on page 194 gets even more bizarre. [LR424]

LARRY WAYNE: It does. [LR424]

SENATOR LATHROP: And 195. [LR424]

LARRY WAYNE: Illegible. [LR424]

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SENATOR LATHROP: He is writing lines up and down and over one another. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And these are the 20 pages Bob Houston sent to you on April 27, 2013, for your consideration in developing a discharge plan. Now at this point in time after you went through these 20 pages, after you went through these 20 pages, and it's evident he's trying to get himself committed, after you went through those, did you say to somebody send me over the psych stuff on this guy? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: This seems to me to be a red flag. I've never had your job and to some extent we are judging after the fact because we know the rampage this guy went on. But there are so many opportunities in this record. And, believe me, this is what three people in my office can pull out of 90,000 pages of stuff that's been sent to my office in response to subpoenas. I'm sure there's more. But it just strikes me as putting your head in the sand. I'm going to give you an opportunity to respond because I don't want to be unfair about this questioning, but...so Kathy Foster says he wants to be committed and not freed. You have these things that Bob Houston sends to you that are bizarre. [LR424]

LARRY WAYNE: They're unusual. [LR424]

SENATOR LATHROP: They're very unusual. And he's writing Nissa Jones in the Douglas County Attorney's Office trying to get himself committed but he's not in Douglas County. Right? [LR424]

LARRY WAYNE: Correct. [LR424]

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SENATOR LATHROP: You got that from the stuff Houston sent to you. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Does it change the course of his discharge plan or does anybody have a conversation about, boy, should this guy be committed instead of freed in a couple of months? [LR424]

LARRY WAYNE: Senator, I've seen writing like this before. It's not common. It's not everyday. But I have seen, over the years I've worked with inmates, writing like this and things that are as bizarre or appear even more bizarre, in my estimation. So when I have Dr. Weilage saying he's not mentally ill. He's manipulating, he's malingering. And I have a meeting with the Ombudsman wherein we discuss a discharge plan and we're beginning to implement that over at the penitentiary, because I've had Mr. Jenkins returned from SMU Tecumseh to the penitentiary to effect that plan. And I see that it's going kind of along the lines that we did discuss in terms of placing him in the control unit at the penitentiary, moving him along to housing unit four, moving him then along to the gallery for transition confinement, and finally entering the transition confinement program with the next class available. It seemed to me that it wasn't a lot...it wasn't as much as we should have been doing, but it was all we could do. [LR424]

SENATOR LATHROP: Well, I got one more e-mail I want you to look at or one more memo and that's on page 208. Can you see well enough to read that stuff? It's a little better. [LR424]

LARRY WAYNE: I can. Yes. [LR424]

SENATOR LATHROP: Okay. This would appear to be an e-mail or a memo that you wrote to Director Houston. Would you agree with that? [LR424]

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LARRY WAYNE: It is. Yes. [LR424]

SENATOR LATHROP: And in it you address a number of inmates, including Nikko Jenkins. How about I read that for you. You have kind of an opening paragraph about people in administrative confinement, and then you say about Jenkins: Mr. Jenkins has served much of the last few years on administrative confinement. More recently, external stakeholders have identified Jenkins' upcoming July 30 mandatory discharge date as a concern. To address this, Jenkins, per his own request--by the way, I never saw that request; I don't think I've ever seen him ask for anything but going to the regional center, but--was transferred to TSCISMU to the penitentiary control unit earlier this year. He appeared to be demonstrating progress in his new environment and was subsequently placed on the transition confinement program. After this, Jenkins again reverted to his more manipulative behavior. This included writing the Douglas County Attorney to plead his case for regional center commitment and declining medication from psychiatrist Dr. Jack. Ultimately, Jenkins cannot seem to discontinue his thinking that he will have an easier life if referred to and/or committed to the regional center. That was your description of his manipulative behavior. Am I right? [LR424]

LARRY WAYNE: That's correct. [LR424]

SENATOR LATHROP: Now this is a guy who's six weeks from being a free man. And you describe his attempts to get into the regional center and have himself committed, and you clearly know he wants to from your writing, a guy that wants to have himself committed six weeks before his discharge and you refer to it as manipulative behavior. [LR424]

LARRY WAYNE: I do. [LR424]

SENATOR LATHROP: Or maybe he was trying to get help. I have to tell you, if there is

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a failure, if there is a failure, and I'm now...this isn't a question, if there is a failure over there it is at some point people tune these guys out and quit caring what they're saying and say, you know what, I got the answer. He's being a manipulator. Six weeks before he's supposed to get out of the penitentiary and he wants to go to the regional center? I cannot imagine, I cannot imagine, Mr. Wayne, anybody manipulating their way into a psychiatric confined unit as a form of manipulation instead of being a free man in six weeks. I know you're not a psychologist and I know you're not a psychiatrist, but my concern is there's the last red flag. And it's like a bus screaming down the highway and going through barriers that say road closed and this is the last one. Six weeks before he's released and you're writing the director to say this guy has gone back to his manipulative ways. Can you believe it? He wants to go to the regional center. And you write that six weeks before he's going to be free. Maybe he was asking for help. [LR424]

LARRY WAYNE: And maybe he chose to do evil acts, including killing people. [LR424]

SENATOR LATHROP: No question about it, sir. And I am not here to apologize for Nikko Jenkins and I don't care what they do with him up in Douglas County. My concern is this panel is put together to get to the bottom of why he got out, because anybody, anybody, judging this guy's conduct would condemn it. There is nobody on this panel that doesn't think this guy deserves whatever he gets. Okay? That's not the point of this hearing. The point is he was confined at the Department of Corrections. It was the responsibility of the Department of Corrections and this administration to keep the people of the city of Omaha safe. And this guy was asking to be committed to the regional center and no one would listen and no one would send him there. And not only did Mark Weilage hide a report from Dr. Baker from everybody, but you missed six good opportunities to look into it yourself. And I'll give you a chance to respond. I'm not...this isn't me berating you. I mean, I am here expressing my outrage that this guy gets out and does what he promised to do and everybody says somebody else told me that everything was okay. [LR424]

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LARRY WAYNE: Well, first off, it's heartbreaking to think that maybe you could have done something to stop those people from being killed. I have considered that many times. What could have been done differently or better by me? Not by anyone else, by me. In all the years leading up to March 20, 2013, I seldom if ever questioned a clinician, whether he be...or she be a physician, a mental health clinician, a lawyer, what have you. These people were subject-matter experts upon whose opinions and recommendations I relied upon and usually deferred to. And I wish I had asked on March 20 or anytime before or after, Dr. Weilage, are there other clinical opinions about this individual. But I didn't do that. If I had seen a red flag, we can argue whether I should have or not, if I had seen one I guarantee you I wouldn't wait around to not ask, is this guy mentally ill. If he's mentally ill, then we need to refer him to the Douglas County Mental Health Board. What I was told...unfortunately what I've seen a lot of times is people feigning a mental illness for some other means that I can't understand why you would feign or fake or manipulate that you're mentally ill. I don't get that. I've seen it a lot though over 39 years and I still don't understand it as we're talking this afternoon why someone would do that. [LR424]

SENATOR LATHROP: Well, we could understand why somebody would do it to get out of segregation, solitary confinement. I mean, there might be a reason but it's hard to imagine one six weeks before your discharge date why you'd want to go to the regional center. Wouldn't you agree with that? [LR424]

LARRY WAYNE: Yes, I would. [LR424]

SENATOR LATHROP: Okay. So along the way between March 20th and the day Jenkins is discharged, did it ever occur to you to question why Sharon Lindgren shut off the Ombudsman's Office from the mental health records? I mean, some of the signs and some of the warning signs that you might have observed that we've gone through today, they, in my judgment, should have prompted you to look in his file. But didn't they at least make you go, that's kind of weird, you know. We had these signs that this guy

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wants to be committed. He's writing this bizarre stuff. I'm reading this stuff. This guy is really weird. And, you know, come to think of it, Sharon Lindgren cut the Ombudsman's Office off from the mental health records back in March 20th. That ever occur to you? [LR424]

LARRY WAYNE: Not until after March 20th when I had more information and I knew there was other information. At the time I believed Sharon probably was operating under the same beliefs as I that Mr. Jenkins was not mentally ill based upon what Dr. Weilage was telling us and, therefore, we weren't going to get into a debate with nonclinical people, i.e., the Ombudsman's Office, about that aspect of what should be involved in his discharge plan. What I wanted to look at was what we could do in terms of placement and socialization for him in the short amount of time we had him before he was discharged, and I wanted to focus on that. [LR424]

SENATOR LATHROP: Okay. Well, I don't want to be argumentative. I really don't. I'm trying to figure out what happened and get to the bottom of it, and I think I've asked the questions about that. And, well, would you at least agree that if you saw Baker's report you would have tried to do something to get this guy committed on his way out the door? [LR424]

LARRY WAYNE: Yes, absolutely. [LR424]

SENATOR LATHROP: And in your experience if you would have seen the Baker report and you would have taken steps to have him committed that all the elements necessary for a commitment were in that report? [LR424]

LARRY WAYNE: I need to amend what I just said. I would have discussed it with Director Houston and I would have said, Bob, there's this other clinical perspective now on Jenkins that suggests that he is mentally ill and we know he's dangerous. [LR424]

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SENATOR LATHROP: Would you have advocated for a civil commitment before he was released into the community? [LR424]

LARRY WAYNE: I would. [LR424]

SENATOR LATHROP: All right. So do you deal with the folks over at the Lincoln Regional Center? Or what involvement do you have with the Lincoln Regional Center? [LR424]

LARRY WAYNE: It's very limited. [LR424]

SENATOR LATHROP: Okay. So there's some. There's some involvement or some interface with the Lincoln Regional Center. [LR424]

LARRY WAYNE: It's been curtailed significantly since the Community Corrections Council stopped existing. [LR424]

SENATOR LATHROP: Okay. Well, let me ask this differently. After Jenkins is involved in the homicides up in Omaha and he is before Judge Bataillon. Judge Bataillon enters an order--and if you need to see it, it's on page 95--he enters...I don't know that it's going to be important to you to answer this question. If it is you're welcome to look at it. Judge Bataillon says I want to have an assessment done to see if this guy is competent. And he directs that he be sent to the regional center. Have you followed that? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And the regional center, if I understand, and as they say, some of what I know or almost all of what I know I've read in the paper, but the regional center says we're not taking him. Are you familiar with that response from the regional center? [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And now he's somewhere in the corrections system where these evaluations and presumably some form of treatment is taking place. [LR424]

LARRY WAYNE: The Lincoln Correctional Center. [LR424]

SENATOR LATHROP: Okay. Do you know why the regional center wouldn't take Jenkins when Judge Bataillon ordered him sent there? [LR424]

LARRY WAYNE: I do. [LR424]

SENATOR LATHROP: Why? [LR424]

LARRY WAYNE: Because they didn't feel they had the security apparatus to maintain he and others at that location safely. [LR424]

SENATOR LATHROP: Okay. How do you know that? Have you had conversations with some people about that? [LR424]

LARRY WAYNE: I've read, like you, what I've read in the paper and I've had some discussions with departmental staff. [LR424]

SENATOR LATHROP: Okay. And so when Judge Bataillon ordered the regional center to take him for an evaluation and they said no, it was because the regional center wasn't equipped to handle Nikko Jenkins. [LR424]

LARRY WAYNE: That's as I understand it, yes. [LR424]

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SENATOR LATHROP: And that would have been the same problem they would have had with committing him after he was done with his sentence at the penitentiary. Would that be true? In other words, were they better equipped to handle him back in July 30, 2013, than they were when Judge Bataillon ordered him sent there for an evaluation? [LR424]

LARRY WAYNE: I don't believe so. [LR424]

SENATOR LATHROP: Same problem. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Might be part of the reason why we weren't interested in getting him committed to a place that couldn't take him in the first place. [LR424]

LARRY WAYNE: I don't know that one leads to the other, Senator. [LR424]

SENATOR LATHROP: You can't tell me it doesn't, however. [LR424]

LARRY WAYNE: I don't know. [LR424]

SENATOR LATHROP: Okay. I want to change subjects a little bit. You might be relieved. I don't know. I want to talk to you a little bit about overcrowding. You know, we have...we started our hearings with having Director Houston testify, and in his testimony among other things he said that back in 2006 there was a report prepared by a consultant that recommended about 1,735 beds be added to the department to accommodate what they anticipated to be a growing population. Did you watch that testimony? [LR424]

LARRY WAYNE: I did. [LR424]

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SENATOR LATHROP: Did you see Director Houston testify about the 2006 report that projected the needs of Corrections in terms of its capacity? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And do you agree that Director Houston said that report was done by an independent consultant, that they predicted the increase in population, that the capacity would be insufficient by around now, and that it was necessary to increase capacity by 1,735 beds in order to provide a humane environment for inmates? That was the report, was it not? [LR424]

LARRY WAYNE: It was. [LR424]

SENATOR LATHROP: Okay. And ultimately the administration did not request or take any steps to increase the capacity since then. They didn't add the beds that were recommended in the report. True? [LR424]

LARRY WAYNE: Correct. We've only done one thing that comes to mind, and that's in this calendar year with the county jail initiative. [LR424]

SENATOR LATHROP: Yeah. Now that we're at nearly 160 percent, we've started to try to have some of the people housed in county jails across the state, including Grand Island, for example. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: Okay. And by virtue of the fact that the administration did not follow the recommendations of the 2006 report, the overcrowding has reached a point where we're somewhere between 155 and 160 percent of capacity. [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Overcrowded by any measure, would you agree? [LR424]

LARRY WAYNE: I would. [LR424]

SENATOR LATHROP: And Mr. Houston testified that at different times the administration asked him to update the cost figures on adding the 1,735 beds. Did you hear that testimony as well? [LR424]

LARRY WAYNE: I believe so. [LR424]

SENATOR LATHROP: And that ultimately, and I think it was in 2010, when Houston presented to the administration an updated cost figure on the 1,735 beds and also the no-cost options, do you remember that testimony? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And the no-cost options so that we can get past the euphemism, the no-cost options are get people out of here as fast as we can. [LR424]

LARRY WAYNE: I wouldn't put it in exactly those words. [LR424]

SENATOR LATHROP: Well, I don't want to suggest that they did anything illegal yet, but I do want to suggest that there was an emphasis on overcrowding and finding people we can move through the system. [LR424]

LARRY WAYNE: Yes, identifying low-risk inmates who are at or near the end of their sentence and could be managed effectively in the community and in fact perhaps their

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chances of recidivism might even be lessened through skilled reentry and supervision in the community as opposed to just turning them loose. [LR424]

SENATOR LATHROP: Okay. And you said low-risk people, and I'm going to come back to that in a minute. But the sense, and it's difficult for this panel, I believe, to get a sense of the mood or the atmosphere in Corrections other than the testimony of Jeannene Douglass who said she felt the pressure to move people through that came from the top. Did you hear Jeannene Douglass testify? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And did you hear her testify to that effect? [LR424]

LARRY WAYNE: I did. [LR424]

SENATOR LATHROP: That she felt pressure. [LR424]

LARRY WAYNE: I heard her testify to that, yes. [LR424]

SENATOR LATHROP: Okay. I want to talk to you about overcrowding so that the panel has a sense of what it was like and what efforts were being undertaken to improve the overcrowding numbers. And the first thing I'm going to direct you to is on page 97. Do you see page 97? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And I'm not being a wiseguy with this. The print okay for you? You can read it? [LR424]

LARRY WAYNE: It's better, yes. Thank you. [LR424]

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SENATOR LATHROP: Okay. Good, good. This would appear to be an e-mail from somebody named Kate Morris. Can you tell us, first of all, who she is? [LR424]

LARRY WAYNE: She was the budget analyst for the Department of Correctional Services on March 27, 2009. [LR424]

SENATOR LATHROP: Okay. And she's writing the following: Robert Spindler. [LR424]

LARRY WAYNE: Robin, yes. [LR424]

SENATOR LATHROP: Robin Spindler, pardon me. What's Robin Spindler's job? [LR424]

LARRY WAYNE: Robin Spindler is the deputy director over administrative services for our agency. [LR424]

SENATOR LATHROP: Okay. Bob Houston, the director; Steven King; Doug Hanson; you, Larry Wayne; and somebody named Rex Richard. Do I have that right or is it Richard Rex? [LR424]

LARRY WAYNE: No, his first name is Rex. [LR424]

SENATOR LATHROP: Rex Richard. Okay. And the first paragraph starts out: Larry Bare had indicated when we met with him at the Work Ethic Camp last week that he was interested in a different way to compute "capacity," one that took into account the type of inmates and the programs at the institution rather than using the "design capacity" to determine crowding. So this would suggest to me that sometime near March 27 of 2009, in response to the growing inmate population, that the Governor's chief of staff has asked for a different way to determine what the capacity is of the

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various institutions. Do I have that right? [LR424]

LARRY WAYNE: That's what it appears to say, yes. [LR424]

SENATOR LATHROP: Okay. Do you remember getting this memo? [LR424]

LARRY WAYNE: I'm sure I did given that I'm on the distribution. [LR424]

SENATOR LATHROP: Okay. But do you remember having a reaction like, wait a minute, the Governor's Office now wants to change how we determine capacity of our institutions? Did you have that moment or do you remember that moment as a reaction? [LR424]

LARRY WAYNE: No, I do not. [LR424]

SENATOR LATHROP: Well, I'm not going to read the whole thing, but it goes on to suggest that we have the old-fashioned way, which is design capacity, and we have this other way that comes to us through the guys that did the 2006 evaluation. Right? Do you remember this at all? [LR424]

LARRY WAYNE: Yes, vaguely. [LR424]

SENATOR LATHROP: Okay. And so this lady, Morris, does a comparison of what the overcrowding situation will look like if we change the accounting method. Right? And that's found on page 100, pardon me, 99 and 100. Do you remember seeing this? [LR424]

LARRY WAYNE: Vaguely. [LR424]

SENATOR LATHROP: Okay. So on page 99 would be what's our overcrowded

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circumstance if we use the old design capacity which has sort of been the standard for determining overcrowding, and at the far right column at the bottom row it has 138.23 percent. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: So that would have been, if we used the old-fashioned way of doing it, that would have been the extent to which we were overcapacity at the Department of Corrections. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And then when you flip the page to here's the other idea that maybe Larry Bare will like, this would be the CGL rate of capacity, operational capacity in population. Do you see that? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And what's that do to the overcrowding situation? Well, let me put it differently. What's that do to the overcapacity number if we adopt the new approach? [LR424]

LARRY WAYNE: It lowers it. [LR424]

SENATOR LATHROP: To what? [LR424]

LARRY WAYNE: One hundred seven point seven percent...point zero seven percent, excuse me. [LR424]

SENATOR LATHROP: So by changing the accounting process for capacity or

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overcapacity, we've lowered by nearly 30 percent the overpopulation problem. [LR424]

LARRY WAYNE: Lowered the number. [LR424]

SENATOR LATHROP: Yeah. We haven't gotten any inmates out and we haven't opened up a single bed, but it does look like our circumstance isn't as bad, doesn't it? [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: Do you know if that was ever adopted? Did we start using the new way that showed less of a problem? [LR424]

LARRY WAYNE: I don't know. [LR424]

SENATOR LATHROP: All right. The department has something called executive staff meetings, do they not? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Tell us what executive staff meetings are. [LR424]

LARRY WAYNE: Executive staff meetings are the director's executive staff. We meet either weekly or biweekly to go over issues that the department is facing. [LR424]

SENATOR LATHROP: Okay. And so if you have a problem with...you said, how often does this happen? [LR424]

LARRY WAYNE: It was in 2009 they were happening weekly. I would say sometime in 2012 or '13 they went to every other week. [LR424]

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SENATOR LATHROP: Okay. And who attends these meetings? [LR424]

LARRY WAYNE: It's the director's executive staff that includes, of course, the director, myself, and deputy director over administrative services, the deputy director over institutions, the deputy director over health services, and a deputy director over correctional industries. Also attending is the general counsel, the public information officer, the staff development and training coordinator, the director's administrative assistant. I think that might be it. [LR424]

SENATOR LATHROP: Okay. And where do you have these meetings at? [LR424]

LARRY WAYNE: In the conference room adjacent to the director's office. [LR424]

SENATOR LATHROP: This is the same place where you met with the Ombudsman? [LR424]

LARRY WAYNE: Same room. On occasion I believe we'll meet with the same group, we'll be expanded and we'll meet in a different area of the building to include all the section heads. And there you have the head of inmate accounting, the head of the budget officer, you have the program administrator,... [LR424]

SENATOR LATHROP: Okay. [LR424]

LARRY WAYNE: ...parole administrator and so forth. [LR424]

SENATOR LATHROP: And at this you can talk about whatever is on anybody's mind. [LR424]

LARRY WAYNE: Yes. [LR424]

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SENATOR LATHROP: Like give us a report, Larry, and Larry will give a report about whatever is...if there's good or bad news. [LR424]

LARRY WAYNE: For a time there was an agenda of things that we were going to cover that we needed to cover, but it wasn't so tight that we couldn't add a pressing issue. [LR424]

SENATOR LATHROP: Okay. I want to kind of move through these. I don't want this...I'm hoping this hearing doesn't go late into the night like the others have and so I'm going to move through this part maybe a little quicker than I would otherwise like to. But on page 113 are the minutes of one of those meetings, and this one in particular is March 15 of 2010. Do you see that? [LR424]

LARRY WAYNE: I do. [LR424]

SENATOR LATHROP: Okay. Two things. In the middle of the first page, which is page 113, it says DCS monthly update to the Governor, parenthesis, permanent item. So was somebody taking the information from these meetings and sharing them with the Governor? [LR424]

LARRY WAYNE: Deputy Director Spindler coordinated that update but sent it to the Governor through the director. [LR424]

SENATOR LATHROP: Well, was the Governor copied? [LR424]

LARRY WAYNE: He was the recipient of that report. [LR424]

SENATOR LATHROP: Is this the report? In other words, would you send the Governor these minutes or is there another report that you were sending the Governor every

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month that we subpoenaed and didn't get? [LR424]

LARRY WAYNE: It's a separate report, Senator. [LR424]

SENATOR LATHROP: Okay. This one at the top of page 114 has announcements, hyphen, Bob Houston. Mr. Houston shared the following. And then there's a bullet point. He continues to talk with many staff about issues on the growing inmate population. Was that a common theme at these meetings? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: On page 120 is the next one. This one at the top, I'd like to give you a date but it says Tuesday, 19, 2011. So we don't know exactly what month this happened in. But there is a population update, right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And in this it says, under population update, on behalf of Mr. Kyle Poppert and Layne Gissler, today Mr. Houston and Mr. Wayne shared that during--it looks like it's cut off--to yesterday's meeting at DOR's, all information was discussed there and we are moving forward. I thank the staff and shared they believe the meeting at DOR regarding reentry efforts, decreasing population went very good and a lot of questions were answered. Right? I read that correctly? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And then on the next page maybe we have a little more detail, and this would be page 121. It says: As he mentioned earlier in the meeting, the reentry meeting at DOR yesterday went good, and he's looking for the following to occur, slash, next steps, colon, first bullet point. We need to be recommending at least 191 to 200 to

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BOP each month. What's the BOP? [LR424]

LARRY WAYNE: Board of Parole. [LR424]

SENATOR LATHROP: So this would be some directive by Director Houston at a meeting at DOR where he said we need to come up with 191 to 200 people to recommend to the Board of Pardons... [LR424]

LARRY WAYNE: Board of Parole, yes. [LR424]

SENATOR LATHROP: ...pardon me, Board of Parole each month. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: In other words, this is how we're going to control the population. [LR424]

LARRY WAYNE: That was a goal in order to meet our budgetary obligation as opposed to closing facilities. [LR424]

SENATOR LATHROP: Okay. And the next bullet point: look at utilizing alternate programming path for those to get on parole. Do by parole eligibility date, they give them a plan in moving out. The alternative programming path is sort of a euphemism for, let's get them out the door and have them get the programming on the outside. Am I right? [LR424]

LARRY WAYNE: If they are low risk, yes. [LR424]

SENATOR LATHROP: Okay. If they're low risk, and we'll talk about risk in a minute. But the point is that instead of having the programming inside the Department of

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Corrections while they're confined, because you can't...there isn't enough of the programming, we're going to try to find offenders that we can put on the outside and then say, and by the way, here, go get some alcohol...substance abuse treatment, stuff like that. [LR424]

LARRY WAYNE: But there was also a concerted effort at that time to push the clinical staff out into the community into our day reporting centers to make the programming available for that population that we were trying to move through. [LR424]

SENATOR LATHROP: Okay. But the idea is there isn't enough of the programming inside the institution to get 200 people out the door to the Board of Parole a month without having them get their treatment or their recommended programming on the outside. Would that be true? [LR424]

LARRY WAYNE: I would say it a little differently. I would say that we were holding people in minimum custody inside our facilities who could be out in the community and still low risk and still be accessing the programming they needed and getting structure and supervision while residing in the community. [LR424]

SENATOR LATHROP: You keep talking about low risk and we're going to get to that in a minute. [LR424]

LARRY WAYNE: Okay. [LR424]

SENATOR LATHROP: But these people are going to, instead of getting the treatment inside, get it outside. And that was one of the things discussed to try to move 200 people to the Board of Parole each month. [LR424]

LARRY WAYNE: Yes. [LR424]

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SENATOR LATHROP: Okay. My next one is going to be on page 122, so if you'll just turn the page. This would be another executive staff meeting July 26, 2011. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And it says monthly updates to the Governor. Positive things, issues, assistance to counties, budget. Do you know what the issues were that day? Do you have any way of knowing? [LR424]

LARRY WAYNE: I'd have to retrieve the separate report that went to the Governor concerning positive things that were going on in the agency and issues we were facing along with how we were going to try to address them. [LR424]

SENATOR LATHROP: Fair enough. Let's move to page 132. [LR424]

LARRY WAYNE: Page 130? [LR424]

