

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

[LR214]

The Committee on Judiciary met at 1:30 p.m. on Tuesday, May 29, 2007, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR214. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Ernie Chambers; Amanda McGill; Dwite Pedersen; Pete Pirsch; and DiAnna Schimek. Senators absent: Vickie McDonald.

SENATOR ASHFORD: Why don't we get started. The first item is LR214. Senator Chambers. Good afternoon, Senator Chambers. [LR214]

SENATOR CHAMBERS: Good afternoon. [LR214]

SENATOR ASHFORD: LR214. [LR214]

SENATOR CHAMBERS: Yes. Members of the committee, esteemed Chairman, I'm Ernie Chambers. I represent the 11th Legislative District. The purpose of this resolution is to suggest that a great deal needs to be done with reference to how the criminal justice system handles criminal investigations, prosecutions, and trials. That resolution will give you the specific date when the 200th person was exonerated as a result of DNA, not an exoneration based on what some people call a legal technicality, but rather actual innocence. What this resolution suggests is that the Legislature should learn from what has been happening, as should the prosecutorial and defense arms of the bar in order that whatever weaknesses exist in the system that can result in people being wrongfully convicted can be recognized and corrected. In some of these cases, people had the entire panoply of appeals, multiple appeals. And when they were exonerated, many times a prosecutor would say, this proves that the system works, not really, because it would not be the prosecutor who did this, but rather people on the defense side who were unwilling to accept a wrongful conviction simply because it had been made and go on from there. So if you have any questions about why I am doing this, which I have not answered at this point, I'm prepared to respond to them. But there's one more comment I have to make. In some of these cases where DNA has established that the person was innocent, there were prosecutors who would resist the person being released. So we are not in a society where the prosecutors carry out their duties in the way that their ethics demand. A public prosecutors primary responsibility is to seek justice, not to procure a conviction. In other countries, they do not have an adversarial system of justice. It is often said here by people who don't even understand the criminal justice system in their own state, let alone all the states of this country, let alone further all of the judicial and criminal justice systems around the world. Some of these people will say, America has the best judicial system in the world. Without knowledge of what's going on in the rest of the world, that is a statement that has no meaning whatsoever, certainly no validity. But in other countries judges will intervene when it appears that a prosecution is not warranted, when a person may indeed be innocent. In this society

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Judiciary Committee
May 29, 2007

such is not the case. Judges will observe an injustice being perpetrated simply because an inattentive or incompetent defense attorney will fail to object to evidence which ought to be inadmissible. On appeal there are appellate courts which will say that the matter not having been objected to cannot be raised on appeal. So if this were really a system interested in innocence, there would not be the type of gamesmanship that takes place. The idea of "playing the lawyer" when the defendant or the accused is the one who is going to be victimized if a lawyer does not raise issues which could go to a persons innocence the courts may know that, but they'll say, you are barred because that issue could have been raised or was not objected to, so even though all of the evidence that should be admissible would suggest that the person is innocent, this innocent person can nevertheless be held under that conviction and kept in jail. Rehnquist was the one I think who said that actual innocence is not a sufficient basis to allow a person to have an appeal. Even in Nebraska there is a cutoff date when certain issues cannot be raised, when a conviction is final. In the past, I have offered amendments, prosecutors would oppose them, that would say that actual innocence is an issue that could be raised anytime. So I find great fault with the legal system on the part of defense lawyers who are incompetent, judges who appoint inexperienced people to defend even capital punishment cases, and on the prosecution side which will attempt to frame people has happened with the Douglas County Attorneys Office, under Stu Dornan. A person that Stu Dornan brought here made such outlandish comments during his summation that the Nebraska Supreme Court, not only excoriated that lawyer for what he did and found inappropriate conduct or misconduct, but ordered a new trial. The person who was granted that new trial had been convicted of murdering a person, had been sentenced to life but, because of this prosecutorial misconduct, a new trial was ordered. That person, rather than being taken to trial, entered a plea agreement which resulted in a sentence of 10 to 20 years, or something like that, he'll be out in 10 years. And this because of prosecutorial misconduct, not because the person was found to be innocent. In the interest of full disclosure, based on what I've been able to determine, this man was not the trigger man in the killing, but there is an indication that he gave the gun to the person who did the shooting and told him to take care of his business. So there are many problems. And all this resolution does is to recognize that fact and to say that the Legislature supports action which will result in more accurate, reliable criminal investigations, prosecutions, and protection of the public. Any questions, I'll respond to them. [LR214]