SENATOR LATHROP: One thirty-two, sir. See the minutes of that executive staff meeting? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: You would have been there. [LR424]

LARRY WAYNE: I was. [LR424]

SENATOR LATHROP: Okay. Down where it says office of the day report, the second paragraph, I want to read that and then talk to you about it. It was noted that with the increasing number of individuals on parole, the department is likely to see an increase in activity found in the news. Did I read that right? [LR424]

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LARRY WAYNE: You did. [LR424]

SENATOR LATHROP: Okay. And do you know who was responsible for that being in these executive staff notes? [LR424]

LARRY WAYNE: I don't because it's not attributed to anyone. [LR424]

SENATOR LATHROP: Okay. Would it be a fair interpretation of that note that now that we are reaching a little deeper into the barrel for parolees that some of them are going to end up in the news? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: So we're starting to take a little more risk with the people we're putting out. Is that a fair interpretation and is that what's being expressed in that note? [LR424]

LARRY WAYNE: The way I interpret it, we would be having a greater number of people on parole. And the way it played out was about the same percentage of people, despite that greater number, continue to violate parole and be brought back to prison, sometimes for laws violations that sometimes got into the news. [LR424]

SENATOR LATHROP: So you don't think it was about risk? Starting to take more chances? [LR424]

LARRY WAYNE: No, I do not. [LR424]

SENATOR LATHROP: Well, then let's go to page 140. This is actually a memo, isn't it? [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And it's from Mario F. Peart, warden at LCC. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And it's to Frank Hopkins, deputy director/institutions. Right?
[LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: And apparently it is the minutes or notes from a meeting that
you attended. Do you remember this meeting? [LR424]

LARRY WAYNE: I'd have to read it to try to familiarize myself. [LR424]

SENATOR LATHROP: Well, you can go right down to the bottom where it says notes
from the warden's meeting, and I'll read it for you. The bullet point: Larry Wayne talked
about RFP. What's RFP? [LR424]

LARRY WAYNE: Reentry Furlough Program. [LR424]

SENATOR LATHROP: And what's that mean? These the guys that are getting paroled?
[LR424]

LARRY WAYNE: These are individuals who are likely going to be paroled but are not
yet eligible for parole but are low risk, very low risk, compliant, and in the community
living at their residence or with an approved residence prior to their actual parole
eligibility date. [LR424]

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SENATOR LATHROP: Okay. For these guys to be on a furlough, they require the approval of the Board of Parole, do they not? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: I want you to remember that. People on a furlough who are free and outside the institutions and not in a placement from the Department of Corrections require the approval of the Board of Parole. True? [LR424]

LARRY WAYNE: True. [LR424]

SENATOR LATHROP: All right. We'll come back to that in just a minute. You said, continuing, he stated that parolees are up and higher risk inmates are being looked at. Next sentence: Remember to use appropriate wording. This suggests to me that we are starting to use or in our effort to harvest inmates for parole, we're beginning to take more and more chances with those that are paroled. Would that be a fair reading of that sentence? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And the next question or the next sentence says, remember to use appropriate wording. Where would we be using appropriate wording if we're paroling higher risk inmates? Where do you want them to use the appropriate wording? [LR424]

LARRY WAYNE: In the parole progress or institutional progress report. [LR424]

SENATOR LATHROP: Is that to make them look more attractive to the Parole Board or to make it look like it was a good idea if they cause some big crime spree when they're

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on parole? Who's going to read the appropriate wording? [LR424]

LARRY WAYNE: The Parole Board. The appropriate wording would refer to if someone was still a manageable risk, the wording ought to describe why we would not be putting the community in jeopardy by putting this individual, who is not the lowest risk but was still a manageable risk, out into the community. [LR424]

SENATOR LATHROP: This is a call for window dressing, am I right? We're taking a higher risk guy, we're going to put him on parole, and whatever you do, make sure you're using the right term so it doesn't look like we're doing something risky here. That's what I get from it. Do I got the wrong impression or am I about right? [LR424]

LARRY WAYNE: That's the wrong impression. [LR424]

SENATOR LATHROP: Okay. The sentence before it you say we're using higher risk inmates are being looked at, and then you say use appropriate wording. That's going to be in documents that are going to the Parole Board. Is that where the documents are that you want them to use appropriate wording? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And so Esther Casmer and the people over at the Board of Parole will find these people more suitable for parole. [LR424]

LARRY WAYNE: Explain why they might not be the lowest risk but why they are still a manageable risk to be in the community. [LR424]

SENATOR LATHROP: Okay. That's your explanation of appropriate wording. And I think that's all of the executive meetings that I wanted to cover, but I do want to hit one last thing on the subject of overcrowding before I go on to the last topic. And that is on

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page 65. And I regret that I don't have more of the stuff in here about these lists, but we have people who are moving about the in Department of Corrections trying to generate lists for the various wardens to find candidates for parole so that we can, with the no-cost option, start getting people on parole. Is that true? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And this guy named Rex Richard writes an e-mail on January 18, 2012, doesn't he? Do you see that on the bottom half of the paper? [LR424]

LARRY WAYNE: Yes, I do. [LR424]

SENATOR LATHROP: Okay. And I have to tell you I'm not sure what all these initials stand for. But I'm going to read this and then ask you. He says: Good afternoon. All attached is the "no" list--and he puts no in quotes--we discussed this morning. What's a "no" list? With all the lists that are floating around as we're trying to harvest parolees and find people for the Parole Board to kick out, what's a "no" list? [LR424]

LARRY WAYNE: The "no" list would refer to people who were high risk to be considered for release to the community and, therefore, wouldn't be considered at all. [LR424]

SENATOR LATHROP: Okay. So these are the guys that are likely to be violent, haven't shown any indication that they've rehabilitated or... [LR424]

LARRY WAYNE: They might be eligible for parole, they might...but their mental illness is significant, the risk they pose due to their criminality would be...make them unsuitable, yes. [LR424]

SENATOR LATHROP: Okay. And so he goes on. As you can see, there are three tabs

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at the bottom with three different groups of data: The first one is PED before 6/30/12, all, end quote. The second is IPR equal no NETRD. And the third is IPR equal no TRD in three years. I'm not sure what all that means, but I guess I want to get to the next sentence. I would suggest concentrating the effort on the third list, that being the IPR equal no TDR in three years, as I think we will find the best fishing...the fishing best in this pool rather than in the list with inmates who have TDRs many years in the future. The fishing in the pool, is that what we're doing when we're looking for people to be paroled? [LR424]

LARRY WAYNE: Rex... [LR424]

SENATOR LATHROP: I'm starting to get a sense of the mood over at Corrections and the difficulties created by the overcrowding when I read memos like this. [LR424]

LARRY WAYNE: Rex has a creative way sometimes of expressing hard, practical realities. [LR424]

SENATOR LATHROP: Okay. But we recognize that by this time we're starting to look for higher risk guys and we're talking about fishing in a pool of inmates. And there's another one on page 139 where we have somebody going about trying to tell the various wardens, yeah, it looks like you got maybe 41 people over there. Can you check them out and let us know? That's on page 139, an e-mail again from our friend Rex Richard dated January 30, 2012. You're copied on this. This would be Rex sending out a list of prospects or people in the pool. Is that's what's happening? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. So my impression is, and you tell me if I'm wrong, but my impression is overcrowding is a big deal over there. [LR424]

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LARRY WAYNE: It is. [LR424]

SENATOR LATHROP: And when we elected...strike that. When the administration chose to go with the no-cost option rather than build more beds, we had to find a way to parole people to level out the population so we didn't go to critical mass. Would you agree with that? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And part of that process involves Rex Richard's identifying numbers in various institutions of people to be looked at for parole. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And so instead of parole being something that's earned, we're trying to find people, a little more risky as we get into this process, so that they can get out of the institution, lower the census, and get their care on the outside. [LR424]

LARRY WAYNE: Still presenting a manageable risk, but you're correct, more risky than the lowest risk people. [LR424]

SENATOR LATHROP: Okay. And some of these people are going to show up in the news. And that was another warning we had. [LR424]

LARRY WAYNE: They might. [LR424]

SENATOR LATHROP: So now we come to Castillas, right, the Castillas Opinion. We get a sense of overcrowding. We get a sense that we are somewhere near 150 and 160 percent of capacity and Castillas comes up or we finally learn about it or the World-Herald finally tells the administration that no one is properly calculating good time

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over at the Department of Corrections for people with a mandatory minimum sentence.
Am I right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Now, I don't know if we'll ever know if somebody knew about this before the World-Herald and decided that it didn't fit the ends or the problem that Corrections was dealing with, which was significant overcrowding. And I'll just make this observation. The statute gives the Governor the authority at 140 percent to declare an emergency--really, really opens up opportunities for the Governor to manage this problem. But we go right by 140 and we're in the 150s and Castillas gets decided. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And nothing happens to bring these people back or to recalculate their sentence until the World-Herald breaks the story like over a year later. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And now we have a bunch of people who have been free. They got out early. They got out on a mistake. Well, it's not a mistake. It was a decision not to follow the Supreme Court decision. Right? [LR424]

LARRY WAYNE: It was. [LR424]

SENATOR LATHROP: And now the administration and the Department of Corrections is trying to figure out what do we do with these guys. True? [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And you have a bunch of these people that have never left, right? So some of the people, even though their sentence release date has been miscalculated, a bunch of them are still in prison. They're the easy guys. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: The guys who got out, what do we refer to them as? The lost boys? [LR424]

LARRY WAYNE: The women and the men that got out. [LR424]

SENATOR LATHROP: Do we refer to them as lost boys? Ever heard that phrase? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: Never heard it? [LR424]

LARRY WAYNE: Not in reference to the sentence miscalculations. [LR424]

SENATOR LATHROP: What's that a reference to? [LR424]

LARRY WAYNE: Lost boys? [LR424]

SENATOR LATHROP: Yeah. I've seen it in some notes. [LR424]

LARRY WAYNE: I don't know, Senator. [LR424]

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SENATOR LATHROP: Okay. We'll just say that there's a bunch of people that got free early because of a mistake in administration and now the question is what do we do with them. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: That would be the post-Castillas problem. Were you involved in any meetings with the Governor with respect to what are we going to do with these guys? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: When did you find out about Castillas? [LR424]

LARRY WAYNE: June 16, 2014. [LR424]

SENATOR LATHROP: Is that the date the World-Herald ran the story? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: Okay. When did the World-Herald run the story? [LR424]

LARRY WAYNE: I believe on June 13th or 14th, 2014. [LR424]

SENATOR LATHROP: Oh, you didn't even find out the day it was in the paper. [LR424]

LARRY WAYNE: I was returning from a leave out of state. [LR424]

SENATOR LATHROP: So you were on some kind of vacation or trip. [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: All right. Fair enough. A little bit of activity in the administration after that? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Like a lot? [LR424]

LARRY WAYNE: Like a lot. [LR424]

SENATOR LATHROP: Like we have a problem. [LR424]

LARRY WAYNE: Big problem. [LR424]

SENATOR LATHROP: We let a bunch of people out that...way too early. One guy was out ten years early I think I read in the paper. A bunch of them were out early. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Some of them for a short period of time and some of them for a long period of time. Do you remember that too? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: What involvement or what meetings did you attend after you got back from your trip to discuss what are we going to do with these guys that we incorrectly let out of prison? [LR424]

LARRY WAYNE: Director Kenney had assembled a team before I got back to address

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that issue and to work in concert with the Attorney General and to keep the Governor's Office informed. [LR424]

SENATOR LATHROP: Okay. So were you meeting with Director Kenney? [LR424]

LARRY WAYNE: I wasn't meeting with Director Kenney about that particular issue. [LR424]

SENATOR LATHROP: What were you meeting with him about? It sounds like you're qualifying your answer. [LR424]

LARRY WAYNE: Director Kenney had already put together the team before I got back and... [LR424]

SENATOR LATHROP: Were you on it? [LR424]

LARRY WAYNE: No, I was not. [LR424]

SENATOR LATHROP: Okay. Who was? [LR424]

LARRY WAYNE: I believe our public information officer/legislative liaison Dawn Renee-Smith, I believe our recently or more-recently hired legislative liaison Jeff Beaty, Director Kenney, and records manager II Mickie Baum. [LR424]

SENATOR LATHROP: Okay. Now Beaty is a lawyer, isn't he? [LR424]

LARRY WAYNE: Yes, he is. [LR424]

SENATOR LATHROP: And did that team include any of the people in legal, if you remember? [LR424]

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LARRY WAYNE: I don't believe so, Senator. [LR424]

SENATOR LATHROP: Okay. What was your role in all this, in that what are we going to do now that Castillas has come to light and we have a whole bunch of people we released early and the director has put a team together? What was your job, if anything, with respect to this? [LR424]

LARRY WAYNE: To help implement the decisions made by that team. [LR424]

SENATOR LATHROP: Okay. And was that team working with the administration?
[LR424]

LARRY WAYNE: It was informing the Governor's Office, yes. [LR424]

SENATOR LATHROP: Okay. That is all stuff that was happening above your pay grade.
[LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. But you had some involvement and that involvement included dealing with something called the T-A-P. Tell us what T-A-P means. [LR424]

LARRY WAYNE: Temporary alternative placement. [LR424]

SENATOR LATHROP: Okay. Before the Castillas decision came out, was that category in existence? [LR424]

LARRY WAYNE: No. [LR424]

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SENATOR LATHROP: Okay. So the T-A-P, temporary...what's it called? [LR424]

LARRY WAYNE: Alternative placement. [LR424]

SENATOR LATHROP: I got to write it down. That sounds like we're going to put them in county jails. But we didn't, did we? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: No, we put them in their own house, didn't we? [LR424]

LARRY WAYNE: We did. [LR424]

SENATOR LATHROP: Okay. You were involved in that, weren't you? [LR424]

LARRY WAYNE: I was. [LR424]

SENATOR LATHROP: And more particularly you were involved in it with respect to four people. Did you have just four people that you were worried about or a number of people? [LR424]

LARRY WAYNE: There were four people I believe who didn't meet the criteria for reentry furlough program who were doing well in their community placement, and it was seen as being unduly disruptive and unfair to bring them back off of our mistake when the last one would be...have completed their sentence by October 28 of this month. [LR424]

SENATOR LATHROP: Okay. So we have the Anderson Opinion. Do you know what the Anderson Opinion is? [LR424]

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LARRY WAYNE: I do. [LR424]

SENATOR LATHROP: Okay. And so I'm going to give you my take on the Anderson Opinion because I've read it. In Anderson v. Houston, Judge Heavican, writing for the Supreme Court, the Chief Justice writing for the Supreme Court, dealt with an inmate that was accidentally released early. Do you agree with that? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. And in that Opinion, Judge Heavican and that Supreme Court was faced with this question: What do we do when the Department of Corrections accidentally releases somebody early? And does that inmate get credit for the time he spends at liberty or free or at large, as the case may be? Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And Judge Heavican answered that question for the Supreme Court this way. He said that if a person is discharged early by mistake by the Department of Corrections, that person is entitled for day-for-day credit while he is free, provided two things are true. Didn't he? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And the two things that need to be true are, number one, the person has to not know that he's been released by mistake. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Right? So if somebody knows that they're being released by mistake or early because Corrections made a mistake, they have a duty to speak up

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and say, hey, you're letting me out early. Are you sure you got the right date because I don't want you dragging me back here in a couple years? Right? [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: So that's the first element where this equitable principle is available to an inmate. You got to know that there wasn't...you cannot know that there was a mistake. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: The second element is you can't break the law while you're out. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: So if you knew there was a mistake or if you broke the law, then you were, under the Anderson case, required to come back to the prison and start where you left off. Would that be true? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And that was everybody's understanding of Anderson. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And everybody's understanding of that Supreme Court Opinion. True? [LR424]

LARRY WAYNE: True. [LR424]

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SENATOR LATHROP: And we had just been through this whole thing with Castillas where the department didn't follow the Castillas Opinion that got us in this problem in the first place. True? [LR424]

LARRY WAYNE: Yes, yes. [LR424]

SENATOR LATHROP: Okay. And now we have...we're trying to fashion a solution but we're also bound by another Supreme Court Opinion written by Judge Heavican in 2008. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And that Opinion requires that we ask each inmate if they knew they were set free by mistake. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And the burden is on the inmate in that Opinion to establish that they didn't know about the mistake, not on the Department of Corrections. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Heavy burden, wouldn't you agree? [LR424]

LARRY WAYNE: Absolutely. [LR424]

SENATOR LATHROP: And they don't get the day-for-day credit if they've been breaking the law. And that was another Supreme Court Opinion that was in play as the administration and the department began to fashion what would be the response to the

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Castillas Opinion. True? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: I'm going to...in front of you is an e-mail and I want to talk about this e-mail because you're involved in it or at least Kyle Poppert is and you look like you're involved in this process. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Let's start...it would appear to be a string and it starts on the second page. And so that the record reflects this, and I apologize for doing this to you, Mr. Wayne, but it is an e-mail from Kyle Poppert dated Thursday, July 31, 2014, at 6:37 in the morning to Gibson-Beltz, Cathy, and Larry Wayne, and the subject is Petit number 71238. Do you see that? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. This starts out from Kyle: Cathy, please have a parole officer investigate the following plan ASAP for placement on alternative housing. This would be that new TAP program you talked about, right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: He will need to be placed on electronic monitoring and will need face-to-face visits twice weekly with the parole officer. There are no other conditions required at this time. If something comes to the attention of the PO which may require closer supervision, please let Larry know. That would be you. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

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SENATOR LATHROP: I spoke with Mr. Petit. He's very cooperative and expecting a call from the PO. His placement was at CCC-O, convicted of child enticement. His TRD, temporary release date, right? [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: So when he's supposed to get out and it still hasn't happened yet, has it? September 18, 2014. [LR424]

LARRY WAYNE: Not as of July 31, no. [LR424]

SENATOR LATHROP: Okay. Well, he's still out isn't he? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Okay. I updated his status in CTS showing his supervision effective today. So if there's any issues arising out of the investigation, please let Larry and I know right away. So you're working with Kyle Poppert to get this guy placed. [LR424]

LARRY WAYNE: And with Cathy Gibson-Beltz, yes. [LR424]

SENATOR LATHROP: Okay. And by placed, do you know did this guy...did anybody bring him in and ask him if he knew he was let out early by mistake? [LR424]

LARRY WAYNE: He was contacted by the parole officer as part of the temporary alternative placement. I don't know if that question was asked: Did you know you weren't supposed to be out? I don't know if they asked him that. [LR424]

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SENATOR LATHROP: I didn't even see the Governor mention that element in his press conferences, nor the Attorney General. So do you know of anybody who was ever asked if they knew they got out on mistake? Can you think of one person who was asked that? Let me put it that way. [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: Okay. So the first part of Anderson that we've dispensed with in the process of coming up with a post-Castillas solution is did you know you got out early on mistake. We just didn't bother asking people. We, what, assume they didn't know or we just didn't think it was important? It is a Supreme Court Opinion. [LR424]

LARRY WAYNE: I believe we assumed that the people who were let out early believed they were let out lawfully and in accordance with their...when they were supposed to go. [LR424]

SENATOR LATHROP: By not asking, it did help with our overcrowding problem, didn't it? I mean, if one of these guys said I knew that I got out early, we'd have more of an overcrowding problem, wouldn't we? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: We'd have to bring them back and we didn't want that. So let's go on with this case of this fellow who you and Mr. Poppert are working with who apparently was, and I don't want to cause...does this guy live in Nebraska? [LR424]

LARRY WAYNE: Mr. Petit? [LR424]

SENATOR LATHROP: Yeah. [LR424]

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LARRY WAYNE: I believe so. [LR424]

SENATOR LATHROP: Okay. Well, I'm not trying to make an example out of him or put his circumstance out. But he does look like he was convicted of child enticement, right? And now we're going to leave him out without making him come back. And this string of e-mails is a string of e-mails dealing with the creation of a category that doesn't exist in the law called the temporary alternative placement. True? [LR424]

LARRY WAYNE: Yes, that's true. [LR424]

SENATOR LATHROP: It never existed before the World-Herald broke the story on Castillas. Is that right? [LR424]

LARRY WAYNE: It never existed before then. [LR424]

SENATOR LATHROP: Okay. Did you ever talk to anybody about whether that was lawful? [LR424]

LARRY WAYNE: I did. [LR424]

SENATOR LATHROP: Who? [LR424]

LARRY WAYNE: George Green and Sharon Lindgren. [LR424]

SENATOR LATHROP: And Kathy Blum, right? [LR424]

LARRY WAYNE: Kathy...George and Sharon are the ones I remember talking with me about it, yes. [LR424]

SENATOR LATHROP: Okay. You had a meeting in their office, didn't you? [LR424]

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LARRY WAYNE: They met in my office, yes. [LR424]

SENATOR LATHROP: Right. That would have been George Green and Sharon Lindgren... [LR424]

LARRY WAYNE: And Kathy Blum. Yeah. [LR424]

SENATOR LATHROP: ...and Kathy Blum sat down in your office and told you that setting up the temporary alternative placement program was not authorized in the law. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: And what we were going to do with this program, and I'll talk to Director Kenney about this a little bit, but what we have are 200...306 people who are released early and 257 of them are at or near the period of time where they would have completed their term had they remained incarcerated. Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: So you still have a significant number who are free but would not be released yet. Right? [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: And in order to accommodate these people and not bring them back, like the Supreme Court Opinion in Anderson would require, we're going to create a new classification of prisoner. Is that right? [LR424]

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LARRY WAYNE: That's correct. [LR424]

SENATOR LATHROP: And that prisoner is going to be the guy that gets to go home.
[LR424]

LARRY WAYNE: It is. [LR424]

SENATOR LATHROP: And Anderson, the Supreme Court Opinion in Anderson...and I'm just going to stop and observe the irony, okay? The irony is that we got into this mess by ignoring the Supreme Court Opinion in Castillas and we're going to try to get out of the mess by ignoring the Supreme Court Opinion in Anderson. Right? And instead of making these people come back that owed the state and their victims time behind bars, we're going to let them remain free and do it by creating something called the temporary alternative placement classification for prisoners. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And what that is, is a euphemism for "you get to go home." Right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And they're going to wear an electronic monitor and they're going to have to check in with a parole officer, but there's no basis in the law for this category. Right? [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: And George Green sat down and told you that. [LR424]

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LARRY WAYNE: He did. [LR424]

SENATOR LATHROP: Now, before George Green came into your office to tell you that this was against the law, did you have any conversation with Mike Kenney, anybody in the administration, anybody about the wisdom of creating a class of prisoner who got to go home and sit on the couch? [LR424]

LARRY WAYNE: Director Kenney and I discussed it before then. [LR424]

SENATOR LATHROP: Before then? And did you share with him ultimately that George Green, two of the people in legal counsel who, by the way, just got burned for not telling you what you need to do when it comes to following a Supreme Court Opinion, two people in...or three in legal counsel have just told you that you can't do this? [LR424]

LARRY WAYNE: I did tell him that, yes. [LR424]

SENATOR LATHROP: All right. And George Green told you there was no basis in the law for it, right? [LR424]

LARRY WAYNE: He told me that, yes. [LR424]

SENATOR LATHROP: And he also shared with you a 1991 Attorney General Opinion, Opinion 1 in 1991, dated in January of 1991, where Bob Spire was the Attorney General and they asked him: Can we let people out without approval from the Board of Parole? You remember him talking about that? [LR424]

LARRY WAYNE: I remember George Green said he strongly advised against implementing the temporary alternative placement program. [LR424]

SENATOR LATHROP: Because it was against the law. These people who are allowed

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to be outside of a facility need to be sent there or approved by the Board of Parole, and he told you that. [LR424]

LARRY WAYNE: I believe so. [LR424]

SENATOR LATHROP: And he sent you a memo to confirm that. Am I right? [LR424]

LARRY WAYNE: It's right in front of me, yes, dated July 31, 2014. [LR424]

SENATOR LATHROP: This would be a memo and it says it's from George Green, general counsel. And it's a conversation apparently he had with you July 30, 2014. Is that right? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And it's about this temporary alternative placement program. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And by the time he has this conversation with you about the legality of this program and creating this new class of prisoner that's free and not required to come back, like Anderson would require, did you know whether the Attorney General had been involved in creating this temporary alternative placement category? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR LATHROP: Do you know where it came from? [LR424]

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LARRY WAYNE: Director Kenney and I discussed it. [LR424]

SENATOR LATHROP: What did he tell you about where this idea came from? [LR424]

LARRY WAYNE: He said that he believed, in his estimation, bringing back this relatively small number of people who were doing well would be a greater miscarriage of justice than leaving them out there, in spite of the objections of our legal counsel. [LR424]

SENATOR LATHROP: Okay. The objections of the legal counsel were this is against the law. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And Director Kenney told you he was going to do it anyway. My question, though, was whether you knew where this program came from. Who devised this TAP program where prisoners get...instead of coming back and serving the time they owe their victims, are going to sit on the couch with a bracelet on their foot? [LR424]

LARRY WAYNE: Director Kenney. [LR424]

SENATOR LATHROP: It was his idea. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: Did he run it by the Attorney General, if you know? [LR424]

LARRY WAYNE: I don't know. [LR424]

SENATOR LATHROP: So these lawyers come into your office, or do you go into theirs?

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[LR424]

LARRY WAYNE: They came to me. [LR424]

SENATOR LATHROP: Okay. I take, from the fact that they sent sort of a cover-your-backside memo to you, that things are getting a little tense over at Corrections about this time. [LR424]

LARRY WAYNE: Very much so. [LR424]

SENATOR LATHROP: And to make it perfectly clear, and I'm going to read this just so that the record reflects what's in it, this is July, it's dated July 31, 2014, to Larry Wayne, deputy director, programs and community services. It's from George Green, general counsel. And it's entitled "Alternative Placement for Inmates," and it reads as follows: On July 30, 2014, Sharon Lindgren, Kathy Blum, and I met with you in my office to discuss an administrative decision to place certain inmates in the community. You informed us that there were four inmates who were released from incarceration prior to their tentative release dates because the Nebraska Department of Correctional Services did not properly calculate their mandatory minimum sentences. You further stated that properly calculating these inmates' sentences, they have less than six months to serve on their sentences but would not be eligible for parole nor be eligible for placement on reentry furlough because either the Board of Parole or the county attorney would not approve that placement. You informed us that the inmates would be placed on electronic monitoring and be required to have contact with a parole officer at least twice a week. I, along with Sharon Lindgren...or, pardon me, I, along with Sharon and Kathy, both lawyers, advised you that we did not think there was a legal basis for the department to allow these inmates to remain in community on this status without the approval of the Board of Parole. Did I read that correctly? [LR424]

LARRY WAYNE: You did. [LR424]

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SENATOR LATHROP: And is that what George Green advised you of? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And did you release these people nevertheless? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And did you do that at the direction of Director Kenney? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: And that was after you advised Director Kenney that legal counsel thought this was against the law. [LR424]

LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: Do you know whether any of these four...well, it's more than four people, is it not? [LR424]

LARRY WAYNE: I believe... [LR424]

SENATOR LATHROP: It's significantly more than four. [LR424]

LARRY WAYNE: I believe it's six or seven. [LR424]

SENATOR LATHROP: Six or seven people were allowed to go to their homes in a program that was devised over at the Department of Corrections apparently... [LR424]

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LARRY WAYNE: Correct. [LR424]

SENATOR LATHROP: ...or maybe somewhere else. But at least, far as you know, Director Kenney devised this program and sent these guys home against the law. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR LATHROP: That's all I have. Go ahead. [LR424]

SENATOR KRIST: Thank you, Chair. Can you tell me what your understanding is of the definition of plausible deniability? Did you want some help? [LR424]

LARRY WAYNE: Please. [LR424]

SENATOR KRIST: And I'm going to read it because I want to make sure that the lawyers in the room know that I didn't misquote it. In a legal definition, it's a condition in which a subject can safely and believably deny knowledge of any particular truth that may exist because the subject is deliberately made unaware of said truth so as to benefit or shield the subject from any responsibility. I've sat through all these hearings and I have listened to folks at almost every level now--we'll hear from the director, the new director in a minute--and it's been said that there's plausible deniability. And I think that Senator Lathrop's staff and this committee has done a good job in eliminating as much of that plausible deniability as we can because there's so much e-mail traffic and so much that says in so much testimony that confirms that indeed people in almost every position did know what was going on. What bothers me, sir, is that all of the folks who have come before us, many of them, when they don't choose to remember or they have selective memory to protect themselves and to protect those that they are supposed to protect, and I use that term deliberately, can't remember, slipped your memory, can't confirm. There's another definition for plausible deniability and it's denial

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of blame in a loose and uninformed chain of command where upper rungs generally blame the lower rungs. I worked in an environment where, in our federal government, where should I have been exposed to interrogation for the things that I knew, I was given special training. And you're pretty good because the answers that you have given have shielded you and others around you in most cases. I think it is in the best interest of this state and it's in the best interest of the safety of not just Senator Chambers' district but of my own, which borders the last of the slayings, that we tell it like it is, we make sure that we correct the issues that have been inconsistent or deliberately look beyond. The last few questions that Senator Lathrop asked you were probably tough questions for you to answer because, indeed, it wasn't just blaming lower levels but you put it squarely on the director, and I think that's notable. But I think plausible deniability has all but been overruled in almost every case. And I would hope that the director in his testimony would take note and would take the leadership that you've shown in the last few questions of telling it like it was, even if it was just a small part of your communications. Thank you. [LR424]

SENATOR LATHROP: Senator Mello. [LR424]

SENATOR MELLO: Thank you. Thank you, Mr. Chairman. A couple issues, Mr. Wayne: If you could go back to pages 145 and 144, the e-mail conversation between Dr. White, yourself, and Dr. Weilage. You had answered Senator Lathrop earlier saying that if you would have known that Nikko Jenkins had a mental illness that things would have been different. If you start on page 145, where Dr. White, you can read it but I'll read it out, quote unquote, he's also getting questions: Larry is fielding questions from the Ombudsman's on the Jenkins case and his discharge planning. He's also getting questions such as if he has a prior diagnosis of schizophrenia, why isn't he considered MI now? That's Dr. White sending the e-mail to Dr. Weilage and it appears to CC you on the e-mail, because on page 144 you say, thanks, Cameron; thanks, Mark. And then you see Dr. Weilage's response to you, Dr. White, and Kathy Foster that also lays out, that first sentence I'll read: The same records from Douglas County basically said

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schizophrenia or malingering. These e-mails were sent on your behalf to ferret out a little bit in regards to Mr. Jenkins' mental health or behavioral problems. And you told Senator Lathrop earlier in your testimony that if you would have known that there was other diagnosis besides what Dr. Weilage said or has told you, things would have been differently. I don't see how you don't read the e-mails from Dr. White acknowledging the schizophrenia from a prior diagnosis, as well as the e-mail from Dr. Weilage in response that also acknowledges a schizophrenia diagnosis, and not question either one of them in regards to your reply e-mails, both just simply saying, thanks, Cameron; thanks, Mark; okay, thanks, Mark. Was that...I mean did you just simply not read these e-mails but simply perfunctory in regards to your reply back of not really reading that they both acknowledged there was an alternative diagnosis for Mr. Jenkins but you simply chose not to acknowledge it? [LR424]

LARRY WAYNE: I am trying to read through this quickly, Senator. I know we're pressed for time so I want...and I want to give you, though, the most accurate response I can. I'm reading the e-mails you're referring to and I keep seeing the same thing. I do not consider him to be majorly mentally ill. He does display symptoms and there is ample evidence that he is in control of these symptoms. I don't understand where the inconsistency arises. [LR424]

SENATOR MELLO: I think the inconsistency, if you look at page 145 from Dr. White,... [LR424]

LARRY WAYNE: Okay. [LR424]

SENATOR MELLO: ...that is the foundation of the communication between the three of you, where he acknowledges that he's getting...that you were getting questions from the Ombudsman's Office in regards to prior diagnosis of schizophrenia, and Dr. White's response is, my view is that we need to treat the symptoms that are currently presenting as opposed to those seen in the past. So Dr. White is acknowledging to you and Dr.

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Weilage, both, that he has had a past diagnosis of schizophrenia. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR MELLO: And then Dr. Weilage also acknowledges that he also has a diagnosis...past diagnosis of schizophrenia but chooses to give his alternate...I mean, his interpretation or his diagnosis in regards to he doesn't think it's schizophrenia but it's a behavioral problem more than anything else. [LR424]

LARRY WAYNE: Absolutely. [LR424]

SENATOR MELLO: You mentioned before you had no idea and no understanding, in a previous question from Senator Lathrop, that you had heard any other alternative diagnosis except from Dr. Weilage; that there was no other...there was no other understanding, from your point of view,... [LR424]

LARRY WAYNE: Okay. [LR424]

SENATOR MELLO: ...that he had any other diagnosis; that he was simply...Dr. Weilage's diagnosis was gospel and he said it was purely behavioral. [LR424]

LARRY WAYNE: Right. I was referring to what's been...there's been a lot of testimony about Dr. Baker's and diagnosis on Mr. Jenkins that came closer to 2013. I was aware of Jenkins' time in Douglas County and a clinician there who said, yeah, he's mentally ill. I was also of the belief that people can be perceived by a clinician as being mentally ill in 2010, and by a different clinician at a different time three years later as, well, really not so much now. And I was going off of what I knew to be the only current diagnosis, but I stand corrected. You are accurate in that I was aware--I don't know if I'm saying his name right--that Dr. Oliveto... [LR424]

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SENATOR MELLO: Oliveto. [LR424]

LARRY WAYNE: ...had in fact...and the Ombudsman and James Davis and I had talked about Dr. Oliveto's concerns that he was...Jenkins was mentally ill. Okay, in 2010 Dr. Oliveto believed this. In 2013, Dr. Weilage says now not so much. [LR424]

SENATOR MELLO: Uh-huh. I appreciate the correction on the record. Thank you, Mr. Wayne. And speaking of Mr. Davis, you were here this morning to hear Mr. Davis and Mr. Moreland's testimony in front of the committee. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR MELLO: Do you recall the conversation that was had with Mr. Davis here at the State Capitol cafeteria to discuss Mr. Jenkins' case? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR MELLO: Do you recall the conversation in the sense that Mr. Davis was fairly emphatic in his point of view that Mr. Jenkins was dangerous, that Mr. Jenkins had a mental illness and that he was going to leave the Department of Corrections out of administrative confinement and fulfill what he was afraid that he would fulfill, what he had...what Mr. Jenkins had told multiple people, that he was going to go murder people after he left Corrections? [LR424]

LARRY WAYNE: With a couple exceptions, if I may. James Davis never told me, nor did anyone else, that Nikko Jenkins was talking about killing people. I heard about that in the fall of 2013. James and Jerall and Barb Brunkow and I did talk about how he was doing at the penitentiary in transition confinement. I acknowledged that it wasn't nearly as much time as ideal, far from it, in fact, but that he seemed to be doing as well as could be expected given the far from perfect circumstances of his placement and his

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upcoming release. [LR424]

SENATOR MELLO: So you're saying that you did not hear Mr. Davis at your meeting that was held here in 2013 at the Capitol, you did not hear him say that Mr. Jenkins, if released, was going to go out in the community, primarily in Senator Chambers' district, in District 11 in north Omaha, was going to go out and murder and fulfill what he's been telling people of killing innocent people? [LR424]

LARRY WAYNE: That's correct. I never knew that Mr. Jenkins was making those comments until the fall of 2013. [LR424]

SENATOR MELLO: Did you then say...do you remember the conversation in regards to what you said in response to Mr. Davis at the meeting that was held here at the Capitol that, I believe--I'm paraphrasing slightly and it is in the permanent record--but that you told Mr. Davis that you can't...what...that Mr. Jenkins can't go in the general population because you were afraid of what he would do in regards to the safety and health of Corrections' staff and their families, as well as other inmates in the Department of Corrections? [LR424]

LARRY WAYNE: I was very concerned about what Mr. Jenkins was going to do after he was released on July 30, very concerned. The problem I had before me that I could do something about as opposed to after July 30 was trying to keep other inmates and staff safe from this violent and dangerous individual, and that's how I was trying...how we, as an agency, were trying to address that reality while still do what we could for him in socializing in the short window we had before his discharge. [LR424]

SENATOR MELLO: I guess just kind of a follow-up question: Who is Rex Richard again? [LR424]

LARRY WAYNE: Rex Richard is a member of the Nebraska Board of Parole at this

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time. Back a few years ago he was warden at the Community Corrections Center in Lincoln. And for just under a year, I believe, he was also on special assignment to central office to help us on doing some of the things that Senator Lathrop was asking about relative to identifying people who were at low or manageable risk to be kind of pushed forward to be considered for parole and community placement. [LR424]

SENATOR MELLO: So time frame wise or time line, for us to get, I guess, an understanding, that Rex Richard was essentially a lifetime Department of Corrections employee... [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR MELLO: ...who was a warden prior to former Director Houston's population reduction initiative... [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR MELLO: ...in which he was then transitioned from being a warden to the reentry coordinator, was a special assignment, special title? [LR424]

LARRY WAYNE: He was placed on a special assignment. I don't remember that he had a specific title for that. [LR424]

SENATOR MELLO: I think in the e-mails I think we have available to us, I think he's called the reentry coordinator, if I'm not mistaken. [LR424]

LARRY WAYNE: I think that might be accurate, Senator. [LR424]

SENATOR MELLO: Yes, reentry coordinator, in which that reentry coordination, as Senator Lathrop asked you earlier, was to identify potential parolees from the

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Department of Corrections to be able to give to the Board of Parole in the sense of trying to reduce the overall prison population through the parole process? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR MELLO: Was there any pushback at all coming from the Board of Parole when Rex Richard was doing the reentry coordination prior to 2012? [LR424]

LARRY WAYNE: Rex has a...he is a very good individual for getting consensus and for communicating verbally and in writing. I think he did as well as anyone could possibly do in identifying the people who were low or manageable risk to be considered for the board. I think he also did a remarkable job of identifying the people who absolutely should not be considered for community release because they would be dangerous to themselves or others. [LR424]

SENATOR MELLO: I'll re-ask my question. There was some pushback coming at times from the Board of Parole in regards to this prison population reduction initiative that Rex Richard was implementing on behalf of former Director Houston in identifying potential parolees. The Board of Parole was not moving as fast as, let's say, the department would have hoped in regards to moving these potential parolees through the system. Is that an accurate statement? [LR424]

LARRY WAYNE: Yes, it is. [LR424]

SENATOR MELLO: What happened in 2012 in regards to Bob Boozer? [LR424]

LARRY WAYNE: Bob Boozer passed away suddenly and unexpectedly. We didn't even know he was ill, and it just happened. [LR424]

SENATOR MELLO: So Mr. Boozer, who was a member of the Board of Parole, passed

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away. The department was having a difficult time, to some extent. I'll paraphrase it, was the Board of Parole was not as quick or fast to move on the Department of Corrections' population reduction initiative that Rex Richard was assisting on of trying to find parolees. They may have been putting some parolees through but not at the level that the department wanted. It's an accurate statement, just paraphrasing what you just answered me. [LR424]

LARRY WAYNE: But it would be an incomplete response and inaccurate to say that they weren't doing a lot and putting a lot more people out. [LR424]

SENATOR MELLO: They were not moving as fast as the department...my question was they were not moving as fast as the department was wanting them to move in regards to the number of parolees the department was giving them in comparison to those they were actually paroling. [LR424]

LARRY WAYNE: In order to meet our budgetary objectives, correct. [LR424]

SENATOR MELLO: To meet the prison population reduction initiative. [LR424]

LARRY WAYNE: We had specific numbers of people that... [LR424]

SENATOR MELLO: ...had to be pushed out. [LR424]

LARRY WAYNE: If they were low risk or manageable risk, then we needed to try to move them in order to fulfill our commitment to the taxpayers to lower our budget. [LR424]

SENATOR MELLO: That was the, real quick, that was the budget that Director Houston requested on behalf of the Governor in 2011? [LR424]

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LARRY WAYNE: Yes. [LR424]

SENATOR MELLO: Okay. What happened when, after Bob Boozer passed away, what happened to his seat on the Board of Parole? [LR424]

LARRY WAYNE: The Governor appointed Rex Richard to replace Mr. Boozer on the Board of Parole. [LR424]

SENATOR MELLO: So Rex Richard was tasked with being the project manager for the department for the population reduction initiative to meet the Governor's budget proposal for the Department of Corrections to move inmates out of the system as quick as they could. The Board of Parole was not moving those individuals as fast as the department was providing those individuals to the Board of Parole. And in that same process, that time line, one of the Board of Parole members unfortunately passed away and that replacement was the individual who was in charge of providing names and moving that process forward within the Department of Corrections to move those parolees out through the Board of Parole. Would that be an accurate portrayal of kind of the scenario we're discussing? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR MELLO: How did the process work after Rex Richard left the department and moved to the Board of Parole? Things sped up a little bit. [LR424]

LARRY WAYNE: They may have. I don't have the numbers in front of me, not to the point where we reached the goal that we had established to try... [LR424]

SENATOR MELLO: The 191 to 200 per month goal? [LR424]

LARRY WAYNE: Yes. [LR424]

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SENATOR MELLO: But there was a number of parolees. That number did increase once he left Corrections and moved to the Board of Parole. [LR424]

LARRY WAYNE: Senator, I don't know for certain. I would have to look at it. But I'd be surprised if maybe that weren't true at least at some level, that they did increase at least for a while. [LR424]

SENATOR MELLO: Okay. [LR424]

LARRY WAYNE: I think by today though...well, never mind. [LR424]

SENATOR MELLO: Thank you, Mr. Wayne. [LR424]

LARRY WAYNE: Yeah. [LR424]

SENATOR LATHROP: Senator Seiler. [LR424]

SENATOR SEILER: I'd like to get this and some of this information in the record. It's called the Nebraska Department of Correctional Services. You're familiar with that. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SEILER: And it's saying that on December...or, excuse me, September 30, 2014, our actual population is 5,151 for all the facilities. And then it talks about the parole population being 18.06 percent of the DCS population, which is the number I just read, and that would be 1,097. Do those numbers sound correct to you? [LR424]

LARRY WAYNE: They do. [LR424]

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SENATOR SEILER: Okay. Now one of the things that I was concerned with on page 139 when you were talking about the "no" list and the...Richard was lining up the different possibilities of parole and the numbers. Throughout my term on the jurisprudence committee...or Judiciary Committee, it seemed like we've always heard that their problem holding up parole is the testing and the programs that are not being done. Did Rex Richard waive those programs? [LR424]

LARRY WAYNE: No, he did not. [LR424]

SENATOR SEILER: So you still kept the programs even though you were pushing. [LR424]

LARRY WAYNE: We migrated a lot of the clinical services into the day reporting centers in the community, and as people went on parole or community custody programming they were asked, made to avail themselves to the programming that was required there. [LR424]

SENATOR SEILER: So you got the program out from under the in-house, put it out there, paroled them, and then said, you got to take this. And if they didn't take the course, did they come back? [LR424]

LARRY WAYNE: Not always. [LR424]

SENATOR SEILER: Okay. So then the people that are still waiting to take programs to get released, they're just kind of caught in a squeeze. Is that right? [LR424]

LARRY WAYNE: We've shifted. Since 2013, paroles are down again. Clinical programming for mental health and substance abuse has been pushed, for the most part, back into minimum and medium, maximum security facilities. It's still available but

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not as available to parolees and community custody inmates, particularly through the day reporting centers and through our parole offices in Omaha and Lincoln. But it has been put...a lot of the clinical resources have been put back into the secure facility, Senator. [LR424]

SENATOR SEILER: Okay. That's all I have. [LR424]

SENATOR LATHROP: Senator Bolz? Senator Schumacher. [LR424]

SENATOR SCHUMACHER: Thank you, Senator Lathrop. First, kind of an easy question: Is your calendar accessible over your phone? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: Can you look up where you were October 28, 2013? [LR424]

LARRY WAYNE: I just received a new phone within the last few weeks because the old one I had was a few years past the time when you're supposed to turn it in. But I will...and I, if I can't, that will be the reason why. [LR424]

SENATOR SCHUMACHER: Okay. [LR424]

LARRY WAYNE: Let me look here. [LR424]

SENATOR SCHUMACHER: I know when I get a new phone, they do some magic with it and all the data from one appears on the other unless I erase it ahead of time. [LR424]

LARRY WAYNE: Senator, I don't have anything on here prior to September of this year, when I received this. [LR424]

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SENATOR SCHUMACHER: Is your old phone still in existence? [LR424]

LARRY WAYNE: It might be. I don't know if it was surplussed or not. I turned it in.
[LR424]

SENATOR SCHUMACHER: Okay. And do you have access to your calendar as it was
on October 28, 2013? [LR424]

LARRY WAYNE: It might be on my desktop back in my office. [LR424]

SENATOR SCHUMACHER: So this is all electronic calendar. [LR424]

LARRY WAYNE: That's what I use, yes. [LR424]

SENATOR SCHUMACHER: Okay. So...and it might be on some backups of that
desktop? [LR424]

LARRY WAYNE: I would expect so, yes. [LR424]

SENATOR SCHUMACHER: And do you know where they exist? [LR424]

LARRY WAYNE: I would have to talk with our information technology folks and see if
they could locate that. I'd be interested myself... [LR424]

SENATOR SCHUMACHER: Okay, would you... [LR424]

LARRY WAYNE: ...to know where I was on October 28, 2013. [LR424]

SENATOR SCHUMACHER: If that information exists, would you provide it to us?

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[LR424]

LARRY WAYNE: I will. [LR424]

SENATOR SCHUMACHER: A couple of odds and ends before we get into some of the other...our bigger issues: Is it your testimony today then that after that discussion in the cafeteria here with the Ombudsman's Office that your great concern of what would happen if Mr. Jenkins would have been released into the general population? [LR424]

LARRY WAYNE: Do I recall that conversation? [LR424]

SENATOR SCHUMACHER: Yeah, I mean is that accurate? [LR424]

LARRY WAYNE: That is accurate. [LR424]

SENATOR SCHUMACHER: Okay, so you were very concerned that this guy was dangerous. He may even beat up guards and trained personnel and other inmates within the institution were he to be let out of solitary. [LR424]

LARRY WAYNE: He received an extra two years on his sentence for assaulting a correctional officer. [LR424]

SENATOR SCHUMACHER: Okay. And along this same line, some things we were told this morning, apparently Jenkins as well as others were involved in some kind of a skirmish or something back in the mid-2000s, a riot of some kind, and you were quoted as saying, "We will bury them in solitary." [LR424]

LARRY WAYNE: I categorically deny that statement. [LR424]

SENATOR SCHUMACHER: Okay. So if we heard testimony this morning, the party

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testifying was mistaken? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: Okay. Now when Mr. Jenkins was returned to the penitentiary and then the Lincoln...the non-Omaha facilities, as I put them...what facilities that you work with down here, that was about 18 months, 2 years before his scheduled release? [LR424]

LARRY WAYNE: I think so. [LR424]

SENATOR SCHUMACHER: Okay. Now we've heard lots of testimony today that, you know, one of the problems here was by the time February of 2013 turned up, he was just a few months away from his release, not much could be done. But when he was...but you had to know or somebody had to know that when he came back from Omaha he was going to be only a year or two away from release, and it was high time to get work on integrating him back into the system. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: And instead, he went to solitary and for the most part sat there until the Ombudsman's Office contacted you folks a few months ahead of time. [LR424]

LARRY WAYNE: That's correct. [LR424]

SENATOR SCHUMACHER: And what systemically went wrong there that someone didn't say, you know, we got kind of a real dangerous character here; and we need to plug him into a release program because we only got one or two years to deal with this guy, so we got to do something? So where did the system fail there? [LR424]

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LARRY WAYNE: Well, we could point...there's been a lot of discussion about finger pointing and I'm not going to engage in that. [LR424]

SENATOR SCHUMACHER: I don't want to know who failed or who said what. I just want to know what went wrong. [LR424]

LARRY WAYNE: We should have, way well out in front of February 2013, been looking at Nikko Jenkins and every other inmate who was designated to likely discharge from restrictive housing all the way out to the community. It's been happening for years and it's a huge concern. It has been for years. We should have been way on top of that. [LR424]

SENATOR SCHUMACHER: Well, you seem, from your answer, to be rather emphatic that it was a big concern, that it was something that needed to be addressed. Was it talked about, that we need to address this? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: Who...again, trying to avoid fingerprinting (sic) because a lot of this is water under the bridge, why wasn't action taken? Where was the "no, we don't want to address this" coming from? Was it coming from budgetary concerns? Was it coming from staffing concerns? Is there a shortage of trained personnel? What was the cause that somebody didn't say, you know, do we really want these cats running in the street without prior reconditioning? [LR424]

LARRY WAYNE: I don't know, Senator. [LR424]

SENATOR SCHUMACHER: Well, you must have been part of these discussions. I mean your sentiment is very clear coming through that something damn well should

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have been done. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: Okay. Why wasn't it done? [LR424]

LARRY WAYNE: If I had an answer, I would give it to you. [LR424]

SENATOR SCHUMACHER: Okay. Well, apparently, there were like these monthly meetings that everybody got together and chewed the fat and got a chance to talk about the problems. Was it brought up there? [LR424]

LARRY WAYNE: Not that I recall. I discussed it. I remember discussing it with staff, saying the same thing Jerall Moreland and James Davis attributed to me in our meeting that it's of great concern, scary to think that we have people that are too dangerous to be out in general population with murderers, you know, hardened criminals, and yet we're going to release them into general...the public? I had those conversations and I... [LR424]

SENATOR SCHUMACHER: When you... [LR424]

LARRY WAYNE: Excuse me. [LR424]

SENATOR SCHUMACHER: When you had these round-table discussions when you're called together once a month and then somebody typed up a nice, pretty report for the Governor's Office, I mean, wasn't that a chance to say, darn it, what are we going to do with these people? [LR424]

LARRY WAYNE: It would have been a good chance to do that, yes. [LR424]

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SENATOR SCHUMACHER: And nobody did. Were you the only one that shared that opinion about something should be done? Was the directors, were the "subdirectors," the shrinks, the psychologists the somebodies? [LR424]

LARRY WAYNE: I can't imagine any rational human being who could look at someone who's too dangerous to be in general population of a maximum security prison that is going to be released to the community and not think that that was a problem. [LR424]

SENATOR SCHUMACHER: And why didn't all these, appears to me, pretty smart, educated people having these meetings all together didn't? Was there some overshadowing thing that said we don't talk about this? [LR424]

LARRY WAYNE: No, because I did talk about it. I just didn't talk about it in the right way with the right people. [LR424]

SENATOR SCHUMACHER: Did you talk to the director about it? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR SCHUMACHER: Did you ever have any...I mean was there any open houses or discussions or something with the Governor's chief of staff, with anybody up the ladder? [LR424]

LARRY WAYNE: No, Senator, the discussions were always informal that I was engaged in. They weren't substantive and they didn't produce anything other than people sharing their concern that, yeah, it's a bad thing, and not until four people are dead and we come here. [LR424]

SENATOR SCHUMACHER: Well, Senator Mello's committee, the Appropriations Committee, receives budget requests if there's a need for budget money. You know,

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you've got a state senator that is Judiciary Committee Chair. Anybody that shared your feelings, to your knowledge, or did you pick up the phone and say, you know, we got a mess here, we are not addressing this issue; do something to help us when you write all these bills? [LR424]

LARRY WAYNE: Most of my time and attention was focused on the other 2,000 or so that are getting out, not from segregation but from community custody or going on to parole. I did not focus on that smaller but very volatile and important part of our population. [LR424]