SENATOR ASHFORD: Senator Lathrop. [LR214]

SENATOR LATHROP: Just briefly, Senator Chambers. What do you expect anybody associated with the state or the Legislature to do if this passes? [LR214]

SENATOR CHAMBERS: What I will do next session is try to see if some kind of commission might could be established or at least a review that would look into the kind of issues that are raised in that resolution. [LR214]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

SENATOR LATHROP: So we would find cases where DNA has established innocence, and then figure out how we got into a conviction? [LR214]

SENATOR CHAMBERS: Right. [LR214]

SENATOR LATHROP: Okay. [LR214]

SENATOR ASHFORD: Yes, Senator Pirsch. [LR214]

SENATOR PIRSCH: Thank you, Senator Chambers. I agree with your, I guess, concerns of looking at cases where there has been prosecutorial misconduct or cases where DNA evidence has materialized that would shed a lot of doubt upon assumptions that were held in prior cases. I guess my only particular concern about this particular way that this resolution is drafted, and that's only in one...in two lines here. On the first, which is, "Whereas, postconviction DNA testing, on April 23, 2007, proved the innocence of the 200th wrongfully convicted person," is that in reference to the Innocents Project then? [LR214]

SENATOR CHAMBERS: Well, they are not the only ones who had done that. This is all of the cases, those with the Innocence Project, plus others who are not connected to that project. [LR214]

SENATOR PIRSCH: And I think it's in...I guess, in so adopting this we're...well, we're adopting then this as a fact then, are we not, if we approve this? [LR214]

SENATOR CHAMBERS: Yes. [LR214]

SENATOR PIRSCH: Okay. And that's the only line that I...I agree with you and your intentions about (inaudible). [LR214]

SENATOR CHAMBERS: Well, if I get you a New York Times article, would that establish the fact sufficiently for you? [LR214]

SENATOR PIRSCH: Well, it's the particular term "innocence" as opposed to...and perhaps I just don't know enough about it. But, I guess,... [LR214]

SENATOR CHAMBERS: But what word...because I'm not...I don't think I'm understanding what you're saying. [LR214]

SENATOR PIRSCH: Let me clarify, I guess. The use of the term "prove the innocence of the 200th wrongfully convicted person," the use of the word "innocence", do you mean that in a legal term or do you mean it in a real de facto term? [LR214]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

SENATOR CHAMBERS: Both, both, in these cases the person was found not to have committed the crime. [LR214]

SENATOR PIRSCH: In any of the cases was the facts of the case such that the prosecutor decided...I mean, obviously, a court didn't determine in all 200 cases innocence, did they? Innocence establishes lack of guilt beyond a reasonable doubt, correct? [LR214]

SENATOR CHAMBERS: No, these were cases where the words exoneration is used because there was not guilt, not because somebody didn't object or prosecutorial misconduct, but the DNA evidence established that this person did not do the crime; there was somebody else who... [LR214]

SENATOR PIRSCH: In any of these cases, were the facts such that the prosecutors said, DNA has come back that would not tend to further the theory, the states original theory that the defendant committed the act, and absent that, with this DNA evidence, prosecutor, though he has a hunch or supposition that there is still some weak evidence that the person committed a crime, that the prosecutor does not refile charges because in lieu of the DNA evidence the prosecutor acknowledges that there is no proof beyond a reasonable doubt, the high level of proof, though he may argue that there is some lesser level of proof that still exists? [LR214]