SENATOR SCHUMACHER: And that part of the population that you were focused on, the 2,000 or some others who were getting out on parole, most of them are drug types or mental types or probably not very dangerous. [LR424]

LARRY WAYNE: Most of them, yes. [LR424]

SENATOR SCHUMACHER: Yeah. So of the people in our penitentiary system that fit into that category, social problems, probably not very dangerous, probably the kind of people you can put an ankle bracelet on and say, stay at home, what percentage is that of that population we look at as compared to the people that you want to say, we want to keep these people behind bars a long time? What's the balance? [LR424]

LARRY WAYNE: The percentage of people that we have less concern about is considerably higher than the folks that for whom we have considerable concern. [LR424]

SENATOR SCHUMACHER: 60/40? [LR424]

LARRY WAYNE: I would say 98/2. [LR424]

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SENATOR SCHUMACHER: Ninety-eight percent of this population is not a danger... [LR424]

LARRY WAYNE: I'm sorry, I misunderstood your question. [LR424]

SENATOR SCHUMACHER: Okay. [LR424]

LARRY WAYNE: I was referring to that small percentage of inmates who discharge from segregation and it's less than 2 percent each year. [LR424]

SENATOR SCHUMACHER: And then we're not communicating. [LR424]

LARRY WAYNE: I'm sorry. [LR424]

SENATOR SCHUMACHER: Of the entire prison population, you indicated your primary work and time is consumed on getting the people who aren't dangerous processed through the system, rather than focusing on the handful who are really bad boys, right? Is that correct? I mean... [LR424]

LARRY WAYNE: My testimony is that I was primarily focused on the people who were being released from general population or from community custody facilities. [LR424]

SENATOR SCHUMACHER: Back to the... [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: Okay. And that's a more nonviolent, more drug, more mental health type of character? [LR424]

LARRY WAYNE: Some are violent. Some are violent and some are of higher concern

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than others. I couldn't...it would be hard for me to break out. The folks who go on parole that we consider to be higher risk, they're held at a higher level of supervision. They have to be seen at greater frequency. But if they're discharged, I don't know what that percentage looks like. [LR424]

SENATOR SCHUMACHER: But of the people who are in custody now in the penitentiary or the Tecumseh or the Lincoln Corrections Center, of them, how much...what percentage of that population needs to be there because they are dangerous, because they've done bad things, really bad things? And what percentage are there because of mental issues, because of drug-type issues, and who, as a practical matter, don't really need to be there and you really wouldn't have a lot of heartburn if they were cut loose? [LR424]

LARRY WAYNE: That's a pretty...would require a pretty unscientific ballpark. [LR424]

SENATOR SCHUMACHER: Yeah, but you've been around. [LR424]

LARRY WAYNE: I could give you an educated guess based upon my years of experience. [LR424]

SENATOR SCHUMACHER: Yeah. I'm just interested. [LR424]

LARRY WAYNE: I would say 20 to 30 percent would represent folks that we would be concerned about and really want to focus on, really emphasize programming for and see how they're responding, see how they're doing in programming, see how that is impacting their behavior while we have them. [LR424]

SENATOR SCHUMACHER: Well, how much of what percentage of the prison population do we really need to have locked up for public safety and what...versus the percentage that is there because of drugs, mental disease and that kind of stuff that

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aren't really...we really wouldn't worry about being on the street? [LR424]

LARRY WAYNE: Your question is a very difficult one, Senator. I don't want to be evasive. I just know that a judge has someone come before them who's been arrested 17 times, average, and they have 13 or 14 convictions, and they've been on probation once or twice, and the offense for which they're before the judge now is not particularly egregious, like robbery or sexual assault or murder, but the judge says, jeez, you've been before me, you've been convicted 14 times, what am I to do with you? Sometimes...a lot of times they'll send them down to Lincoln for one to three years. [LR424]

SENATOR SCHUMACHER: But a lot of them have...I mean 14 times is a pretty extreme situation. [LR424]

LARRY WAYNE: No. [LR424]

SENATOR SCHUMACHER: We've got habitual situations at three. [LR424]

LARRY WAYNE: No, no, Senator, that's the average, as I understand it. [LR424]

SENATOR SCHUMACHER: The average person has been guilty of 14 past felonies? [LR424]

LARRY WAYNE: Convicted roughly 14 times. I'd have to double-check that with our policy research individual, but I believe that's the number that was shared with me. Now these are not felony offenses all of them. They can be misdemeanors. They can have resulted in jail or fine or probation or whatnot, but, yeah, those people I would say, if there was a suitable front-end alternative to incarceration, they'd be good candidates for that. [LR424]

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SENATOR SCHUMACHER: Okay. I mean we're talking about whether we should build a new prison, ultimately, here. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: And that's pretty important if there's another way we can do this. You indicated that there was quite a bit of turnover in the psychology, psychiatric personnel at Tecumseh. [LR424]

LARRY WAYNE: There was enough that I have a hard time remembering the names of the staff down there on the clinical staff. [LR424]

SENATOR SCHUMACHER: And is that because it's the kind of job that's your first job out of school and you move on, or is there internal problems? I mean I imagine it's a pretty tough job to be there. [LR424]

LARRY WAYNE: It is a tough job. It's a demanding, difficult population compared to working in the community with a private practice or something, if you can do that. [LR424]

SENATOR SCHUMACHER: Is that where they move on to? [LR424]

LARRY WAYNE: Sometimes. Sometimes they move on to other public sector populations like Department of Health and Human Services or something along that line. I don't know but that's what I...that's what I'm told anecdotally. When we lose someone we say, jeez, they were really a good clinician, were going to be hard to replace; they moved on to this other assignment that they...this job they found more desirable. [LR424]

SENATOR SCHUMACHER: And maybe more pay too. [LR424]

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LARRY WAYNE: Maybe that too. [LR424]

SENATOR SCHUMACHER: Now when you self-diagnose the problems where you thought the systemic failure occurred, was that someone was not telling you, advising you what was the full nature of the picture here? Is that...I think you said that earlier. [LR424]

LARRY WAYNE: Which problem? We talked about a lot of them. [LR424]

SENATOR SCHUMACHER: Jenkins. Excuse me. Jenkins. [LR424]

LARRY WAYNE: Yes, I did not know about Dr. Baker's and some other clinicians' assessment of Mr. Jenkins that he was mentally ill. [LR424]

SENATOR SCHUMACHER: Whose job would it have been to assure that you know? [LR424]

LARRY WAYNE: I'd say Dr. Weilage. [LR424]

SENATOR SCHUMACHER: And to the extent he didn't share information with you or the Johnson County Attorney, that's where you'd put the focus of the failure? [LR424]

LARRY WAYNE: He's the opinion I listen to. He's the head of mental health, the assistant administrator for behavioral health, over mental health in our agency. I deferred to him as the clinician who I had in the room to tell me was Jenkins mentally ill. [LR424]

SENATOR SCHUMACHER: Yet you knew this guy was really scary. [LR424]

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LARRY WAYNE: I knew his behavior was very problematic. I did not know he was mentally ill. In fact, I was told he was not. [LR424]

SENATOR SCHUMACHER: But his behavior was so bizarre, off of the norm, that you were afraid to release him to general population and, as you said, almost laying awake nights worrying about what would happen when you turned him loose. [LR424]

LARRY WAYNE: I don't want this to sound wrong, but his behavior was very problematic but it wasn't all that terribly unusual for people that I have known, over 39 years, in segregation. There's a lot of people who have displayed symptoms like that. What Senator Lathrop was reading off was certainly a concern to me, but it didn't shock me because it wasn't anything that I hadn't heard about before. It was certainly a concern but it's not as apparent, from my experience, as it is for someone who hasn't worked in Corrections, perhaps. [LR424]

SENATOR SCHUMACHER: Does the segregation cause the behavior or the behavior cause the segregation? [LR424]

LARRY WAYNE: It depends on the individual. Segregation, I would say, exacerbates the behavior and the condition. [LR424]

SENATOR SCHUMACHER: And we've got 213 people sitting in it right now? [LR424]

LARRY WAYNE: Restrictive housing. Excuse me. Yes. I don't know the number. [LR424]

SENATOR SCHUMACHER: Okay. So we get down and he's transferred back to Lincoln. He's again put in segregation, or whatever euphemism we want to use today, and he sits there right up to the day of release. Is that true? [LR424]

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LARRY WAYNE: No. He was sent to the penitentiary, then on to housing unit 4, then on to transition confinement. Then he started a class on June 10, 2013, 50 days before his discharge. [LR424]

SENATOR SCHUMACHER: So he was no longer in solitary confinement once he got to...in this last 60 days? [LR424]

LARRY WAYNE: He wasn't...no, he wasn't in general population yet but he had been moved to a location where for a short time anyway he could get some treatment. [LR424]

SENATOR SCHUMACHER: Was this a room by himself? [LR424]

LARRY WAYNE: He was in a group. He was housed, I believe, on a gallery with other inmates, not like restrictive housing. He wasn't in general population but he was allowed to meet in groups with other inmates to explore issues such as cognitive restructuring, behavior modification, thinking for success, and the CALM program. [LR424]

SENATOR SCHUMACHER: Were you kind of watching this particular case since he was such a problem, causing you to lose sleep at nights? [LR424]

LARRY WAYNE: We were watching it, yes. [LR424]

SENATOR SCHUMACHER: And day or two or three or four before the door was unlocked and given a pat on the back, did it occur to you that maybe you should take a long shot and let a county attorney or mental health board make the determination if he was mentally ill or dangerous? [LR424]

LARRY WAYNE: No. [LR424]

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SENATOR SCHUMACHER: Why? I mean that was a simple bureaucratic out for you guys to say, hey, send him over to the county attorney and let them...with all the reports and let them have the problem. Why not? [LR424]

LARRY WAYNE: Because the clinicians told me he did not meet the criteria for being mentally ill and, therefore, being eligible for referral to a mental health board. [LR424]

SENATOR SCHUMACHER: But that was a county attorney's decision, not a clinician's decision. [LR424]

LARRY WAYNE: This was Dr. Weilage who told me this. [LR424]

SENATOR SCHUMACHER: But that...the responsibility for making that determination whether to refer to a mental health board was not that of a clinician. It was that of the county attorney. Why wasn't a file given to the county attorney and said, look it, this guy is really weird; we need to do something but he's beyond our authority; he's in your ball cart now; he's going to be on the street in three days? Why wasn't that done? [LR424]

LARRY WAYNE: I don't know other than what I've already testified to that he did not meet the clinical description of someone who was mentally ill. [LR424]

SENATOR SCHUMACHER: But that was a decision for the mental health board. When was the decision made not to follow the Castillas decision, the Supreme Court decision? When did...you know, the population is too big a deal; we've got to play Lord Nelson and turn a blind eye toward that thing? [LR424]

LARRY WAYNE: It seems that the decision was initially made on February 8, 2013, when there's an exchange between Linda Willard and Jeannene Douglass, in which Douglass alleges that Willard says something to the effect that we can keep doing what we're doing, which we find out later is not what Willard said. [LR424]

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SENATOR SCHUMACHER: And so none of the higher-ups in the mechanism, I mean everybody just followed this clerk's interpretation of a phone call (sic)? [LR424]

LARRY WAYNE: If I had known that the Supreme Court had made a decision that we were in fact a party to as an agency and not just Castillas as an individual, and that the Attorney General was saying, yeah, you definitely need to change the way you're calculating releases, I'd have gone to Director Houston and said, we have a problem, Bob. The Supreme Court has indicated we've been doing it wrong; we need to start doing it right. We need to get everyone on board, notify everyone, including the Governor of what we have, of what we're doing to fix it, in February 2013. [LR424]

SENATOR SCHUMACHER: Where would you lay the responsibility for not communicating that to you at? [LR424]

LARRY WAYNE: General counsel. Mr. Poppert says he told me. I can't imagine getting up one morning after 39 years and deciding, after following orders and laws by the Legislature, by my bosses, that suddenly by the courts we're not...we're going to ignore court orders, we're going to ignore the Attorney General Opinion. I can't imagine ever on any day making that decision to consciously say, we're not going to do this. So I...I know. Mr. Poppert says he talked with me about it. I wonder what...I don't know exactly what he said. I don't know how that didn't get communicated. [LR424]

SENATOR SCHUMACHER: How might he have told you? [LR424]

LARRY WAYNE: He might have said, Larry, the Supreme Court has ruled this on Castillas. George has some questions about it but Linda Willard, the Attorney General person who advises us, sees it differently. And by the way, Jeannene Douglass has some questions. We ought to make sure the director and the Attorney General and the Governor's Office are all on the same page with the Supreme Court ruling and that

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we're doing the right thing. That's how it should have been communicated to me. That's how I would have preferred, you know, that the people lay it out there. [LR424]

SENATOR SCHUMACHER: Do you feel you had any responsibility to do that on your own and to look down into your...I mean to be more hands-on than what you do? A lot of activity is going on. Clerks are making decisions, attorneys are making decisions,... [LR424]

LARRY WAYNE: Yeah. [LR424]

SENATOR SCHUMACHER: ...and you know if you were Harry Truman, you'd say the buck never got to me. [LR424]

LARRY WAYNE: I'd like to know what I was doing October 28, as you asked. I plan to research that, 2013, because I would have loved to have been at that meeting. And since I was invited to be at that meeting, I would love to know what was such a bigger deal than...or why I didn't understand the ramifications as I just explained it to you. [LR424]

SENATOR SCHUMACHER: But you were at the meeting when the attorney, Lindgren I think it was, said, look it, we're not even going to talk about this guy's mental health. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: And that was, that was cool. [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR SCHUMACHER: Thank you. [LR424]

SENATOR LATHROP: Senator Chambers, do you have questions? [LR424]

SENATOR CHAMBERS: A few, for real. [LR424]

SENATOR LATHROP: Okay. [LR424]

SENATOR CHAMBERS: Mr. Wayne, the questioning by the Chairman got into the record the kinds of things that I think need to be there in terms of what your role basically was, and you appeared to be forthcoming. But I'm a skeptical person by nature, having been in politics as long as I have been. And when I was a small child, I believed in religion and I read the Bible almost...well, I won't say compulsively but some things stuck out in my mind and one involved a meeting between God and Satan. And Satan answered questions something like politicians. God asked him, where do you come from? And Satan said, I come from going. Where do you come from? I come from going. But that's not what he said. He said, going to and fro in the earth and up and down in it. But the question was, why would a man like Job, who had wealth, a family, standing in the community, love God? And the devil said, well, Satan, well, you gave him everything; take what he's got from him and then we'll see what happens. So God said, well, do what you want to do but don't put your hands on him. So a great wind came and blew down the house, his kids got killed, flocks died, crops went bad. And Job said something to the effect, though He slay me, yet will I trust Him all the days of my appointed time. I'll wait till my change come. And he wouldn't curse God. So then Satan said, skin for skin, all that a man hath will he give for his life. So then God didn't deny that but he said do whatever you want to, to him, but don't kill him. So the boils and all these things happened to him and various people came around to explain why these bad things happened, that he must have been a bad guy. These things wouldn't happen. Then there was a young guy and he said, I thought in gray hair, long beards and age there would be wisdom, but that's not true. And I've sat here and I've listened to all that you supposedly wise men have said. I've even heard Job say if I were afflicted, if

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you were afflicted as I am afflicted, I wouldn't heap all of these accusations on you; I would try to comfort you. And while he was saying this, the worms were crawling out of his sores and he would take this shard and scrape to scratch and to remove the worm. That Bible is a nasty book. So the young man said, if I don't speak then I will burst, and then he was the source of the wisdom. I said all that to say this. You seemed to have been, while you were speaking, a person who was going to be forthcoming even if it meant throwing the director under the bus, so to speak, by placing responsibility. But then there is that consideration, all that a man has will he give to save his own skin. Now I don't think you would lie on the director, in the director's face, but here's what I'm going to ask you. If you have several layers of employees and each step up you went there would be more responsibility that that category would have, then there's a gap between all of these employees and the top layer of the people who really are the decision makers. And it appears that something very bad went wrong on their watch. Maybe they were not as attentive as they should have been. Maybe they placed confidence where they should not have. But now the axe is going to fall and their heads may roll. Would it be out of the question, based on the knowledge you have of human nature, the years you've been in the world, the way you've seen how people will do, especially bad people or have been considered bad enough to be locked up, that people similarly situated, all in jeopardy, would get together and say, we'll all hang...we must all hang together or we'll hang separately? There will be little nibblings around the edges where it can seem that we're pointing the finger to give credibility, but when it comes down to the real heavy stuff where if we were implicated in that we would all hang together. So none of us is going to point the finger at any of the others with reference to any of the very serious matters. So when it comes to a decision by the Supreme Court that was ignored, and just by coincidence or happenstance or accident the ignoring of that decision played right into a plan we have that will help reduce the prison population, so we're going to let things go as they are. But if we're questioned, we don't know anything. We all have deniability and will work only if all of us stick together and say it stayed at that level below us. Even though it's serious enough that if you ask anybody should this have been told to the president of the company, if left

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uncorrected it could destroy the company, people would say, yeah, it should have been. And because of that, we've all got to say we didn't know. And if somebody is questioning us about something that we cannot deny, then we will not be able to recall it. We will not deny it, but we cannot recall it. So it's neither yea nor nay. That leads me to the question that I'm going to ask you. If answering a certain question a certain way would mean that your job would be lost, would you tell the truth in answering that question since you're under oath even at the risk of losing your job? [LR424]

LARRY WAYNE: Yes, there's no job worth having that I'd have any part of where I would have to lie to keep it. [LR424]

SENATOR CHAMBERS: And I'm not being argumentative so I'm accepting what you say, because you seemed to be forthcoming to me because I can't read minds, but I listened to you. You said that had you known about the psychiatrist's diagnosis, and you know the difference between a psychiatrist and a psychologist. The psychiatrist is a medical doctor and so forth. You did not know, based on what you told us, about Dr. Baker's diagnosis of mental illness for Nikko Jenkins. And if you had known it, then your course would have been different. And I'm not going to go through all the steps and different things, but your course would have been different. Is that basically what you said? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR CHAMBERS: Now Dr. Weilage probably knew that you placed confidence in him and what he said because of the relationship the two of you had, and you said that you relied on him. He'd become aware of that. He told this committee under oath, after much questioning, that he knew that if he had shared with the Johnson County Attorney that diagnosis of mental illness, that would have been sufficient to have the county attorney initiate civil commitment proceedings. Then we went down the itemization of the bizarre behaviors, which Dr. Weilage also withheld from the county attorney, and he

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conceded, after much questioning, that maybe any one of those but certainly all of those together would have led to the initiation of the civil commitment. After he spoke there was...first of all, do you think he should have withheld that information from the county attorney when he was in conversation with the county attorney based on the county attorney having contacted him about Nikko Jenkins' request for civil commitment and Nikko Jenkins' mother needing...I meant making the request? And the county attorney made it clear that he would have to have something from the prison officials to give him a basis to start these proceedings and Dr. Weilage withheld that psychiatrist's report, withheld a description of Nikko Jenkins' behavior, and then falsely said that he was being treated, and it was false because he admitted that the only programming that was recommended for Nikko Jenkins by this committee that reviewed him was violence... [LR424]

LARRY WAYNE: Reduction program. [LR424]

SENATOR CHAMBERS: ...yes. But that was only given at NSP so that's out of the question. The other thing Dr. Weilage wanted to jump to and say, well, all inmates have counseling available. I said I'm just talking about Nikko Jenkins; was he receiving counseling? Dr. Weilage finally had to say categorically, no. So I'd said, then what treatment was he receiving? He was receiving no treatment. So not only did he withhold information from the county attorney, he misled him as to what was the way that Nikko Jenkins was being handled. That's by way of background. If what I say...have said is true, if it can be documented from the transcript of Dr. Weilage's testimony and if, based on that testimony, he did and said and didn't do and didn't say the things as I represented, do you think his behavior met the standard that would be expected of a person to retain employment with the Department of Corrections as a psychologist? You said no job is so important that a person should lie. Dr. Weilage lied about Nikko Jenkins receiving treatment. Is his job different from the job you said is not worth lying about in order to hold? [LR424]

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LARRY WAYNE: No. [LR424]

SENATOR CHAMBERS: If he lied about that and said that treatment was being provided, when in fact it was not, he knew that it wasn't, when you make a statement or an averment as true when you know it's false, that's a lie. If you make a statement where it's factually accurate but it's done in such a way as to mislead, the Nebraska Supreme Court has said that qualifies as a lie also. It also said in a decision very...of recent vintage that if you are asked a question and you give a partial, fragmentary answer, that is a fraud and a misrepresentation. Now if all the things I've said about Dr. Weilage are true, should he keep his job? In your opinion, as somebody with all the years of experience that you have, the knowledge you have, I'm sure, of people who have been terminated for various derelictions, omissions, or commissions, should he keep his job? [LR424]

LARRY WAYNE: Senator, you know that's not my decision to make. [LR424]

SENATOR CHAMBERS: I'm not telling you...saying that you'd be the one to fire him. [LR424]

LARRY WAYNE: You're asking my opinion. [LR424]

SENATOR CHAMBERS: Your opinion. You threw the director under the bus so come on. [LR424]

LARRY WAYNE: I have a lot of problems with what I wasn't told. I have a lot of problems with what I was heard...what I heard in this committee from Dr. Weilage, from the testimony. It would really be presumptuous for me to offer an opinion whether or not he should keep his job, I would think. [LR424]

SENATOR CHAMBERS: I'm going to send you a copy of the transcript of his testimony

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that he gave under oath, and here's what he acknowledged, that if he had given that information to the county attorney and it was presented to a board of mental health, it's likely that that board would have committed him. He would have been sent to the regional center. And under much questioning, he acknowledged that it's unlikely that a person would be cured of mental illness in 30 days. And he acknowledged that if crimes were committed during the 30 days after Nikko Jenkins was released from prison and instead of being released from prison he had been committed to the regional center, would those crimes have been committed, Dr. Weilage said, no. If Dr. Weilage had not withheld that information, if he had not lied regarding treatment being given Nikko Jenkins--because Nikko Jenkins, in his letter to the county attorney, said he was being denied mental health treatment--if those things were true, you know where Nikko Jenkins would be right now? He would be in the regional center. He would have been placed in the regional center rather than having been released into my community. And now when I use the term "my community," I mean the city of Omaha. And had that occurred, we would not have this committee. You would not be here. I would not be saying what I'm saying. There would be four people still alive, their families would not be trying to heal whatever hurt they still feel. There would not be a crazy man who may at some point stand before a three-judge panel to see whether the state ought to kill him now. None of that would have happened. And it can all be traced right to one man who had to acknowledge under intense questioning from me that he could have just said yes to when the first question was asked, and the question was, did you withhold that report? He started out, well, not purpose...not on purpose. But did you withhold it? You know what I had to do to get him to admit it? Explain what the word "withholding" means when somebody at a fast-food restaurant gets a check and they don't get the full amount of the check based on the number of hours they worked because some of the money goes to the government, and that money not going to the employee but, rather, to the government is known as withholding. Do you agree with that? He said, well, yeah. I said, now there's a report that was not made available by you to people who had to make decisions that would be influenced by or dependent on that report. Did you withhold that report from them? He didn't want to answer. I said, well, did you give it to

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them? Well, no. Well, when you did not give it to them, did that constitute withholding? Well, yes. That's what I had to go through. That's why I'm going to send you that transcript. And I'll tell you what I'm leading up to. The Legislature was demeaned by the Governor, the Chairman, the Chairman of this committee and the Chairman of the Judiciary Committee, and somehow condemned for what Nikko Jenkins did because of our omissions or commissions. And the Governor went so far as to indicate that something that should have been done, in my opinion but not his opinion. Well, let me put it like this. He said that nobody connected with what I've discussed with you and the letting out of Nikko Jenkins should be disciplined in any way, and he had indicated, and either him or the head of the Republican Party had said just unequivocally, that the Chairman is biased--I think that's the head of the Republican Party--and he has already reached a decision that Corrections is responsible for what happened. And I want you to...I want to explore that with you to see if you can help me give an answer to that guy. Now the miscalculations of the inmates' time which resulted in providing an incorrect mandatory release date and inmates were released who should not have been released, what department was responsible for that miscalculating occurring? [LR424]

LARRY WAYNE: The Department of Correctional Services. [LR424]

SENATOR CHAMBERS: Several Supreme Court decisions, and I'm not going to go through all of them because we've been through it, were ignored by employees and some officials, if you include among officials the legal department. What department did those work for who ignored those Supreme Court decisions? [LR424]

LARRY WAYNE: The Department of Correctional Services. [LR424]

SENATOR CHAMBERS: Now what department created a category of persons, prisoners, who could be released in a way that would violate the law? And in this instance, the legal counsel said that but the department went and did it anyway. Which department did that? [LR424]

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LARRY WAYNE: The Department of Correctional Services. [LR424]

SENATOR LATHROP: I'm just going to remind everybody to speak up so we make sure we get a good record. [LR424]

LARRY WAYNE: Sorry. [LR424]

SENATOR LATHROP: Thank you, Mr. Wayne. [LR424]

SENATOR CHAMBERS: Now we know the answer. What position does the Chairman of the committee hold? What branch of government is the Chairman of this committee a part of? [LR424]

LARRY WAYNE: The legislative. [LR424]

SENATOR CHAMBERS: And the Chairman of the Judiciary Committee, who is not here but his name is Senator Ashford, what branch of government is he a member of? [LR424]

LARRY WAYNE: The Judiciary. [LR424]

SENATOR CHAMBERS: Now the constitution... [LR424]

LARRY WAYNE: I'm sorry. The Legislature. [LR424]

SENATOR CHAMBERS: I know what...right. I know what you meant, but it's good for the record. Okay, the Legislature. The constitution says, after it lays out the separation of powers, as we call it, that no individual or collection of individuals shall exercise the duties and powers of any of the other branches unless specifically authorized by the

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constitution to do so. Based on your knowledge, is either Senator Lathrop, the Chairman of this committee, or Senator Ashford, the Chairman of the Judiciary Committee, an employee of the Department of Corrections? [LR424]

LARRY WAYNE: They are not. [LR424]

SENATOR CHAMBERS: And based on our exchange, neither of them individually or the two of them together are responsible for any of these derelictions or missteps that we've discussed. Is that true? [LR424]

LARRY WAYNE: That's true. [LR424]

SENATOR CHAMBERS: So the facts, it seems to me, would lead us to the conclusion that those responsible for these problems that we're dealing with are in the Department of Corrections. Would you agree? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR CHAMBERS: Do you feel that you're biased by arriving at that conclusion based on the facts? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR CHAMBERS: Nor am I, nor is Senator Lathrop, nor is Senator Ashford. And I'm doing this on the record for this purpose. When individuals are attacked, they can speak for themselves--Senator Lathrop, Senator Ashford. But when the Legislature as an institution and a committee created by the Legislature by implication is attacked, I as a member of the Legislature have an obligation to speak and try to correct the record. I almost hate to see...let me put it like this. I don't dislike you as much as I thought I was going to dislike you before you spoke, and maybe I like you a little more than I wish I

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did. But you and I, as men of the world, know that in the same way that a judge will look at somebody with a number of convictions and, as you say, they could be little petty things but the judge will say, what am I to do, you've been given a chance for probation, you messed up; we gave you a small sentence, you messed up; and now here you are again. The only thing left for you is a long time because at least you won't be back here for a while. You are high enough in the hierarchy of the Department of Corrections...first of all, I think you have too many duties and that's why you can't focus on any one of them, so you say you look at that large pool of inmates. So I sympathize with you. But when the housecleaning comes, when the wagon comes, you will have to go too. You are at the top. Mr. Kenney is going to be fired. But if he had the pride that I have, he wouldn't let it come to that. He would resign. But I can't tell people how to conduct their business. He will be swept out. You will be swept out. I believe that all of the wardens should be swept out. Everybody who has been in the Department of Corrections for a long time should be swept out and there has to be a new departure, a new beginning. There is no way that those who are part of the current administration, despite the attempt of the Governor to shift responsibility and blame to everybody, there's no way they should remain on their jobs. And the fact that you, so that you'll understand what the Governor is doing, you don't want to be presumptuous enough to say that a man who by his own sworn testimony acknowledged that things would have been different had he not inappropriately withheld a report and withheld information from the county attorney, sometimes people cannot do what they know they should do because of sentiment or anything else. But when they take that decision, our actions carry consequences. And if you are going to participate in the covering over, the minimizing of the seriousness of derelictions, it indicates that you do not have whatever steel it takes to be in the spine to make a hard decision. If you don't have it, you cannot stay where you are. And this man, I have stated, Weilage, the responsibility for those four deaths are on his doorstep. I listened to you. You said words to the effect, I have thought about this situation and wondered if there's anything I could have done that would have made a difference. Summing up, is that similar to a statement you made? [LR424]

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LARRY WAYNE: It is. [LR424]

SENATOR CHAMBERS: And if there were something that you could have done and should have done and didn't do, would you resign? [LR424]

LARRY WAYNE: I would consider it, yes. [LR424]

SENATOR CHAMBERS: And you'd do that based on ethical and moral--I didn't say religious--moral considerations? There is an obligation that a person would have and a duty to discharge, and that duty might be to leave the position that you hold. Obviously, you concluded that there was nothing that you did that contributed substantially to this situation. There was information withheld from you. And if you had it, you would have behaved differently; you would have prevented some things from happening. But you couldn't because you didn't know. The county attorney couldn't do what he could have done because information was withheld from him that he needed but he didn't know. And the person who knew, who presumed on the friendship and trust you reposed in him, admitting under sworn...under oath in a sworn testimony that a psychiatrist is more capable of diagnosing mental conditions than a psychologist, would elevate his personal opinion above the diagnosis of the psychiatrist and not just say, we have two competing opinions and this is mine and this is that of the psychiatrist, but withhold that opinion and not even let it be a part of the equation. I'm going to ask you again, if just you and I were here, are you an atheist? [LR424]

LARRY WAYNE: No. [LR424]

SENATOR CHAMBERS: So that means you believe in God. [LR424]

LARRY WAYNE: I do. [LR424]

SENATOR CHAMBERS: And you would not be a coward toward me and brave toward

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God, meaning that you would lie to me to make me think a certain way, but you don't mind lying in God's face. Now with that, here's my question: With all that we've discussed, and we know what you would do if you were situated in the circumstances we talked about, do you think that Weilage, if all the things that I said are true...let's make it theoretical; let's make it hypothetical; let's speculate. If a person in a position of responsibility had done the things that I said, is that person worthy of retaining that responsibility? Or is the standard that that person should be held to breached in such a way that he no longer is suitable to hold that position, yes or no? If you say "well," then I'm going to leave it alone. [LR424]

LARRY WAYNE: You've articulated that I'm in a bad position, that we are in a bad position. I think the only way I could make that worse would be to start giving opinions in this arena that don't...that aren't mine to have. I don't get to say whether Mark Weilage keeps his job or not. []

SENATOR CHAMBERS: We're not talking about Weilage now. [LR424]

LARRY WAYNE: I thought we were. [LR424]

SENATOR CHAMBERS: No, I said we're going to...I'm going to use a hypothetical. I'm being theoretical. [LR424]

LARRY WAYNE: Sorry. [LR424]

SENATOR CHAMBERS: In a hypothetical, if a man holds...do you believe that where much is known, much is required? [LR424]

LARRY WAYNE: I do. [LR424]

SENATOR CHAMBERS: Do you believe that people who are given a public trust,

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meaning they voluntarily assume a duty to the public, and they violate that trust, first of all, if they're given that trust, are they held to a higher standard than an ordinary citizen who is not accorded that trust? [LR424]

LARRY WAYNE: They are held to a higher standard. [LR424]

SENATOR CHAMBERS: And if that trust is violated, should that person retain that position of trust? [LR424]

LARRY WAYNE: Hypothetically? [LR424]

SENATOR CHAMBERS: Yes. [LR424]

LARRY WAYNE: They should be held accountable. [LR424]

SENATOR CHAMBERS: And what would accountability result in, as far as holding that position? [LR424]

LARRY WAYNE: It could result in dismissal. [LR424]

SENATOR CHAMBERS: Should it? [LR424]

LARRY WAYNE: I'm not going to say. [LR424]

SENATOR CHAMBERS: You don't even want to hypothecate; you don't want to extrapolate. [LR424]

LARRY WAYNE: No, Senator, I don't. [LR424]

SENATOR CHAMBERS: Okay, but I think your refusal to answer that question is an

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answer because if you didn't think he should lose his job, you would say, no, I don't think so. So when the only two possibilities are yea or nay and you refuse to say nay, then your unspoken answer that everybody knows is yea. Here's the last thing I'm going to ask you: With all that has been said in the newspapers, the disputing that has gone on publicly, some of it accurate, some of it not, whenever there is a scandal of any kind, there will be some things added that shouldn't be, some things left out that maybe should be in it, but it's not going to be an accurate picture. Do you think that any time soon, and by that I mean within five or ten years, the Department of Corrections will be...will regain the public's trust? [LR424]

LARRY WAYNE: I do. [LR424]

SENATOR CHAMBERS: Are you married? [LR424]

LARRY WAYNE: I am. [LR424]

SENATOR CHAMBERS: Well, I guess a person who could say "I do" at a marriage ceremony could say "I do" when I ask do you think the Department of Corrections will be restored. I appreciate your having come here. I don't agree with the courses of conduct you engaged in along the way. I don't mean like Weilage, but I meant the decisions that were made. And I think you, Director Kenney, and all these top people should have made it clear to all of their underlings that if there's any issue of importance, bring it to me; if you have any questions about anything or anybody, bring it to me; don't withhold anything from me, which, if I find out about later and it makes a bad thing for me, I'll tell you like a sergeant told us when I was...we were learning how to march in basic training. And you had this poncho. You round it up and put it on your pistol belt. And if you didn't put it on right and you marched, then it would unravel and look like you had a tail. And the sergeant would be held to ridicule by other sergeants who were marching companies because of platoons...because he didn't even teach his soldiers that. So the sergeant would have a way of bringing people in. Believe it or not, I

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was younger at one time than I am now. He said, you can make it hard on me by what you did, but you can never make it as hard on me as I can make it on you. Now that has to be the message that I think these top people have to get across to their employees and their subordinates. I think something is wrong and there was a breakdown in leadership when, with all the testimony we've had, there are important things that people didn't tell you, they didn't tell the director. That goes from the head of the legal department all the way up the line. A psychologist is confident in withholding from you something that you ought to be told, withheld it from the director, withheld it from everybody except, he said, some people who worked with him down there at Tecumseh. And that's all, Mr. Chairman, that I would have. [LR424]

SENATOR LATHROP: Okay, Senator Chambers. Senator Bolz. [LR424]

SENATOR BOLZ: I wanted to follow up on a question that Senator Schumacher had. You stated emphatically that you thought it was a problem that individuals on administrative confinement weren't given the attention that they needed to make sure that they weren't released from administrative confinement into the public. Is that a fair summary, that more could have been done for the individuals on administrative confinement who were facing a release date? [LR424]

LARRY WAYNE: Well, if their behavior is such that you can work with them. There's people that are on administrative confinement that act out in a very, you know, destructive fashion to themselves and others. Not everyone is amenable to treatment and, unfortunately, probably most of the folks who have been, and thankfully it's a small number, but any, even one, as we know now is too many, discharging from restrictive housing back to the community, that's a big problem, yes. [LR424]

SENATOR BOLZ: So it's a big problem? [LR424]

LARRY WAYNE: Yes. [LR424]

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SENATOR BOLZ: Okay. So your memo says that that's your opinion and that Dr. Weilage and social work director Kathy Foster agree that priority should be given to focusing on the general population or administrative confinement inmates who are mentally ill, sex offenders, or violent offenders. You go on to state that you think there should be a series of things that happen in those circumstances for those priority cases involving the Transformation Project, crisis intervention, parole if appropriate. The simple question is this: Have these policies been implemented? Have you changed based on what you've learned? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR BOLZ: Has that been codified and communicated to everyone involved in a way that's formal and protects the public safety? [LR424]

LARRY WAYNE: It's in the process of occurring. It's called the discharge review team. And it looks at the individuals we've been discussing who pose significant challenges and may, in fact, be good candidates to be considered for referral, for instance, for a Mental Health Board commitment. [LR424]

SENATOR BOLZ: Included in your discharge review team, is there a requirement that a second opinion be accessed in cases that are concerning and dramatic and violent, such as the case of Nikko Jenkins? [LR424]

LARRY WAYNE: Yes. [LR424]

SENATOR BOLZ: Thank you. [LR424]

SENATOR LATHROP: I think that's it. [LR424]

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SENATOR CHAMBERS: I have one that I forgot. [LR424]

SENATOR LATHROP: Oh, I'm sorry. [LR424]

SENATOR CHAMBERS: That's okay. One thing, and the reason I'm asking you this, Mr. Wayne, is because the term "violent criminals" is in the news a lot. There are various acts that you could say are violent because maybe somebody was seriously injured or somebody was killed, like motor-vehicular homicide or, you know, something like that. So does the fact that a person is convicted of a crime that could be called violent mean that that is a violent person in the sense of this is the person's character and nature and it's likely to be repeated? [LR424]

LARRY WAYNE: There's as many violent crimes and individuals. For instance, in my experience, many of the folks incarcerated for murder are...they're model inmates. They were model citizens, a lot of them, before they committed their heinous crime. But in a moment, a flash of rage or insanity, they killed someone and they've come to prison. And they end up being stable as inmates. I would say they did a horrible, violent thing. But I wouldn't describe their character as being violent. It's... [LR424]

SENATOR CHAMBERS: I agree with you, and obviously the Governor might, because there have been some people who worked in the Governor's Mansion who, like you said, committed a murder. And Jimmy Carter said the only ones he would have working in the White House around little Amy were those convicted of murder because, as you've said, they commit that act and then they're not going to do it anymore, and then they spend the rest of their life trying to atone for it. And the reason I'm doing that: There is not a lot of nuanced thinking that goes on when we're in the middle of political heat and just labels are cast around. And ever since I've been in the Legislature, I've tried to get my colleagues to understand that to say somebody is a criminal means, in the broadest sense, that they violated a law that is designated a crime. So in that sense they're a criminal, but in the sense of saying that the person has a criminal nature and is

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going to commit crimes as a way of life cannot be concluded because of this one act for which he or she was convicted of. And I say that, as with the Chairman, not to say, for example, that I agree with anything that Nikko Jenkins did or that I exonerate him from it. I'd just say that there were preventative things that could have been done that were not done. He is a murderer. He is a killer. And with all that I say being against the death penalty, and other people having created situations that made what he did possible, he should never walk free among people again, in my opinion. If the people who work in Corrections--it's a job that you shouldn't have to assume; it should be assumed by us who are in the Legislature--could help make people understand that not everybody can be judged by one act, and that act causes that person to be perpetually condemned no matter what other circumstances may be at play, now if the political heat dies down over this issue, then there might be a degree of political sanity that will occur and be restored. And we won't be, as a Legislature, attaching humongous sentences just to show we're tough on crime, putting in place mandatory sentences, taking away the discretion of a judge and saying one size fits all. Then we could begin to talk about a society that is humane, that acknowledges the fundamental, basic human dignity of every person so that even if a person must be punished, society should not do it in a way that's uncivilized, inhumane, or that is disregardful of the basic dignity of that person who is being punished. That will never happen and I know it. But it doesn't mean we cannot have aspirations. I really am through now. [LR424]

SENATOR LATHROP: Okay. The only...first of all, I want to thank you for coming down here today. I do share the opinion that I think you've been candid with us and that, for that, we appreciate it. Some of the stuff we've asked you have been difficult questions to answer, and I also appreciate that I feel like you've been honest with us. The only thing I'd say as you leave is that we talked about that group that Kyle Poppert put together, and his e-mail to you said the 28th. I think it actually happened on the 31st. So if you're going to look at your calendar and provide that stuff to Senator Schumacher, you might look at the 31st, which I think ended up being the date that sentencing committee got together. [LR424]

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LARRY WAYNE: Okay. [LR424]

SENATOR LATHROP: Okay. [LR424]

LARRY WAYNE: Thank you. [LR424]

SENATOR LATHROP: Oh, did you bring anything in response to the subpoena, by the way, any documents with you? [LR424]

LARRY WAYNE: I have some notes here that I took in preparation for this testimony. [LR424]

SENATOR LATHROP: But not...they...I don't need...you know, as you collect your thoughts, I'm not trying to gather that. But did you...the subpoena asked you to bring certain documents with you. Did you bring anything in response to that? [LR424]

LARRY WAYNE: I think...no, we... [LR424]

SENATOR LATHROP: Okay. [LR424]

LARRY WAYNE: I think we, as best as we could, we produced everything already. All I have here is a copy of the Ombudsman's report on Nikko Jenkins... [LR424]

SENATOR LATHROP: Okay. [LR424]

LARRY WAYNE: ...and a report from Dr. Jack, a psychiatrist. [LR424]

SENATOR LATHROP: Okay. Then with that, you are excused. And thank you for your testimony. [LR424]

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LARRY WAYNE: Thank you. [LR424]

SENATOR LATHROP: You may take your stuff with you. Next we will have Director Kenney testify. [LR424]

MIKE KENNEY: Trying to arrange transportation. Sorry. [LR424]

SENATOR LATHROP: That's all right. Before you have a seat, let's have you raise your right hand. Mr. Director, do you swear that the testimony you're about to give this special investigative committee will be the truth, the whole truth, and nothing but the truth? [LR424]

MIKE KENNEY: Yes, I do. [LR424]

SENATOR LATHROP: All right. Have a seat, sir. Would you recite your name and spell your name for us, sir? [LR424]

MIKE KENNEY: Mike Kenney, K-e-n-n-e-y. [LR424]

SENATOR LATHROP: And you are the current director of the Department of Correctional Services. Is that true? [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: And have been since September 25, 2013? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Why don't you give us your background in Corrections, so that

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we...I know some of us sat through your confirmation hearing and are familiar with it, but let's have you put that on the record just the same. [LR424]

MIKE KENNEY: Briefly, I started at the penitentiary in 1977 as a correctional rehabilitation counselor. I worked in several facilities, as we say, going up the food chain. I was a parole officer for four years. I opened the Hastings Correctional Center for that period of time it was open in 1987. I've been warden. I did follow Mr. Clarke at his invitation up to Washington from 2006 to 2008 and was what they call a regional commander of the eastern division of about six facilities in Washington. We don't have that position here. It'd be like having two Frank Hopkinses, if you were in the Washington system. I came back to Nebraska and was presently warden at the Omaha Correctional Center until the date you mentioned, September 25 of last year. I think total I've been warden of six different facilities in two different states and that brings me...that's a quick summary. [LR424]

SENATOR LATHROP: Okay, and that's a fair summary and does give us a bit of a background on your experience and your work history prior to being nominated and appointed to the position you now hold by Governor Heineman. [LR424]

[]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And I appreciate the fact that you were not at the helm when Nikko Jenkins was released, nor was he released from the facility that you were warden of. Is that true? [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: Okay. So we...I will...at least I will not be asking you questions about Jenkins. But I am...of course, do have some concerns about Castillas. That

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Opinion came out while Houston was still the director. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Were you aware of the Castillas Opinion before the World-Herald broke their story on Castillas? [LR424]

MIKE KENNEY: No, I wasn't. [LR424]

SENATOR LATHROP: You were warden of what facility at the time? [LR424]

MIKE KENNEY: The Omaha Correctional Center. [LR424]

SENATOR LATHROP: Okay. Do you have legal counsel over there? [LR424]

MIKE KENNEY: Do I have? No. [LR424]

SENATOR LATHROP: Or is...no, no, no, no, at the Omaha Correctional Center. [LR424]

MIKE KENNEY: Oh. [LR424]

SENATOR LATHROP: When you were warden there, did you have a lawyer that worked for you or... [LR424]

MIKE KENNEY: No, we relied upon the central office legal team. [LR424]

SENATOR LATHROP: Okay. So you wouldn't have had an attorney in your office say, gee, Bob (sic), you know what, it turns out the Supreme Court decided Castillas? [LR424]

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MIKE KENNEY: No. [LR424]

SENATOR LATHROP: I should say "Mike." Okay. When did you become aware of the Castillas decision? [LR424]

MIKE KENNEY: When the World-Herald story broke in June of 2014. [LR424]

SENATOR LATHROP: And by then you are director... [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: ...and have been for some time. [LR424]

MIKE KENNEY: Yeah--yes, excuse me--for eight or nine months, I think, yes. [LR424]

SENATOR LATHROP: Okay. So that's kind of a big story. (Laugh) [LR424]

MIKE KENNEY: Yes, it was a huge story. [LR424]

SENATOR LATHROP: Yeah, it's...the...what makes that funny is "a big story" is an understatement. [LR424]

MIKE KENNEY: I don't mean to insert mirth. That just... [LR424]

SENATOR LATHROP: No, no. [LR424]

MIKE KENNEY: That is an understatement, yes. [LR424]

SENATOR LATHROP: It is an understatement because of the consequences of having

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released, what, 307 people early? [LR424]

MIKE KENNEY: I thought one figure was 306, but I'm not going to mince details like that. [LR424]

SENATOR LATHROP: Okay, well, I might not remember it exactly. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: But we're pretty close: 306 or 307 people get released too early because the Department of Corrections isn't calculating their release date the way the Supreme Court told them to. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And that becomes evident to you in June of 2014 when the World-Herald breaks the story. [LR424]

MIKE KENNEY: Correct. [LR424]

SENATOR LATHROP: Now you said it was an understatement to call that a big story, and so I can only assume that there are a whole bunch of meetings that follow that. [LR424]

MIKE KENNEY: Yes, there were. [LR424]

SENATOR LATHROP: Okay. And now it's on the Governor's radar too. [LR424]

MIKE KENNEY: That's correct. [LR424]

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SENATOR LATHROP: Were you having meetings with the Governor after the Castillas Opinion hit the Omaha World-Herald and became news? [LR424]

MIKE KENNEY: Yes. I was keeping him apprised of our efforts. He was greatly concerned about the releases and wanted updates on what we were doing. [LR424]

SENATOR LATHROP: I'm sure he was greatly concerned. My question was whether you were having meetings with him. [LR424]

MIKE KENNEY: Yes, yes. [LR424]

SENATOR LATHROP: Okay. And some of those meetings would have involved what are we going to do. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And at the time, was the Attorney General participating in these meetings as well? [LR424]

MIKE KENNEY: Some of them, yes. [LR424]

SENATOR LATHROP: And let's just take the first week after Castillas ends up on the front page of the paper. How many meetings you suppose you had with the Governor and the Attorney General? [LR424]

MIKE KENNEY: Less with the Attorney General, and we didn't...I would say maybe...say the time frame. The first couple weeks or the first... [LR424]

SENATOR LATHROP: Let's say the first week after this became a story in the World-Herald. [LR424]

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MIKE KENNEY: Maybe two or three, and I don't think the Attorney General was present at all of them, or someone from... [LR424]

SENATOR LATHROP: Okay. [LR424]

MIKE KENNEY: When I say "the Attorney General," I want to clarify. That doesn't necessarily mean (Attorney) General Bruning. That could be a representative from his office. [LR424]

SENATOR LATHROP: Okay. [LR424]

MIKE KENNEY: Okay? [LR424]

SENATOR LATHROP: But he does show up at some of these meetings, doesn't he? [LR424]

MIKE KENNEY: Yes, yes. Yes, that's correct. [LR424]

SENATOR LATHROP: And he does help formulate a plan, doesn't he? [LR424]

MIKE KENNEY: Yes, um-hum. [LR424]

SENATOR LATHROP: Okay. So we have 306 or 307 guys that get released, and the...first of all, in these meetings we have lawyers from the Attorney General's Office, if not Jon Bruning himself, talking about the Anderson Opinion, right? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And you were here this afternoon when we went through the

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elements of Anderson. That would be your understanding of Anderson? [LR424]

MIKE KENNEY: Yes. I have some comments, but I'll wait for you to ask the question. [LR424]

SENATOR LATHROP: Sure. Well, you would agree that in the Anderson Opinion, the Supreme Court said that if an inmate had been released early, they could get day-for-day credit if they didn't realize they were released by mistake, right,... [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: ...and, secondly, if they hadn't broken any laws while they'd been out at liberty. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Those are the two elements of the Anderson Opinion that Chief Justice Heavican put into this equitable doctrine. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And the Governor, of course, in press releases cites Anderson extensively... [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: ...for the proposition that an inmate who is at liberty because of a mistake by the Department of Corrections should get day-for-day credit. [LR424]

MIKE KENNEY: Yes. [LR424]

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SENATOR LATHROP: Okay. And I noticed that when he started having these press conferences, he was talking about the importance of them having not committed any crimes. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Right? You listened to those press conferences and saw some of the press releases where both the Governor and Jon Bruning, the Attorney General, said, you get this credit if you haven't broken the law while you've been at liberty. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And the flip side of that is, is that if you've broken a law while at mistaken liberty, that you have to come back to the Department of Corrections and start where you left off. [LR424]

MIKE KENNEY: I'm not a lawyer, so I'm not sure that that's exactly what it says. [LR424]

SENATOR LATHROP: You don't get credit...well, in the Anderson Opinion, Judge Heavican said you don't get credit, day for day, while you're at liberty if you're breaking the law... [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: ...which would suggest that you have to come back and start where you left off. [LR424]

MIKE KENNEY: I think that's the rub, sir, yes. [LR424]

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SENATOR LATHROP: Okay. So if I'm one of these guys who was mistakenly released early because this Department of Corrections was not following the Castillas case, and I was breaking the law, it would be incumbent upon the Department of Corrections to return me to the department to begin my sentence where I left off when that lucky day came along and I was liberated early. Isn't that true? [LR424]

MIKE KENNEY: I want to speak to that, if I can, without saying yes. [LR424]

SENATOR LATHROP: Well, I'm talking about the Anderson Opinion and not some remedy that was formulated afterwards. We're just talking about the Opinion. And the Opinion says the guy comes back if he's broken the law while he's free. Isn't that what Anderson says? [LR424]

MIKE KENNEY: I don't...not the way I read it, sir. [LR424]

SENATOR LATHROP: Okay. I am going to read the court's holding in that case, and maybe then I can ask you the question again. And it's on page 28 of that book if you'd like to look at it. The last sentence: As such, we hold the prisoners who had knowledge of the governmental mistake and yet made no effort to correct it like prisoners who actively cause or prolong a premature release or commit crimes while at liberty do not deserve sentence credit under the equitable doctrine. That's the court's holding? [LR424]

MIKE KENNEY: Yes, it is. [LR424]

SENATOR LATHROP: And that holding would suggest that if you knew about the early release and the government mistake, you don't get credit; and if you commit a crime while you're out, you don't get credit. [LR424]

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MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Okay. So we agree on the principles, the two conditions the Chief Justice put on the ability of an inmate to take advantage of this equitable doctrine that allows them to get day-for-day credit. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And he also said the burden of proof is on the inmate to prove that they didn't know there was a mistake by the government when they were released. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Okay. My first question is, do you know, of these 306 people, if anybody ever asked a single one of them whether or not they knew they were released early because of a mistake? [LR424]

MIKE KENNEY: I don't think anyone asked them, because every one of those people got a signed discharge paper, a legal document in error by...I will add, an errant document, but a legal document placed physically into their hands, signed by the warden, saying that they were released. [LR424]

SENATOR LATHROP: That's true with everybody who was released early. Would that not be the case? [LR424]

MIKE KENNEY: Yes, that's true of everyone released, yes. [LR424]

SENATOR LATHROP: Okay, so that's baked into the cake, if you will, and part of what would have been presumed in the first place when Judge Heavican wrote this as a

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condition. So my question, again, is, did any of the 306 people who were released early, were any of them called upon to prove that they did not know it was a mistake by the Department of Corrections? [LR424]

MIKE KENNEY: Not to my knowledge. [LR424]

SENATOR LATHROP: Okay, so one condition of the Anderson Opinion has been completely ignored by the Department of Corrections in fashioning whatever solution we come up with for how are we going to deal with these guys that we let out. Would that be true? [LR424]

MIKE KENNEY: I guess we'll disagree on that, sir. [LR424]

SENATOR LATHROP: Well, did you ask any of them? I thought we just established that you didn't. [LR424]

MIKE KENNEY: No, and I'm not a lawyer and I don't... [LR424]

SENATOR LATHROP: It isn't a legal question. [LR424]

MIKE KENNEY: I thought that...okay. [LR424]

SENATOR LATHROP: The question, Director, isn't a legal question. The question is a fact question, and I think you answered it: We didn't ask these guys whether they knew there was a mistake. Is that true? [LR424]

MIKE KENNEY: That is true. [LR424]

SENATOR LATHROP: Okay. And Anderson says that it's incumbent upon each inmate to prove that they didn't appreciate that it was a mistake, and no one asked any one of

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these 306 people. Is that true? [LR424]

MIKE KENNEY: That's also true. [LR424]

SENATOR LATHROP: Okay. That's one condition of Anderson. The other condition of Anderson is that you can't have broken the law while you're at liberty. Is that true? [LR424]

MIKE KENNEY: As I understand it, yes. [LR424]

SENATOR LATHROP: Okay. And you know what, it's not just that it's a legal principle. Governor Heineman was saying it in his press releases, as was the Attorney General. Right? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Okay, and so we have 306 people who are at liberty, and I read the World-Herald on September 29, 2014, and guess what I see: a whole bunch of these people had been committing crimes and not brought back to start their sentences where they left off. True? [LR424]

MIKE KENNEY: True. [LR424]

SENATOR LATHROP: Okay. So now we have two elements in Anderson, two conditions of Anderson that an inmate has to reach in order to take advantage of the equitable doctrine Judge Heavican carved out that says you get day-for-day credit, and we are paying attention to neither of them. Isn't that true? [LR424]

MIKE KENNEY: No, sir, I don't believe so. I'd like to explain. [LR424]

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SENATOR LATHROP: Okay. Who did we ask about whether they knew it was a mistake? No one. [LR424]

MIKE KENNEY: I think...you're right. [LR424]

SENATOR LATHROP: Okay. And how many of the inmates who were out, the 306...I have to tell you, notwithstanding the best efforts of the World-Herald, I couldn't sort out how many people broke the law and were never brought back. But it looks like exactly none of them were required to come back and begin their sentence over. Can you give me anybody who had to start their sentence with the day they were mistakenly freed because they broke the law? [LR424]

MIKE KENNEY: No, I can... [LR424]

SENATOR LATHROP: Any of them? [LR424]

MIKE KENNEY: I can tell you we tried. [LR424]

SENATOR LATHROP: Okay. [LR424]

MIKE KENNEY: Or we at one point did. [LR424]

SENATOR LATHROP: "We tried." None of them were called back to begin their sentence. Those who broke the law while at liberty were not required to come back to the Department of Corrections, go back into prison, and begin their sentence where they left off on the day they were mistakenly released. That's the case. [LR424]

MIKE KENNEY: No. We arrested one parolee named Lybarger... [LR424]

SENATOR LATHROP: Okay. [LR424]

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MIKE KENNEY: ...and took him back to the Diagnostic and Evaluation Center. [LR424]

SENATOR LATHROP: Okay. We can agree Mr. Lybarger perhaps had to start his sentence over. The rest of the people that were featured in the World-Herald article on September 29, 2014, were allowed to either remain at liberty or not come back to Corrections to begin the sentence they left early at the point where they left early. Isn't that the case? [LR424]

MIKE KENNEY: Well, no, we issued warrants for a number of people. [LR424]

SENATOR LATHROP: Okay. You issued warrants for a number of people, and we'll talk about the guys that you issued warrants for. When they came back, those were people that owed you more than a year. Is that true? [LR424]

MIKE KENNEY: More than six months. [LR424]

SENATOR LATHROP: More than six months. So we have two classes of people that are...three classes that are free: we have those who are free that would be done; we have those who are free that would be done within six months; and we have those who are free that owed or would be released more than six months down the line. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Right? Those that you brought back, that third category, they picked up where they left...they picked up at a point where they were given credit for the time they were at liberty. [LR424]

MIKE KENNEY: I don't believe that's absolutely true. I think... [LR424]

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SENATOR LATHROP: In other words, they didn't have to start over. [LR424]

MIKE KENNEY: I think we're going through the process of taking away that good time, and there is legal considerations about due process and how we take away that, that there's... [LR424]

SENATOR LATHROP: Oh, no, there isn't. You know what, the Anderson case is very clear. And this isn't good time. This is time...this is not good time. This is credit for time they spent at liberty, not good time. [LR424]

MIKE KENNEY: Right. [LR424]

SENATOR LATHROP: You don't need a hearing, and you're not in the process of anything. If you guys had not told these guys that they start where they left off if they broke the law, this isn't about trying to figure out good time. This is about whether you're going to ignore one of the central tenets and the conditions in the Anderson case, and you haven't made them start over. These guys that have broken the law have been essentially allowed to remain and get credit for the time they spent at liberty. That's the case, other than perhaps Lybarger, right? [LR424]

MIKE KENNEY: I misspoke when I said good time. [LR424]

SENATOR LATHROP: Yes. [LR424]

MIKE KENNEY: I meant the time you referred to, what we commonly call Anderson time. [LR424]

SENATOR LATHROP: Okay, Anderson time. These guys that broke the law, other than Lybarger, still got Anderson time, even though they broke the law. [LR424]

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MIKE KENNEY: Not in every case. [LR424]

SENATOR LATHROP: Not in every case? Well,... [LR424]

MIKE KENNEY: We're...the fact that we haven't done it yet, we're asking the Attorney General if there is an issue with doing that and how...and I know you say there isn't any problem, (snaps) it should just be done. I defer to you. You're a lawyer. I'm not. But I don't know how exactly I'm supposed to do that. [LR424]

SENATOR LATHROP: Well, I've got to tell you something. No one was talking about sitting down with the Attorney General and trying to figure out how to take away their Anderson time until the World-Herald did a story on September 29. [LR424]

MIKE KENNEY: I agree. [LR424]

SENATOR LATHROP: These guys were not going to have to come back. They broke the law, and you were going to still give them credit, day for day, for the time they spent at mistaken liberty, right? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Okay. So we have those people. We talked about the three groups, one that owes you more than six months that are going to have to come back. And then we have the group that would be done, right,... [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: ...at the time we figured out that Corrections should have been calculating things differently after Castillas, which is in June of 2014. [LR424]

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MIKE KENNEY: Um-hum. [LR424]

SENATOR LATHROP: If you would have been done with your sentence, you got to stay free, right? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: No one's going to make them come back. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Even some of those guys committed crimes though. [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: And they got to stay free. And then you have another class, and that's the class of people whose sentences would not be done yet but it will be within six months. [LR424]

MIKE KENNEY: Well, we... [LR424]

SENATOR LATHROP: Right? You had a group? Because, I'm going to tell you, I watched the press...I read the press conferences of the Governor and the Attorney General, and I read the news articles when they, you know, have a press conference. And what I noticed is they started out and said, if these guys are done and they would be free and discharged by now, we're not going to go after them. [LR424]

MIKE KENNEY: I have an explanation. [LR424]

SENATOR LATHROP: But we are going to go after those guys that owe us more than a

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year, right? [LR424]

MIKE KENNEY: I have an explanation. [LR424]

SENATOR LATHROP: Well, we're going to get to it. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: And that's the group who we let stay out but still owed us time. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And for them we created a different group, didn't we? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: We created a different category, a new category that's never been heard of before. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And that's called temporary alternative placement. [LR424]

MIKE KENNEY: That's right. [LR424]

SENATOR LATHROP: Right? Now this was a classification of prisoners that are going to be housed at their own house. They get to stay at home. [LR424]

MIKE KENNEY: They're already at home. [LR424]

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SENATOR LATHROP: Well, they're already at home because you let them out early.
[LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: Okay. And now we're going to let them stay at home and call them temporary alternative placement. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Right? And that group of prisoners...temporary alternative placement has never been done, right? [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: No one has ever created that category until it happened after the Castillas case. [LR424]

MIKE KENNEY: That's right. [LR424]

SENATOR LATHROP: And that was carved out for how many different prisoners? How many people owed us time that were now going to be in the TAP program? [LR424]

MIKE KENNEY: Maybe seven or eight. [LR424]

SENATOR LATHROP: Seven or eight--are you sure it's not more than that? [LR424]

MIKE KENNEY: No, I'm not sure. [LR424]

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SENATOR LATHROP: Okay, because when I started doing the math, we had 306 people who were released early, 257 of them would have had their time done, we had a couple that died, 3 that I think would have been discharged on parole, and we end up with a number that's somewhere around 40, don't we? [LR424]

MIKE KENNEY: Yeah, I think maybe slightly in excess of 40 maybe. [LR424]

SENATOR LATHROP: Okay. And they are the people who are...owe us less than a year and would not have been done at the time of Castillas. [LR424]

MIKE KENNEY: That's right. [LR424]

SENATOR LATHROP: Okay. And they get to be in the TAP program. [LR424]

MIKE KENNEY: No, sir. [LR424]

SENATOR LATHROP: How many people are in? [LR424]

MIKE KENNEY: About 20 of them--at least 20 of them--had warrants, active warrants, and were arrested and brought back. [LR424]

SENATOR LATHROP: Okay. Okay. And so does that get me to...? I'm trying to do the math here in my head, and that's not what I came down here to do. [LR424]

MIKE KENNEY: Right. [LR424]

SENATOR LATHROP: Are we maybe higher, closer to 20? [LR424]

MIKE KENNEY: Yes, we are. [LR424]

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SENATOR LATHROP: Okay. So we're closer to 20 people in this TAP program.
[LR424]

MIKE KENNEY: No. (Laugh) I'm sorry. [LR424]

SENATOR LATHROP: Okay. I'm asking the questions and trying to... [LR424]

MIKE KENNEY: Of the 20 people...of the 40 people that owed us more than six months or owed us...let me back that up. Of the 40 people we talked about, 20 had warrants. Their crimes and the amount of time they owed were very serious. Of the approximately 20 left, some of them...all of them were in the community. All of them were adjusting very well. Some of them were placed on the reentry furlough program, as mentioned by Mr. Wayne. Some of them were brought back and then paroled right away by the Parole Board because they had achieved their parole eligibility and they had already demonstrated that they were being reasonably good citizens in adjusting to the community. And so that, you take off...those numbers away and I think it's seven or eight, but I won't dispute if you have a different figure. [LR424]

SENATOR LATHROP: Okay. Let's call it seven or eight. Let's talk about the reentry furlough program. So after you pick these guys up, you run them through the Parole Board and get the Parole Board's permission to place them outside of the...an institution. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And then we got a problem with some of them you can't get Parole Board approval with. [LR424]

MIKE KENNEY: Exactly. [LR424]

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SENATOR LATHROP: Right? [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: And so you have people that you want to put outside of the institution, and you can't get the county attorney to sign off on it and you can't get the Parole Board to sign off on it, so we're going to create a category for these guys... [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: ...and call it the temporary alternative placement category. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: Right? [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: Now you had a conversation with George Green about this, didn't you? [LR424]

MIKE KENNEY: I did. [LR424]

SENATOR LATHROP: Yeah. George told you there's no legal justification for this, didn't he? [LR424]

MIKE KENNEY: Yes, he advised me against it. [LR424]

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SENATOR LATHROP: Would you share with him the July 31 notes? I am going to have placed in front of you, Director Kenney, a handwritten note dated July 31. Yep, that's it, one page. See that document? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And I'm going to represent to you that that's the handwritten personal notes of George Green from a meeting he had with you on July 31, 2013 (sic)... [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: ...'14, I guess, 2014. Do you see that in front of you? [LR424]

MIKE KENNEY: Yes, sir. [LR424]

SENATOR LATHROP: Okay. Now before you start reading,... [LR424]

MIKE KENNEY: Sorry, I'm sorry. [LR424]

SENATOR LATHROP: ...let me ask you if you remember having a conversation with George Green on July 31, 2014. [LR424]

MIKE KENNEY: I don't remember the day, but I'll defer to your...yeah. [LR424]

SENATOR LATHROP: Okay. The notes would reflect, at least Mr. Green's notes would reflect, that that conversation took place on July 31, 2013 (sic). Is that right? [LR424]

MIKE KENNEY: Fourteen, I believe, yes, yes. [LR424]

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SENATOR LATHROP: Fourteen, pardon me, I... [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: I'm caught up on something else. [LR424]

MIKE KENNEY: I agree. [LR424]

SENATOR LATHROP: Two thousand fourteen...and that the conversation is about the TAP program. [LR424]

MIKE KENNEY: If you don't mind, I'll read it now. [LR424]

SENATOR LATHROP: No. Now I'm going to ask you about your recollection. When you met with George Green, it was to discuss the wisdom, among other things, to discuss the legality of the temporary alternative placement program. True? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: He had already had before he met with you a conversation with Larry Wayne wherein George Green and the other two legal counsels in Corrections advised Mr. Wayne that there was no legal basis for this classification that you were creating for the seven or eight people that you could not get the Board of Pardons...Parole, pardon me, the Board of Parole, to approve for parole or a furlough. Is that right? [LR424]

MIKE KENNEY: Yes, that's my understanding. [LR424]

SENATOR LATHROP: And you knew that that was the purpose of getting together. [LR424]

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MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And you met with George Green where Green was going to express his concern that this is not a lawful program. True? [LR424]

MIKE KENNEY: Yes, true. [LR424]

SENATOR LATHROP: I want to walk through this memo, all right? [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: The first thing it has at the top, it's dated July 31. Do you see that? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And it says, M-K, comma, in his office. That would be you: M-K being Mike Kenney. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: All right. And he says on the first...he has bullet points here, does he not, in his notes? [LR424]

MIKE KENNEY: Um-hum. [LR424]

SENATOR LATHROP: Yes? [LR424]

MIKE KENNEY: Yes. [LR424]

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SENATOR LATHROP: Okay. I...that's the lawyer in me. The "uh-huhs" and the "huh-uhs" are hard to...hard for the transcribers. [LR424]

MIKE KENNEY: I caught myself. I'm sorry. Yeah. [LR424]

SENATOR LATHROP: That's okay. [LR424]

MIKE KENNEY: (Laugh) Yes. [LR424]

SENATOR LATHROP: So the first thing he says is: Showed him the memo dated July 31 to L-W--Larry Wayne--not copied. [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR LATHROP: Do you remember him showing you that memo? [LR424]

MIKE KENNEY: I don't, but I'm certain he did. [LR424]

SENATOR LATHROP: Okay, do you need to see that memo? [LR424]

MIKE KENNEY: I was listening carefully. I hadn't...I don't dispute it a bit. I know it exists. [LR424]

SENATOR LATHROP: Okay. And that memo was about the TAP program, and George Green had advised Larry Wayne in that memo that there was not a legal basis for establishing the TAP program. True? [LR424]

MIKE KENNEY: That's true. [LR424]

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SENATOR LATHROP: And these are people you can't get Board of Parole authority to release to an alternative setting, so you're creating this group. [LR424]

MIKE KENNEY: Yes, sir. [LR424]

SENATOR LATHROP: The second thing, the second bullet point, is: Bare, Bruning, Freudenberg, Smith, Governor, Kintner, Bell in office when decisions made regarding lost boys. First of all, who are the lost boys? [LR424]

MIKE KENNEY: I don't know. I've never used that phrase. [LR424]

SENATOR LATHROP: Okay. [LR424]

MIKE KENNEY: Apparently, it's referring to these early discharged inmates. I've never used the phrase. [LR424]

SENATOR LATHROP: Okay. That would at least be George Green's slang for the people that were headed to the TAP program. [LR424]

MIKE KENNEY: I guess you can surmise that. [LR424]

SENATOR LATHROP: Okay. Well, what I'm mostly surmising is from his bullet point: that you shared with him that the decision regarding the TAP program was a decision made with Bare, Bruning, Freudenberg, Smith, the Governor, Kintner, and Bell in the office when the decisions were made. Did you tell Mr. Green that? And by the way, he's here today. [LR424]

MIKE KENNEY: I know. I saw him come in. I don't... [LR424]

SENATOR LATHROP: Okay. Did you tell Mr. Green that? [LR424]

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MIKE KENNEY: I don't remember telling him that. I remember telling him--I owned the decision--that I'd been advised against it. [LR424]

SENATOR LATHROP: You can own it. The question is, who was in the room when the decision was made? And did you share with Mr. Green that these gentlemen or these people were in the room when the decision was made to establish the TAP program? [LR424]

MIKE KENNEY: Senator, I believe I constructed/invented this by myself at my desk. I remember when I thought it up. I believe I informed Mr. Green that I had told these people about that... [LR424]

SENATOR LATHROP: Okay. [LR424]

MIKE KENNEY: ...that that's how... [LR424]

SENATOR LATHROP: Did you share with the people--Bare, Bruning, Freudenberg, Smith, the Governor, Kintner, and Bell--that you were creating a category of prisoners who were going to be allowed to remain at liberty and that Green had told you it was unlawful? [LR424]

MIKE KENNEY: The first part and not the second: I told them this is what I was going to do and it's what I thought was the right thing to do. I didn't...I don't think I mentioned to them that I did it against the advice of legal counsel. [LR424]

SENATOR LATHROP: When you told the Attorney General and the other lawyers in the room and the Governor that you were setting this up, did anybody ask you if you could, whether it was even legal to do? [LR424]

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MIKE KENNEY: Senator, I don't even remember. It's...let me explain. I think I mentioned this in passing on...throughout time. I didn't go into a room with all of these people present and say, this is what I'm doing. I think I mentioned it to various people as I...saying, I know how I'm going to handle or I know how I want to handle the people that don't qualify for RFP who are otherwise RFP qualified, except absent the permissions that you have mentioned. [LR424]

SENATOR LATHROP: Couldn't get, yeah. [LR424]

MIKE KENNEY: And so when I did this, I didn't walk into a room full of these names and announce this thing. I think I said, this is how I'm going to deal with it, this is how I want to deal with those seven or eight people. [LR424]

SENATOR LATHROP: Okay. What decisions were these people in the room...when you advised Mr. Green that these people were in the room when decisions were made, what decisions were you referring to? [LR424]

MIKE KENNEY: He'll have to testify. I don't... [LR424]

SENATOR LATHROP: You want to read the bullet point again? [LR424]

MIKE KENNEY: I'm speculating on what his notes mean, and I... [LR424]

SENATOR LATHROP: Well, did you tell him...obviously, he's writing something down that he thinks he heard you say. Right? [LR424]

MIKE KENNEY: Right. [LR424]

SENATOR LATHROP: And in it, you list the chief of staff, the Attorney General, two people from the Attorney General's Office, the Governor, Kintner, and Bell, and said to

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Green that they were in the room when decisions were made. What decisions were made when they were in the room? That's my question. [LR424]

MIKE KENNEY: I don't know, because I will dispute that. I...they weren't in the room. There was no room with all of these people in it when I invented the TAP. I think what I said was I am...I think I was in meetings in the room when all these people were there. I couldn't tell you what specific decisions, but I don't think it's tied to this. And if I communicated that to George Green somehow and he misunderstood it, that was in error. [LR424]

SENATOR LATHROP: We may have to call these people and find out what decisions were made, or you can tell us if you know. [LR424]

MIKE KENNEY: Say it again, please. [LR424]

SENATOR LATHROP: If you don't know, if you don't know what decisions were referenced, then okay. But I don't know what else this committee is going to do but to try to bring these folks in and ask them what decisions were made when they were in the room, because this looks like an admission to me. And I can appreciate you don't want to go there with me today. [LR424]

MIKE KENNEY: Senator, that's not the case. I had several...(laugh) I had... [LR424]

SENATOR LATHROP: Okay, well, let's try the next bullet point. Let's try the next bullet point. The next bullet point... [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: ...on this memo says: correction goals served by leaving lost ones in community. Do you remember telling Mr. Green that the goals of Corrections

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would be served by leaving the "lost ones" in the community rather than returning them to the Department of Corrections to finish out the sentences they owed their victims?
[LR424]

MIKE KENNEY: I would say it differently than this. I did tell Mr. Green that, in my point of view, the mission of our agency and the reintegration efforts that we have with inmates would be better served by doing this than by arresting these people and bringing them back inside the prison walls. [LR424]

SENATOR LATHROP: Well, the judge gets to sentence them, and you're supposed to incarcerate them until their sentence is complete, and you have no legal basis to let them out without the Board of Parole's permission. Isn't that the case? [LR424]

MIKE KENNEY: I agree. [LR424]

SENATOR LATHROP: And you did. [LR424]

MIKE KENNEY: I took a very lenient view of the statute that says that I can place...the Director of Corrections can place people in a residence facility at his discretion. And I can't quote you the citation but it exists. [LR424]

SENATOR LATHROP: Oh, I've read it. I've read it. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: And George Green had the Attorney General's Opinion from 1991, the very first Attorney General Opinion from 1991, that he told you about, didn't he? And he said, there's an AG Opinion that says you can't do this. And you did it anyway. [LR424]

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MIKE KENNEY: I'm sure he did. I'm sure he did. [LR424]

SENATOR LATHROP: And the Correction goals, by the way, where are we on population about this time of year? Somewhere near 158 percent of capacity? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And not bringing these guys in...bringing them in would exacerbate the overcrowding circumstance, would it not? [LR424]

MIKE KENNEY: Not significantly, not seven or eight people. We get 20 people at a time from Douglas County. That's not the motive, sir. [LR424]

SENATOR LATHROP: Well, the next bullet point says: know that statute requires Parole Board approval, board not going to give it. That was the discussion you guys had about these "lost boys" with Mr. Green? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And you told him, well, the Parole Board isn't going to give me permission to let them stay at home, so I'm going to create the TAP. Right? [LR424]

MIKE KENNEY: I don't like the way you said it as much as the way I'd say it, but that's correct. [LR424]

SENATOR LATHROP: Well, that's it, though, isn't it? The problem was you had to create this group of people you let stay home and not come back and complete their sentence, like the Supreme Court Anderson Opinion required, because you couldn't get approval from the Board of Parole. [LR424]

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MIKE KENNEY: We wanted to put... [LR424]

SENATOR LATHROP: That was your problem. [LR424]

MIKE KENNEY: We wanted to put them on RFP, and there were technical differences why we couldn't put them on RFP and... [LR424]

SENATOR LATHROP: First of all, you couldn't get the county attorneys to agree to it, right? [LR424]

MIKE KENNEY: In two counties, yes, that's true. [LR424]

SENATOR LATHROP: Yeah, Sarpy County and Lancaster County said, no, and don't put me in the middle of it, didn't they? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR LATHROP: And so you can't get them on parole, and George Green told you the 1991 Attorney General Opinion said you have to have the Board of Parole's permission and if you're going to create this separate class and let these guys stay at home on the couch instead of come back to the penitentiary, you're breaking the law. [LR424]

MIKE KENNEY: Yeah, he told me that. [LR424]

SENATOR LATHROP: The last bullet point says: doesn't have the luxury of insisting on statutory compliance. Do you see that bullet point in the memo in front of you? [LR424]

MIKE KENNEY: Yes. [LR424]

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SENATOR LATHROP: Do you remember telling George Green that you don't have the luxury of insisting on statutory compliance? [LR424]

MIKE KENNEY: I don't remember saying that, but if he...I won't dispute it if he says...if you took it... [LR424]

SENATOR LATHROP: That's where you were at when you were in the meeting, isn't it? "I don't have the luxury of insisting on statutory compliance because the Board of Parole isn't going to release these guys and I'm not going to bring them back." [LR424]

MIKE KENNEY: Well, when I say I don't remember saying it, it's really truthful. But I'm not going to deny saying it. I don't remember making that utterance, but I won't dispute it. [LR424]

SENATOR LATHROP: I said this with the last witness, and I'll just make this remark too. You know, I listened to the press conference about George Green after this was over. We had him up here a couple of...a few weeks ago, right, and we talked about, well, he didn't read the Castillas Opinion. And the Governor gets a press conference and Jon Bruning does a press conference the next day and go, I can't believe it, utter incompetence, because we didn't know about a Supreme Court Opinion and didn't follow it, and that's George Green's fault. And everybody had a big press conference and said, boy, it's George Green's fault. You know what, here's the thing. Castillas...the problem that you had releasing 306 people early was because you weren't following the Supreme Court Opinion. And then, when you're fashioning a remedy, you're not following one either. You're not following the Anderson Opinion, either of the two conditions Judge Heavican set on the equitable doctrine of allowing these guys day-for-day credit. And then, when you go to fashion a remedy, you're ignoring the advice--good advice--from legal counsel that it's against the law. [LR424]

MIKE KENNEY: I disagree. [LR424]

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SENATOR LATHROP: And for the life of me, the irony, it's not lost on me: that after everybody says and criticizes George Green for not reading the Castillas Opinion, mocks him, and then when you fashion a remedy, you ignore the Anderson case and you ignore an Opinion from the Attorney General's Office that directly, clearly, and unequivocally said you needed the Board of Parole in order to let these seven or eight people stay free. [LR424]

MIKE KENNEY: Senator, I'm not going to agree about the Anderson. I completely own the TAP program. I'll take all the blame for that. [LR424]

SENATOR LATHROP: Oh, I think you're falling on your sword. I think you're falling on your sword. And we'll find out what decisions were made when we talk to these people next. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: I don't...I...Director Kenney, I don't believe that you came up with this on your own, that you didn't run it by the Attorney General's Office,... [LR424]

MIKE KENNEY: (Laugh) Sorry. [LR424]

SENATOR LATHROP: ...and that some lawyer, after George Green told you you were breaking the law, that you didn't talk to the Attorney General. [LR424]

MIKE KENNEY: Sir, I'm not falling on my sword. And it's...I don't lie. I've never lied under oath. I'm not lying to you today. I've sat at my desk and thought of how I could do an RFP-like program that would provide electronic surveillance, that would provide parole officer supervision. If you will permit me just this much? [LR424]

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SENATOR LATHROP: Go ahead. [LR424]

MIKE KENNEY: I feel passionately about this and I think you're inferring something I need to respond to, and that's that I would be deceptive and protect other people. That isn't happening right now. I looked at RFP... [LR424]

SENATOR LATHROP: Well, then we can just agree that you don't remember what decisions these people were in the room to make. [LR424]

MIKE KENNEY: I think I notified these people that this is how I was going to handle these...this handful of people and... [LR424]

SENATOR LATHROP: Well, I've seen the e-mails. You know, they came last night at about 4:30 from the Corrections or the Attorney General's Office, the e-mails did. And I can see them. They look something like this: Well, we'll have the 257 that would be released, so now we're down to 49, and 3 of them died and now we're down to 37, and we're going to pick up 20 and now we're...you could see them do the math, which is...the math was, how do we get the number that we have to drag back to the Department of Corrections lowered? [LR424]

MIKE KENNEY: I can tell you that math was not inspired by a capacity issue, an overcrowding issue. It was inspired by my desire to keep people who were integrating into the community, who had been relatively crime free and, if anything, doing misdemeanors, and to keep their programs intact because we know that recidivism is tied to stability in the community, and to disrupt them and bring them back...I had conversations with people about this when I took Lybarger after being in D&E for one day. And I got him out because I received a call that said, what kind of a director are you going to be? And I decided to be the kind of director that was going to enforce the mission of the agency: to reintegrate people in a successful manner that still upheld qualities of justice but didn't disrupt their lives. [LR424]

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SENATOR LATHROP: That's fine, that's fine. [LR424]

MIKE KENNEY: And...and that's what my... [LR424]

SENATOR LATHROP: And that's the kind of director you are, but you had to ignore the Anderson Opinion and exactly what the Supreme Court told you to do with these guys when they were done. And when you found out you made a mistake and you rounded these people up and you had to look to see if they broke the law, you didn't. And when you were told by the Supreme Court Opinion in Anderson that these guys owed more time, you decided not to make them serve it. And that's... [LR424]

MIKE KENNEY: Senator,... [LR424]

SENATOR LATHROP: No. No, sir. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: It's the law. It's the same Supreme Court that George Green...that issued the Castillas Opinion. It's the very same Supreme Court. They come with the same authority and they told you exactly--exactly--how to handle these inmates. And you chose to ignore the Supreme Court Opinion. You created a category that violated an Opinion from the Attorney General's Office, Director Kenney. And you may think that that's a...that that is a quality of a strong director, and I say you broke the law. [LR424]

MIKE KENNEY: Sir, Anderson himself violated the law on numerous occasions at the time he got this ruling from the Nebraska Supreme Court. [LR424]

SENATOR LATHROP: You know what, I read that Opinion, and the court said, there's

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not evidence of it and we're not taking it up. So that's not the question. The...Judge Heavican, I'll read his holding again if you like. He says very clearly that if they break the law or knew that they were allowed to be released, that they do not get credit, they go back to the penitentiary, and they start their time where they left off. [LR424]

MIKE KENNEY: I...we... [LR424]

SENATOR LATHROP: Now, I'll argue with you about that Opinion all you'd like, because I've read it over. [LR424]

MIKE KENNEY: Well, I don't want to argue about it, sir. I want to explain that when we ran CJIS crime information data on these inmates you're talking about that were out there, a lot of them had less traffic violations, poor registrations than Anderson himself. [LR424]

SENATOR LATHROP: I'm not talking about traffic violations. You want me to go to the...I have the article from the World-Herald on September 29. There were assaults. There were serious felonies in there. [LR424]

MIKE KENNEY: And they...and you're saying that they were left out? [LR424]

SENATOR LATHROP: I'm telling you what the reporting was, and my understanding today... [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: Well, let me tell you. They went to talk to the Governor about it and the AG, and they said, I got no comment, there's pending litigation--which, incidentally, there wasn't any. [LR424]

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MIKE KENNEY: Were there assault convictions or just charges? [LR424]

SENATOR LATHROP: Well, I don't know because I didn't run that stuff. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: Did you? [LR424]

MIKE KENNEY: Sir, I'm saying I have. [LR424]

SENATOR LATHROP: No. [LR424]

MIKE KENNEY: I've got some stuff here. [LR424]

SENATOR LATHROP: Okay. [LR424]

MIKE KENNEY: I'm not trying to be defensive. I'm not trying to be argumentative. I'm trying to say that this is a complicated issue and that our understanding, my understanding--I'll leave everybody else out of it--my understanding of Anderson, if it's flawed, if it's erred, then I own that too. But my understanding of Anderson was that he himself did minor crimes like traffic, no registration, running stop signs, and things like that. At the time the Supreme Court decided that he was going to get credit for that time out, we have a lot of inmates in similar situations that, when we ran the CJIS report, that's why they were left alone, that's why they weren't brought back, is that they were minor. [LR424]

SENATOR LATHROP: So what you've done is you've gone outside the facts that are in the reported Opinion and found out that this guy Anderson, who somebody maybe didn't prove that he broke the law while he was free because, I can tell you, there was a second Opinion in 2009 after he'd already gone back and had a hearing. They bring him

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back, he goes all the way up to the Supreme Court, and the Supreme Court says: Yeah, that's not even an issue here. So the fact that somebody told you that he might have violated the law never made it in the Opinion and doesn't change the holding. The holding is, if they break the law, they come back and start over. And you didn't make all these guys come back and start over. [LR424]

MIKE KENNEY: That's correct. The holding was that they don't get credit for their time served. [LR424]

SENATOR LATHROP: True. [LR424]

MIKE KENNEY: That's right. There's no language in there that says--and I agree it's inferred, it's implied--that they should come back, we should arrest them. [LR424]

SENATOR LATHROP: Oh, it's not implied. It's direct. It's in the holding. They say "We hold..." I mean, it's the holding. It is as clear... [LR424]

MIKE KENNEY: Well, I must have missed the language. Does it say that we hold that we...they need to be returned to prison? It says, such a prisoner has essentially acquiesced in the loss of his or her right to a continuous sentence. [LR424]

SENATOR LATHROP: Right, which is to say they don't get credit for the time they spent at liberty if they've been breaking the law. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: And if they don't get credit for the time they spent at liberty, then they come back, right, unless they get into the TAP program. [LR424]

MIKE KENNEY: That's right. [LR424]

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SENATOR LATHROP: Okay. That's all I have. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR LATHROP: Senator Krist. [LR424]

SENATOR KRIST: No, I...I'll..no, no questions. [LR424]

SENATOR LATHROP: Mello. [LR424]

SENATOR MELLO: Thank you, Mr. Chairman. Director Kenney, did you prepare at all with any attorneys, any staff, anyone from the Governor's Office, the Attorney General's Office, in preparation for today's testimony? [LR424]

MIKE KENNEY: No. [LR424]

SENATOR MELLO: You speak... [LR424]

MIKE KENNEY: I prepared with our staff at central office, I'm sorry, yes. [LR424]

SENATOR MELLO: With the Department of Corrections' staff? [LR424]

MIKE KENNEY: With the staff at central office. [LR424]

SENATOR MELLO: But no...you had no conversations at all about today's hearing or testimony with anyone in the Governor's Office, Governor's Policy Research Office, or the Attorney General's Office? [LR424]

MIKE KENNEY: No, not...I think the Governor knew that I was testifying today and said,

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good luck, you're going to go into...it's going to be tough. And I said, yeah, I know it will be. [LR424]

SENATOR MELLO: Okay. I have a couple questions, and it's something that you and I have traded an awful lot of letters over the last couple of months... [LR424]

MIKE KENNEY: Yes, sir. [LR424]

SENATOR MELLO: ...specifically regarding the cost calculations in respects to the miscalculation of sentences, as well as how the department comes up with their fiscal estimates both in regards to this issue and, I would also raise, come up with fiscal notes in general in regards to issues surrounding good time. You sent a letter of response back to me on August 15--and I'll give you the gist of it because I'm sure that you read it because you did sign the letter--where you make a point of contention that the Department of Corrections provides public information in regards to...Senator Seiler actually had a copy of the most latest one, the Department of Correctional Services' annual cost report, and you guys provide that updated version in respects to what are the costs to the state for housing an inmate at different facilities. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR MELLO: I inquired to the Department of Corrections, with the assistance of the Legislative Fiscal Office, what the miscalculations of sentences would have fiscally on the state. And the Department, in reply from you, said that in calculating any kind of cost, both short-term and long-term costs, the department only incorporates per diem costs when it relates to sentencing and/or inmates in respects to continuing longer sentences. [LR424]

MIKE KENNEY: Yes. [LR424]

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SENATOR MELLO: We may just have a general disagreement, which I think, to some extent, if I've got to pursue legislative action, I will, because I think our branch of government makes the determination in regards to both budgets, appropriations, and what actually are the costs of running government. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR MELLO: So the reality is, there may be a general disagreement between you and myself right now and/or the executive and legislative branches. But as your department continues to provide public information, which you don't dispute, which you and I sit next to each other at the LB907 working group with the Council of State Governments last month, that also referred to the Department of Correctional Services' annual cost report as the public knowledge and foundation of what it costs to house an inmate. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR MELLO: At some point in time, has there been any conversation since then that the real cost associated with housing inmates longer due to the miscalculation of sentencing, that we need to take in consideration staffing costs and/or capacity or facility costs in preparation for the upcoming budget cycle of fiscal year 2015-2017? [LR424]

MIKE KENNEY: That's a long question. I think I understand it. But if I can respond in kind of components, I think the first thing we probably disagree with, and I can just explain it, it's...first of all, budget is not my forte. And that's not an excuse. I'm just saying I'm not...it's not my strong suit and I'm still learning a lot about it. Now to say that, one of the ways we calculated the capacity issues, the extra inmates, the percentage of overcapacity, was that we wanted to use just per diem--food, clothing, those kinds of things... [LR424]

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SENATOR MELLO: Medical care. [LR424]

MIKE KENNEY: ...and medical care and, you know, those kinds of things because what we weren't adding on and what we haven't experienced is we haven't expanded; we haven't built new buildings; we haven't added staff and buildings, which are very expensive items to add. And so while the number of inmates we have increases, we're not putting brick and mortar and uniformed officers into the formula because we haven't actually had...we haven't been able to build or hire officers. And so I think in a real simplistic way that's why we said, although we're pushing people into rooms more than what we would like to and there is a congestion or a capacity issue, that what we're really only paying for realistically then is maybe some extra hot water, extra meals, extra clothes, extra medical care. And, you know, I don't...I won't arm wrestle with you about that. That's why we wanted that figure, is because to reflect that that was part of a building or an FTE impact really wasn't accurate in our mind. So I don't know if that... [LR424]

SENATOR MELLO: I'll take you at your word of that was your...that was the department's view, that you wanted to give that perspective. But I have a tough time seeing and I have a tough time believing now...it's October 10.. You'd provided the Governor and the State Budget Administrator and the Legislative Fiscal Office your budget request on September 15. [LR424]

MIKE KENNEY: Yeah. [LR424]

SENATOR MELLO: And you incorporated in your budget request more staffing due to security concerns in regards to overcrowding. [LR424]

MIKE KENNEY: Yes. [LR424]

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SENATOR MELLO: Now, you can tell me and tell our colleagues here that that was the department's original consideration on August 15 when you sent me this lengthy letter. But then a month later you submitted a budget request that completely counters what you just explained to me, that you are now taking in consideration staffing costs in respects to dealing with overcrowded prisons right now, which the sentence miscalculation scandal proves that we will have inmates in Corrections significantly longer that we were not anticipating. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR MELLO: So for me right now, from where I sit at this moment in time, I have a tough time seeing and believing that you didn't provide me this information back in August to try to divert away the attention of what the real costs were to the sentence miscalculation issue. I know that you were stressed. I know that there was a considerable number of issues the department was wrestling with. But the fiscal issue is something that both the legislative branch and the executive branch should be able to find some common ground on, because the reality is the executive branch has to come through our branch of government to receive funding to operate the Department of Corrections. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR MELLO: And as you have been hearing from these hearings over the last month, the issue of underfunding the Department of Corrections over a number of years has been brought out in multiple testimonies. So I have a tough time accepting this August 15 letter and estimates based on (1) what you now submitted on your September 15 budget, which I think whether we can agree or disagree I think was providing I think a false perspective of really what it costs then the state to house an inmate a month earlier when you gave me this letter. The only other issue I will pose to you is it's now day 50 since I've requested from the department, and I have spoken with

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you privately as well, the Capital...the Capital Facilities Master Plan that the Legislature appropriated money for in the 2013-15 budget cycle, in which you provided both my Appropriations Committee and the Judiciary Committee in March the somewhat updated version of what this is...what you can anticipate from us in a few months when we complete this master plan for you to consider in respects to any programming needs for the department and/or any capital construction and/or facility expansion that may be needed to deal with prison overcrowding. It's now October 10. You provided in those documents in March that you were going to provide, if anything, a time frame, that this master plan was going to be released publicly to the Legislature and the state in general when you submitted your budget request last month. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR MELLO: It's now a month...almost a month...it's 25 days later since you submitted that request, and I feel unfortunate that I am badgering the department and the Governor publicly, daily, to get what was offered and said would be given to the state at large and the Legislature back in May. And my concern, more than anything else, is it's October 10. This hearing and, obviously, this committee is not purely looking at investigating what the department's strategic consultant or consultant has created for your strategic plan moving forward. But I have concerns in regards to (1) why it wasn't proposed and submitted publicly last month. And the only conclusion I can come to is that you're trying to withhold this for a later date, because either (1) you don't want us to see what's in it; (2) you don't want to...you want to try to draw out the clock and let it be known to us in December when the Legislature, we have a new Legislature and essentially a new Governor comes in, instead of when it was supposed to be submitted: a month ago. I'll give you the opportunity to respond, Director. I have to be honest, you've been fairly candid with me when we've talked about this and you've said in multiple private meetings, with Senator Chambers and Ashford in one of them, as well as you and I speaking together at an LB907 working group, that the plan will be available shortly. Fifty days later, the plan has not been available. And I don't believe

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that, as a state senator, I don't think a committee Chair, anyone in our branch of government should have to publicly condemn the department on a daily basis to remind the state and remind the public that you were supposed to provide a public document, by statute, I remind you, by statute, on September 15. And regardless of what happens with this committee and regardless of what happens with LB907 working group, that document has been appropriated money for and was expected to be released on September 15 and it hasn't. I'll give you an opportunity to respond. [LR424]

MIKE KENNEY: Senator, I appreciate your frustration, and I think it's deserved. I don't think there's probably anything I can say here that isn't going to sound like an excuse, so let me lead with that. As it is, the people who are most tasked with budget preparation, the people in our research office, the people in our...that have the ability to work have been...and I guess all the mirth has gone out of my voice, Senator Lathrop. When we...when you asked me at the beginning about this incident, to say it's been totally consuming...forgive me just for a minute here. I'm fine, thank you. To say it's been totally consuming is a big understatement. I've watched the men and women of this agency come in on weekends and evenings. I've seen them so stressed out. Things like what you're mentioning--the proper budget, the adjusted budget, the deficit or the master plan in particular--has just taken a back seat, frankly, in a lot of our planning. We continue to try to meet with Dewberry. There are some disagreements with Dewberry about some of the data, and we're...candidly, we're in kind of an arm-wrestling match with them about that. And I just resent the fact that I'm being emotional at this point because it sounds like a deflection, and that's not who I am. I'm not making excuses. We're working pretty hard. I hope to get it to you just as soon as we can. But we have a couple program statements that are way overdue that will put into motion the final touches of this plan. I guess we're unwilling to release it...excuse me. I apologize. We're not going to...we don't want to release that prematurely or in a half-baked way. I know you asked if we could, and I just think there's a reluctance to do that because I don't want to give you a partial picture of it. And like I said, I think it sounds like an excuse. We have been completely preoccupied with all of these things. And so it's...so there you

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have it. I'll get better here. You just be patient with me. I feel passionately about our agency and our inmates and public safety. I was probably going to wait for the end to say that, but some things are just slipping a little bit here. And it's not a lack of will. And regardless of what you...opinions that you might be forming right now, I don't think it's a lack of competence or interest or any other thing. I think the pressure is on, and I think we're going to respond just fine. And we'll get it to you just as soon as we can. I'm embarrassed that we haven't been able to keep pace with expectations. It seems like this has kind of taken a life of its own and really dominated--totally dominated--our landscape for the last three to four months. And we've got a ways to go. We've got a lot of stuff to do. So I'm sorry. I hope I didn't put you on the spot in my reaction, and I'm going to kick myself later for... [LR424]

SENATOR MELLO: No. [LR424]

MIKE KENNEY: ...for this...being in this position. But I am who I am. [LR424]

SENATOR MELLO: Director Kenney, I think all of the senators up here would agree that public service is not easy on multiple levels. But I would also say that you have a boss, and your boss is the Governor. And when the Governor chooses to turn issues such as this into more of a political punching issue and/or, for an example, attack the legislative branch for not submitting our budget request, even though it was completed, not submitting our budget request on September 15, and we submitted it that four days later, and for the Governor to go out publicly and excoriate the Legislature... [LR424]

MIKE KENNEY: Right. [LR424]

SENATOR MELLO: ...and then his own Department of Corrections can't produce the most valuable work product for both branches of government to figure out what we're going to do to address prison overcapacity right now,... [LR424]

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MIKE KENNEY: Um-hum. [LR424]

SENATOR MELLO: ...almost to 160 percent, it no doubt makes your job a lot more difficult because it puts us and others in a situation to have to explain to the public we want to try to figure out the problems and solutions here instead of taking political pot shots from the chief executive officer of the state. [LR424]

MIKE KENNEY: I understand. [LR424]

SENATOR MELLO: So if...any word of advice from me to you would be to go talk to your boss and ask him to find a way to be more productive in regards to these conversations, to find a way to take politics out of what we're trying to do, to stay out of, I would say, his involvement in an independent committee like this, and let us do our jobs and, to some respect, let you do your job to provide us and his budget administrator with the Capital Facilities Master Plan, which, frankly, you and I can both agree, your underlying budget submission should have been based on this plan. So if you have concerns in regards to what the consultant is suggesting to you, any program statement or program expansion within Department of Corrections, statutorily and based off the contract and the funding that we gave you, should have been based on this master plan. And that's the one concerning part that I've got outside of anything that we're discussing today is how you came up with a budget request that wasn't based off the blueprint that you told us or your agency told us two years ago when we appropriated the money for you to do that. [LR424]

MIKE KENNEY: Well, I can respond to that, and it may not be a response that you find palatable. But the...I think, if I can speak for the Governor, I think he feels strongly that, at this juncture, this would be the business of the Governor, of the new Governor, and I think that's not to excuse us for the bad timing. But in terms of Governor Heineman getting behind this master plan and whatever it holds, whatever the recommendation is in there, I think, like other things he has mentioned, I think he would rather defer to the

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oncoming Governor and have them be part of the next session. And again, I know he has said that, and I think that does make sense to me. But that...the real reason you don't have it is because we have failed to get everything to our consultants. And there is a little tug with them about data, and data drives the final product. And so if we're not in agreement about that, then I don't want this to be a flawed thing. Again, I opened with...I know that will sound like an excuse, but there are some reasons for that, and I apologize and we'll get it. [LR424]

SENATOR MELLO: If the Chairman will give me one more, kind of, question, the issue of administrative disciplinary actions and the loss of good time through administrative actions has been an issue... [LR424]

MIKE KENNEY: Um-hum. [LR424]

SENATOR MELLO: ...that Senator Ashford and myself raised last fall in...or at least I did in communication with the Governor and which the department made changes to their rules and regulations to... [LR424]

MIKE KENNEY: Right. [LR424]

SENATOR MELLO: ...change the amount of administrative good time that could be lost to an inmate. [LR424]

MICHAEL KENNEY: Yes. [LR424]

SENATOR MELLO: But something that I still have a tough time getting my hands wrapped around a little bit is how the department comes up with fiscal estimates and fiscal impacts when it deals with sentencing laws. And I'd draw your attention. Former Director Houston in 2013--February 27, 2013--testified in opposition, and I assume he testified in opposition on behalf of the administration, in front of the Judiciary Committee

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on LB379, which would have taken away good time credits as part of the sentencing law. Director Houston testified in opposition to that bill and, specifically, I'm just going to read you what he says: The bill proposes changes in sentencing credits for certain crimes commonly referred to as good time. As our fiscal note indicates, such a provision would have an impact on the population of the department, increasing the number of inmates into the future. While our facilities will continue to function in a safe manner, currently we stand at approximately 145 percent of our rated capacity. Good time is an important facility management tool for the department as we manage this population. A year later, you came into that same committee and gave a completely opposite testimony, a complete opposite testimony. And you provided a fiscal note that had the complete, essentially, opposite point of view of... [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR MELLO: ...that changes similar to what was presented a year earlier--we're going to have a minimal fiscal impact, if any--and it was kind of a minimal impact at all on prison overcrowding. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR MELLO: From where I sit, and dealing with budgets, dealing with fiscal notes, I have a tough time believing that the administration somehow changed completely a policy perspective and a fiscal perspective that wasn't based on politics and wasn't based on the issues that we've been investigating regarding one inmate in respects to that inmate's release from the Department of Corrections. And I don't have to show you this testimony. It's public testimony that Director Houston gave. It's completely opposite the testimony you gave this year, simply one year ago, February of 2013. This wasn't the 2011 bill that has been quoted multiple times, LB191. This was a separate bill that was brought not by the department that you testified, the department testified in opposition to, and said it was going to have dire fiscal impacts and it was

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going to overcrowd our prisons more than we're at right now. [LR424]

MIKE KENNEY: Um-hum. [LR424]

SENATOR MELLO: I don't expect an answer, but I think it should show for the public record of how political, good or bad, your agency, and operating under the auspice of the Governor, has taken this issue from 2013 to 2014. Thank you, Mr. Chair. [LR424]

MIKE KENNEY: Thank you. [LR424]

SENATOR LATHROP: Senator Krist. [LR424]

SENATOR KRIST: I passed, but I just...I have to make this point based upon the questions that were asked and answered. There are a few of us who sit on both of the committees having to do with Corrections and, Director, you're there as well. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR KRIST: The Governor suggested in that last Corrections reinvestment committee that we don't need to rush into anything. Well, Director, if we don't do something in the 2015 Session, we're going to have the ACLU and many other people down our throat. And we're not going to need you because the Department of Justice is going to come in here and tell us how to run these operations. And it's going to cost us a lot more money than if we solve it ourselves. So we can't wait until the next Governor walks in and tries to make some decisions. This administration needs to own what has happened. This legislative process needs to go through, and we need to have legislation in 2015 that speaks to the problems that we have created. That's not a question. That is a...that is my word, and I will say it again when we go into that October 22 meeting. This is not a game. We're not pushing back on it. We're not going to allow the next Governor to take his time and figure out what's going on. We're going to do

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something in the 2015 Session, and it's because the master plan needs to get done, the budget needs to be put in place. That direction and that message should be crystal clear to you, sir. Thank you. [LR424]

MIKE KENNEY: It's extremely clear. I hope I haven't given you the impression that I'm disinterested in moving forward or any of the things you mentioned, sir. [LR424]

SENATOR KRIST: Well, I hope not...I'm not misunderstood either. We're not going to allow the next Governor to come in and sit down and make plans or change things that he knows nothing about. We're going to have a new administration that's going to help us do that, but we're going to have CSG help us develop a plan. Because if we don't, as I said, we're going to have a lot of help; and the state of Nebraska cannot afford that help. Thank you. [LR424]

SENATOR LATHROP: Senator Seiler. [LR424]

SENATOR SEILER: Director Kenney, I have a...I can take you through a whole series of questions, but that just wastes time so I'm going to cut it a little short. I've been practicing law for 48 years and I have a high respect for the law. I've been sitting here the last day and a half or and the other hearing too. And first we hear one of your psychologists is hiding a psychiatric report, playing with evidence, trying to screw around with things, total violation of the law and the respect for the law. And then you come up and testify that TAP is a program that you developed. And when people were telling you it was a violation of the law, I think you've got an atmosphere problem. And you're not helping it any by being against your guidance by the law. They're telling you this is what you got to do. You don't get the opportunity to say, Supreme Court, go to hell. I'm going to do it my way. That's for songs and country singing. That's not for this. And so I really believe you've got a real problem in your entire setup and you really need to get on it to change that atmosphere to respect for the law and respect for evidence and not play games. Thank you. [LR424]

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MIKE KENNEY: Thank you, Senator. [LR424]

SENATOR LATHROP: Senator Bolz, do you have any questions? Senator Schumacher. [LR424]

SENATOR SCHUMACHER: Yes, just a couple. I think Senator Lathrop adequately summarized the holding in the Anderson case that the burden of proof is on the prisoner to show that they were innocent of anything in being let free early and that they behaved themselves while they were out. I do have a question on the procedure though. When you make a determination that X has got to be brought in because they were released as a result of this screw up, what do you actually do? Do you just call the State Patrol and say, go get this guy? Do you go to court and ask the judge for an order? Is there notice, is there a hearing? What actually happens? [LR424]

MIKE KENNEY: There are a number of means we used. The more formal one was I believe it was 20 warrants issued by the Attorney General's Office and those went to law enforcement. Colonel Sankey, the State Patrol, did what they would do with any other warrant that would be they would go search for people, use intelligence, databases and try to find those folks. And the other thing, there were some people...some people had done their previous sentence and per ala Anderson or not, had done an additional sentence and were actually on parole on the second sentence and so they were under supervision by a parole officer. So that's...and that's the case with Lybarger, for example, that I mentioned where the parole officer actually went out to the parolee and said, ah, guess what? You're doing great on parole on the number you're on. But there's this number back here that we miscalculated so we're going to put you in cuffs and take you back to the D&E. And if you'll permit me to editorialize, you're going to lose your job, you're going to lose your family contact, you're going to disrupt the stability that you've had for several years now and you're going to give us this pound of flesh and so that's what happened in some cases with the warrants and some were

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arrested by parole and done administratively. [LR424]

SENATOR SCHUMACHER: The warrants that the Attorney General's Office got, for what crime were they issued? [LR424]

MIKE KENNEY: Generally felonies. [LR424]

SENATOR SCHUMACHER: But what...was this a new felony charge or? [LR424]

MIKE KENNEY: If they had been released previously and a lot of them were not...they were not getting Anderson time because of the law...because they had violated the law, in this case I believe the felony threshold was the one we looked at and they had done a significant crime. And so we knew that they were forfeiting their entire Anderson time. [LR424]

SENATOR SCHUMACHER: So what...I mean, the procedure is bothering me here. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR SCHUMACHER: I'm just trying to see how you worked through it and who you talked to, to work through it. You make a determination that so-and-so was released as a result of a mistake and he or she is floating around society and probably should not be because of the rulings in Castillas and Anderson. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR SCHUMACHER: Okay. What do you do legally, what procedure happens that tells an officer to go knock on his door and put the cuffs on? [LR424]

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MIKE KENNEY: Those people that were on parole... [LR424]

SENATOR SCHUMACHER: Make a simple case, not parole. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR SCHUMACHER: They're just a guy that was released early. [LR424]

MIKE KENNEY: Well, as Senator Lathrop mentioned earlier, there were like three categories of these people so they weren't all similarly situated. The people that we believed owed us time either got a warrant issued and a law enforcement officer would find them and arrest them... [LR424]

SENATOR SCHUMACHER: What was that warrant for? Was it for a new crime? Was it for the old crime? [LR424]

MIKE KENNEY: I can't remember the exact language from...I'd have to read one of the warrants from the Attorney General's Office. It was tantamount to a fugitive from justice. But please don't quote me. I don't have that language in front of me, and I don't want to make a mistake in the record. [LR424]

SENATOR SCHUMACHER: Well, this is what's bothering me because in this Anderson case, at least the procedure that was used there, it says the department eventually discovered its mistake and on September 16 filed a motion for *caus* and a notice of hearing in the Douglas County District Court. Anderson did not appear and they issued a warrant. Now you have somebody at liberty. Liberty is kind of a powerful thing. [LR424]

MIKE KENNEY: Yeah. [LR424]

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SENATOR SCHUMACHER: You shouldn't just be able to go say go get 'em because. There should be a--as in this case--a motion made with the court, say, Judge, we'd like to have an order to go out and get this guy and a notice, chance for the guy to appear and say, wait a minute, wait a minute, Judge. Hold the fort. Because, you see, I didn't know about this mistake and I've been a good boy. They should not put the cuffs on me. Have you discussed that procedure? Because I'm having a hard time seeing where you have carte blanche authority to just go pick somebody up without somebody on liberty without at least an opportunity for hearing, as was the case of Anderson. Have you discussed that with the Attorney General, with your counsel? [LR424]

MIKE KENNEY: Well, we're in the process of discussing that with the Attorney General. It does seem to run at least askew with some of the other things I've heard today about what authority we have. So I'll just answer by saying, yeah, I am concerned about due process. I am concerned about liberty interest and what's involved in pulling back, especially people who have committed misdemeanor crimes for which they wouldn't be incarcerated if they were found guilty. So I don't find myself disagreeing with you, Senator. [LR424]

SENATOR SCHUMACHER: I'm not disagreeing with you. I notice this procedure because it seems fairly unfair without a hearing to deprive liberty and an opportunity for hearing. Somebody has got to go to court to say, Judge, you know, one way or the other. [LR424]

MIKE KENNEY: Well, that's precisely the position we took and we're pursuing how to do that. We're doing this... [LR424]

SENATOR SCHUMACHER: Have you had discussions with the Attorney General on this? [LR424]

MIKE KENNEY: I believe we've asked for an Opinion and we don't have an instant one

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back. [LR424]

SENATOR SCHUMACHER: But you realize the other side of that rub is the longer this thing takes the more of this uncertainty in these people's lives as well as maybe their time is running out. [LR424]

MIKE KENNEY: I do. It's again, it's hard to do every single step all...simultaneously all at once. We took care of the most critical people that were going to get out first and then we sort of triaged that in terms of public safety, get the first people first; then decide who gets warrants and get the inmates who were in the prison already who just had their time adjusted, get them noticed up. And it's been segmented based on that prioritization. So what you're saying is very important, and we are working on that. [LR424]

SENATOR SCHUMACHER: Without killing too much more time, you made the comment: We haven't been able to build or hire officers. Why? [LR424]

MIKE KENNEY: We haven't been able to what? [LR424]

SENATOR SCHUMACHER: I think in your testimony... [LR424]

MIKE KENNEY: Oh, oh. [LR424]

SENATOR SCHUMACHER: ...we haven't been able to build or hire officers. [LR424]

MIKE KENNEY: Well, we haven't had budget submissions that we put into place. We actually have had some deficit requests and it wasn't...the last one wasn't approved. I think we asked for... [LR424]

SENATOR SCHUMACHER: So basically the answer to that because of money. The

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money isn't available. Haven't asked for it, haven't gotten it. [LR424]

MIKE KENNEY: Yeah, that's true. [LR424]

SENATOR SCHUMACHER: Okay. When you put your hat on and took this office and looked at the situation, did you say, my gosh? You know, we need some buildings, we need some officers, we need something. Who's been minding the store? [LR424]

MIKE KENNEY: I didn't. I had been close enough to knowing what our reality was for a while. I know that in the scope of things I think Corrections isn't a popular place to put money, to pour money. I'm getting ready to make statements I probably shouldn't make. But I think the overall state has a budget. There are needs everywhere in the state. We have always tried to adopt a can-do attitude where we'll tighten the belt, we'll do this and that, we'll try to make it happen. I think that's probably what was in my mind is the resources are thin. Let's see how we can be innovative and creative and try to... [LR424]

SENATOR SCHUMACHER: Right. But when it comes, if somebody as you did walked in clean and looked at the operation said, holy smokes. We should have been doing something and raising our budget three years ago or four years ago or two...you know, last year at least. Right? I mean, this didn't get to be a crisis overnight. [LR424]

MIKE KENNEY: Well, even in my smaller subdivision in my facility, we would...we every two years for the biennial budget request we would submit budget requests and we would ask for things and we would know that there would be things that would be approved. There were other priorities. We weren't the only agency in the state, and we would get some things and there are some things we wouldn't get. So I wouldn't make the...I didn't have as dramatic a reaction to it as what you're suggesting. But I, of course, I was eager, if we could, have additional resources. That would always be good. [LR424]

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SENATOR SCHUMACHER: Had the department been making requests and sending them up the ladder that we need these things, there's something brewing here? [LR424]

MIKE KENNEY: Well, we did make a deficit request last year. I understand why it didn't go through. We needed 59 FTEs, but we also had PSL savings for institutions where we couldn't keep people up and that's a distribution. That's a problem of some of our facilities we can keep plenty of staff at and some of our facilities that are more remote we have more difficulty with it. And so, yes, yes, we did make requests; and I understood the decisions on that. [LR424]

SENATOR SCHUMACHER: Thank you. [LR424]

SENATOR LATHROP: Senator Chambers, do you have questions? [LR424]

SENATOR CHAMBERS: Yes. Mr. Kenney, Director Kenney, we meet again. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR CHAMBERS: You have the power to terminate any employee in your department. Is that correct? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR CHAMBERS: And they could have a hearing and then appeal and so forth, but you have the power to terminate or is that not true? [LR424]

MIKE KENNEY: That's correct. [LR424]

SENATOR CHAMBERS: Now I'm not going to take you through everything that I did

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with reference to Dr. Weilage. But if everything that I had alleged is true and he knowingly and deliberately withheld a diagnosis that a psychiatrist hired by the state on a contract had made that Nikko Jenkins was mentally ill and that report, that diagnosis was deliberately and intentionally withheld by Dr. Weilage because he disagreed with it, not only was it withheld from people within the department who might have to make decisions about the type of treatment, the level of custody which would have attached to inmate Jenkins, it related to the carrying out of a duty by a county attorney. This county attorney had been requested by Nikko Jenkins himself and by Nikko Jenkins' mother to initiate civil proceedings to hold him, commit him to the regional center. And the county attorney had contacted and spoken with both Dr. Weilage and his boss, Dr. Cameron White, about these matters raised by Nikko Jenkins and his mother. And to cut through a lot of other things, he needed something from the Corrections people indicating that there would be a basis for initiating these proceedings. Rather than reveal the information that Weilage knew the county attorney was seeking which he knew he had in his possession, he deliberately withheld it, information relative to the conduct of Nikko Jenkins, such as the four serious self-mutilations and the other things that I don't want to keep repeating. [LR424]

MIKE KENNEY: Right. [LR424]

SENATOR CHAMBERS: Deliberately withheld all of that information. Then affirmatively misled the county attorney by saying that Jenkins was receiving treatment when he was not and Weilage knew he was not. Do you think those are serious derelictions by Dr. Weilage or did they comport with the standard of a person trained professionally, licensed by the state, and hired by the Department of Correctional Services, given a public trust to perform certain duties and he knowingly violated those duties? Do you think he's entitled to retain employment with the state in your department? [LR424]

MIKE KENNEY: I don't want to answer that with a yes or no, but I do want to answer it. [LR424]

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SENATOR CHAMBERS: I want you to answer it. [LR424]

MIKE KENNEY: I think accountability is required. What I think he is entitled to is the seven rules of just cause. I think there has to be...for example, in the middle of this process, which is extremely thorough and is a matter of record and there will be a record created and produced as a result and the findings and results will come forward, I think it's premature for me to in the midstream to make an assessment or a determination and say this is how it's going to happen and this is what the conclusion is. Am I bothered by what I hear? Sure I am. Am I committed to accountability? Yes, I am. Do I think that, you know, it should be some kind of spontaneous reaction right now and in the midst of the LR424 hearings? No, I don't, sir. I think I should let the committee do its job. I think it should make its findings. I think I should review those. And I think I need to then assess where we are with that. I'm not intending to sweep anything under the carpet. That's...I have no interest in that. But I hope that answers your question. [LR424]

SENATOR CHAMBERS: It gave a very diplomatic answer. But you do understand that I did not ask you if you intend to fire this person. You did understand that. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR CHAMBERS: Okay. [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR CHAMBERS: Now there have been allegations made that the Chairman has already predetermined that Corrections has done something wrong even before we finish our hearings. And I remember things. I tell people that at my age my brain cells are Teflon--everything slides off and nothing will stick. But old folks are cunning and we can convert that Teflon to Velcro and everything sticks that needs to stick. And it just

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happened that I remembered a newspaper article and its headline, the date of this article...(inaudible) see where they put...August 16, 2014, and I'll hold it up so you can see how large the words are. And here's what those words say: Inappropriate, inexcusable, and irresponsible and the article quotes the context of that statement and who made it. "As I have stated, those responsible for these miscalculations will be held accountable. Their actions were inappropriate, inexcusable, and irresponsible." Dave Heineman, Governor of Nebraska. And just a little bit, I'm not going to read the whole article, you drafted charges against George Green. Is that correct? [LR424]

MIKE KENNEY: Yes. [LR424]

SENATOR CHAMBERS: Are those charges...can I get a copy of them? [LR424]

MIKE KENNEY: The hearing...I don't know that the charges were ever served. Mr. Green elected retirement... [LR424]

SENATOR CHAMBERS: But can I get a copy of the charges that you drafted? [LR424]

MIKE KENNEY: Let me amend my first answer because, Senator Chambers, I don't know if there ever was a physical draft of charges prepared for Mr. Green. [LR424]

SENATOR CHAMBERS: Okay. That would be good enough for my purposes. But at any rate, here is a quote attributed to you. But before I read that quote, the determination was made to terminate these people. Here's a paragraph: Governor Dave Heineman and Corrections Director Mike Kenney, both of you, announced the personnel actions Friday calling them a step toward regaining public trust. And here's the direct quote attributed to you: "My decision in both of these cases would have been termination," Kenney said. You both announced that George Green would be terminated and so would Sharon Lindgren. Not directly or indirectly did anybody die at the hands of any of these people who were released prematurely due to the

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miscalculations. But in the case I'm talking about, four people died. And in an article dated September 25, 2014, from the Omaha World-Herald headlined "Heineman: Disciplinary action is not needed for state prison workers." I'll read just a bit of it. It's written by Paul Hammel. Governor Dave Heineman dismissed the notion Wednesday that state Corrections employees should face disciplinary action for failing to disclose all opinions about the mental health of convicted killer Nikko Jenkins. Jenkins was fully responsible for killing four people in Omaha, not the state Corrections Department, Heineman said, adding that neither Omaha Police nor the Nebraska State Patrol was responsible either. Then I want to come to...because I said I wouldn't read everything: Jenkins had asked to be committed and his family asked the Johnson County Attorney's Office to call a hearing that would have led to his commitment. But last week a state psychologist, Mark Weilage, testified that when he was contacted by a deputy county attorney he did not disclose that a prison psychiatrist had diagnosed Jenkins as mentally ill and had said he should be considered for a committal, a commitment because he was threatening to kill people when he got out. Weilage said he did not disclose the diagnosis because he disagreed with it and didn't believe that Jenkins should be considered for placement in a mental facility. Later in the hearing, Weilage's boss in the prison system, Dr. Cameron White, said the information should have been disclosed. It should have been disclosed. Had it been disclosed, the murders would not have occurred. The Governor, unlike you, said there should be no disciplinary action. Now here's the question that I will ask you. Will you say categorically that he should not receive any disciplinary action? [LR424]

MIKE KENNEY: Well, at the risk of disagreeing with Governor Heineman, for whom I have a great deal of respect, I would like to see the results of this hearing so I wouldn't come to that conclusion right now. [LR424]

SENATOR CHAMBERS: That's good enough answer... [LR424]

MIKE KENNEY: It's possible that he has information I don't have. [LR424]

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SENATOR CHAMBERS: But here's something that I will suggest to you. Our hearing is not what should determine whether or not Weilage faces disciplinary action but the facts that can be established. And unlike the Governor and even the Department of Corrections, I have spoken by phone with the deputy county attorney Richard Smith, the Deputy Johnson County Attorney, and I sent him the portion of the transcript where Dr. Weilage made these admissions. And I'm going to send you the same information I sent to that county attorney and I'm going to send you the cover letter. And if you think that withholding information which resulted in the obstruction of governmental action being taken, which had it been taken would have resulted in the saving of four lives, if you say that kind of action comports with a person who is to be deemed a professional, a person who is licensed to practice by the state, who has had a public trust reposed in him, if you will say that his conduct comports with the standards of professionalism that governs that profession and that he adequately discharged the duties in a way expected, no, demanded of somebody in his position, then I would say that you are worse than him because you know better. And you have set a standard already. You had determined to terminate two people whose actions had not resulted in anybody directly or indirectly losing life. So I'm not going to ask you a question that would demand an answer of any kind with reference to what I'm talking to you about. But I want what I'm saying to be on the record because there's a double standard that is found in the Governor's Office. And it will be practiced by you if you can fire, as you should have, Lindgren and Green. You know why I keep bringing this up? If I don't believe that the most heinously committed murder committed in the most heartlessly cruel, bloodthirsty, premeditated fashion should not result in the death of the perpetrator, and I will fight session after session tooth and nail to get rid of the death penalty for somebody who beyond a doubt has taken an innocent life, it shouldn't be hard for you to understand why I am so distressed, almost to the point of being distraught, except that it takes a heart to feel that and I don't have one, why I will continue to bring up time after time after time the loss of four lives which did not have to be. This is not where somebody even was driving drunk like that inmate driving the van

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and under the influence drives the vehicle in such a way that somebody loses life, that's inexcusable and all these other things, but that's not the same as what I'm talking about. Here there were people, including Weilage, afraid of Nikko Jenkins because of their observing his demeanor, of threats he had issued. He could have good time taken away for the words he was uttering if directed toward a guard, an employee, or maybe even another inmate. But when he says I am going to murder people when I get out of here and he is deemed to be so dangerous that he cannot be put into the general population of that penitentiary where there are numerous murderers, murderers who must be protected from this murderer, and there was a way to prevent him from doing what he said he would do. If I am one in charge of a wild animal and I bait that animal in the cage and I know what the disposition of this animal is anyway, but I aggravate that animal, I exacerbate his wildness, his predacious nature and then I from a position of safety open the gate, the door of that cage and send him forth raging, knowing what he will do, I bear responsibility in a sense even more than the animal because it acted in accord with its nature and that which was on that animal. Nikko Jenkins is culpable in the same way that a tiger would be culpable for killing a person. The real culpability rests on the one who turned that wild animal, meaning the tiger, loose. No human being by me will be referred to as anything less than human. It is a human flawed, broken, gone far astray, but nevertheless we're still talking about a human being. And, Mr. Kenney, Director Kenney, I'm not saying that Weilage should have interposed himself between a raging Nikko Jenkins and a possible victim. All that I've been saying is that the work product of a person hired by the state to produce a work product was in the possession of Dr. Weilage. And all he had to do was say, here it is. And he deliberately and intentionally refused to do it, not negligently. It was beyond recklessness. Those people at Tecumseh and some of them at NSP could predict what Nikko Jenkins was going to do. You heard Mr. Wayne testify that when you have somebody too dangerous to be in the population of a maximum security prison, and he didn't add this, but where the population comprises in part murderers, first-degree murderers, and the murderers must be protected from him but not the unsuspecting public, whose duty it is of the Department of Corrections to provide protection. Weilage knew what Nikko Jenkins

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was. Deputy Director Wayne knew what Nikko Jenkins was. Everybody knew. And they knew what he would do. Dr. Weilage testified that he did not disbelieve Nikko Jenkins when he was saying he would kill people. But he facilitated that killing and made it possible. So I'm going to send you that transcript and then I'm going to have a conversation with you. You have already made it clear that you would terminate two people, but they quit rather than go through the process. I think you have an obligation. I'm glad to hear you introduce the statement you made in response to what I had asked you that, and I'm paraphrasing, even if it means disagreeing with the Governor, you're not going to at this point take that position that there should be no accountability demanded or however you stated it. I wanted to get that into the record. The Chairman and others have asked you questions that would cover anything that I would want to ask you about. And there will be occasions when I'll talk to you, but I'm going to have to tell you something so you can start preparing for it. You know and I know that whoever the next Governor is will not retain you as the Director of Corrections. You know that, don't you? [LR424]

MIKE KENNEY: Oh, I don't know that to be a fact. [LR424]

SENATOR CHAMBERS: You don't lie. You said you don't lie. [LR424]

MIKE KENNEY: Well, then, Senator, you have to understand in the most critical sense, no, because I can't predict the future. [LR424]

SENATOR CHAMBERS: Then let us do it like they do in the courtroom. Based on your knowledge, your experience, your observation for many years of how the political system works and how people who become chief executives, whether the President of the United States, the governor of a state, or the mayor of a city comes into office, they usually--and I don't think you can show me an exception--will clean house when it comes to all of those top-level people who serve at the will of that chief executive. You've seen that happen, haven't you? [LR424]

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MIKE KENNEY: Sure. [LR424]

SENATOR CHAMBERS: Have you lived a life in such a way that you feel you're going to be treated differently from the way all of those people have been treated and are continuing to be treated right now? [LR424]

MIKE KENNEY: If you'll permit me just this much narrative... [LR424]

SENATOR CHAMBERS: Sure. [LR424]

MIKE KENNEY: John Wooden had a great definition in his book about success. And if you don't know who John Wooden is, one of the most successful... [LR424]

SENATOR CHAMBERS: He was a coach of... [LR424]

MIKE KENNEY: ...basketball coaches at UCLA... [LR424]

SENATOR CHAMBERS: They called him the wizard of...you know. [LR424]

MIKE KENNEY: ...and seven consecutive...John Wooden defined success, if you'll...this is worth listening to just a second, he defines success as a team that came in and had won by 30 points and Wooden walks in the locker room fuming. What's wrong, Coach? He said, you didn't play up to your potential. You should have won by 60. Another time they lost by 5 points. He walks in a foot above the ground, he's high-fiving, he's hugging these guys. Coach, we lost. He said, it isn't about winning or losing. It's about playing up to your potential. It's about doing every single thing you can to squeeze the maximum performance out of you, whether it's ethically, whether it's intellectually, whether it be, you know, organizationally. And, Senator, when I think about January and who the new Governor is, all I intend to do is do my job and leave everything on the floor. I'm not in

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charge of making that decision. I'm in charge of positioning myself. I've got great affection for this agency. I've got great affection for this state. If I'm supposed to be there, I'll be there. If I'm not, I'm prepared for that eventuality. [LR424]

SENATOR CHAMBERS: But as two men of the world, pragmatic, realistic and practical, we know that you're not going to be retained in that position. And since you gave a little story, I'll give one then I'll be through. There was a guy who did things which caused some people to agree with him greatly, others to disagree. And there was a Friday and he was going to come into town, and the people who really liked him spread palm branches along the little road and they put him on a jackass and he rode into town. And the people were shouting, hosanna. But today it would be a whoo, whoo, whoo, whoo, whoo, you know. Exactly one week later, not exactly but for the sake of the story, more people were saying crucify him. So one Friday he rides into town on a jackass and the following Friday he's treated like a jackass, only worse than a jackass is allowed to be treated because he was tortured to death. And unfortunately, in the Roman Senate there was no senator such as I who disbelieved in the death penalty to the extent that he would have done what he could to prevent that from happening. So we've both told our little story, but we both know what the outcome is in your future. So I hope you're sending out resumes and you may be able to get a job at UNO right beside former director Houston. And they will have two former directors, which I think has never happened in the history of any state in this Union. [LR424]

MIKE KENNEY: I think that's quite unlikely for me, but I appreciate your comments. [LR424]

SENATOR LATHROP: Or he could rise up after three days. Right? [LR424]

SENATOR CHAMBERS: I'm not going to touch that. [LR424]

SENATOR LATHROP: Yeah. Okay. I think that's all the questions we have. And,

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Director, we appreciate you coming here. We appreciate your patience. I know you've sat through the entire day of testimony and we sincerely wish you the best with a troubled department in the time you have. [LR424]

MIKE KENNEY: Thank you. And I know I always try to put the last part on here, I just want to respond to my earlier loss of composure. And it's not an apology. I think what happens with me is we have taken a lot of shots and I think we deserve a lot of shots. I think we own this. I believe that...are the mistakes we've made. I want to be accountable for those. If I can put in a little thing, that represents...everyone we've talked about is in the upper echelon. Everyone we've talked about is in a highly professional, executive, managerial categories. And if I can just say that there are...the times that I emote a little bit about it is the men and women who work really hard in really tough jobs who also feel smeared, who also feel denigrated by the events that took place, and I just feel terrible about that. And so sometimes I get a little emotional because they go home and their children talk to other kids at school and they say, what did you, you know, what do you do, mommy and daddy? And, you know, that's kind of tough for them. And I'm going to end now, I promise I won't be long. But I'm very, very proud of our staff and they have very tough jobs and I'm sorry that anything we've done has caused them to go through that. [LR424]

SENATOR LATHROP: No need for an apology with this group. [LR424]

MIKE KENNEY: Okay. [LR424]

SENATOR CHAMBERS: And let me just say one thing. [LR424]

SENATOR LATHROP: I knew that when you spoke we were going to... [LR424]

MIKE KENNEY: I'm sorry. [LR424]

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SENATOR CHAMBERS: This is for him. [LR424]

SENATOR LATHROP: Okay. [LR424]

SENATOR CHAMBERS: There was a guy many years ago and he faced down the religious leaders of his day. He stood up to a Roman governor. He stood when all of his friends ran off and left him in the hands of the enemy. But that can be taken as your example because the shortest verse in the book is what? Jesus wept. [LR424]

MIKE KENNEY: Jesus wept. [LR424]

SENATOR CHAMBERS: So if he wept, and you're a Christian, cannot you allow yourself to do the same thing when an appropriate occasion arises? [LR424]

MIKE KENNEY: I do. I just didn't want you to think it was a regular deal. [LR424]

SENATOR CHAMBERS: And so that people won't get the wrong idea about me, many years ago that guy was tempted by one known as the devil and the devil quoted scripture. Just thought I'd throw that out there. [LR424]

MIKE KENNEY: I understand. [LR424]

SENATOR LATHROP: Okay. Thank you. [LR424]

MIKE KENNEY: Thank you for your indulgence. [LR424]

SENATOR LATHROP: We have subpoenaed George Green. And, Mr. Green, I'm going to tell you that we're going to release you from your subpoena. And I do want to make this comment. This committee had an opportunity to review what happened in the Castillas case. The fact that that Opinion didn't get read, didn't get incorporated into the

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manner in which good time was calculated for people who were serving a mandatory minimum sentence and you were here to account for that and you had a rough day, and I appreciate that you had a rough day. And frankly, we're not taking any of that back, Mr. Green. But I would say that today we watched an administration scramble to come up with a solution once the Castillas case became a problem with 306 people that have been released. And when people in the administration began to come up with solutions that didn't comport with the law, you stood up and the committee recognizes that. And I think we owe it to you to recognize that to you publicly before we turn the cameras off and to thank you for standing your ground, for making the point, and doing what lawyers do. And anyway, thank you for what you did and for your willingness to be down here today. And with that, we will release you from your subpoena...we'll release you from your subpoena and hopefully we won't have to do that again. But I won't rule it out either. Okay, thank you, Mr. Green. That will conclude our hearing. And I may ask the committee to stick around for a little bit so we can go into Exec Session and have a conversation about what to do next. [LR424]