SENATOR CHAMBERS: Although your question is a long one and complicated, the way you asked the question, I could not answer that that's not the case. [LR214]

SENATOR PIRSCH: And it may be a picky point that there is a difference in my mind between innocence and not being able to prove the guilt in court in the matter brought. So, I guess, that's just where my...when it says innocence, there is no doubt about it that the prosecutor has assessed, in light of the DNA, that there is not enough proof to prevail beyond a reasonable doubt. I guess, isn't that a different inquiry than the inquiry of is actual innocence established? [LR214]

SENATOR CHAMBERS: I think that's a legitimate issue to raise. And lest it be misunderstood based on my approach, there have been cases where when the DNA evidence came in the prosecutor would move to dismiss the charges and release the man because it would implicate somebody else as the perpetrator. [LR214]

SENATOR PIRSCH: And that's obviously...you would think that if the prosecutor is making statements that he believes the man is innocent, certainly that is strong proof... [LR214]

SENATOR CHAMBERS: Right, and there were... [LR214]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

SENATOR PIRSCH: ...that the person would be counted among the innocent. I'm just saying, are there cases where, at the end of the case, the prosecutor is...perhaps has a supposition that he has the right man, but in certain cases lacks the proof in light of this DNA evidence to prove beyond a reasonable doubt? [LR214]

SENATOR CHAMBERS: I can't say that. And in some of these cases, the person had been convicted such a long time ago that the original prosecutor may not be around, the... [LR214]

SENATOR PIRSCH: Yeah. [LR214]

SENATOR CHAMBERS: ...other evidence they may not have. But in most of them it would implicate somebody else as the one who had done it. [LR214]

SENATOR PIRSCH: Would you have any objection to maybe rephrasing just that little passage, something to the effect of, when the prosecutors reach...something...we can tweak this, the determination that proof beyond a... [LR214]

SENATOR CHAMBERS: You don't like the term innocent,... [LR214]

SENATOR PIRSCH: Well, it's a... [LR214]

SENATOR CHAMBERS: ...because you don't want to believe that an innocent person was convicted, right? [LR214]

SENATOR PIRSCH: What? No, no, there may well be circumstance of that, and that's why I'm supportive of your...well, not all of it. [LR214]

SENATOR CHAMBERS: I'm willing to look... [LR214]

SENATOR PIRSCH: If there is anything...I mean, if there is greater precautions that can be taken, then we should take them. I'm just saying that we're reaching a finding of the third party, adopting the finding of the third party, to which I haven't had any direct input. [LR214]

SENATOR CHAMBERS: Nor I. [LR214]

SENATOR PIRSCH: Yeah. And so I'm a little bit hesitant about doing that. But, other than that, I guess that's my one concern. [LR214]

SENATOR CHAMBERS: Well see, I don't know that all the people sitting in prison now are guilty, but we say they were, because the prosecutor said so. And a person is

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

described in the paper as a convicted murderer. Well, we don't know whether that person really did the murder or not. But since it's on that side, we accept that as being gospel truth, and we don't question it. [LR214]

SENATOR PIRSCH: I guess the word "convicted" would have a legal significance. And that's all I'm looking for is... [LR214]

SENATOR ASHFORD: Well, let me...can I just to clarify. I think what...we're talking about individuals who have gone through a proceeding of some kind,... [LR214]

SENATOR CHAMBERS: Um-hum. [LR214]

SENATOR ASHFORD: ...have been convicted. [LR214]

SENATOR PIRSCH: Right. [LR214]

SENATOR ASHFORD: As opposed to somebody who is, prior to the trial, some sort of exculpatory evidence is discovered. [LR214]

SENATOR CHAMBERS: Um-hum, right. This person has been convicted and sentenced and is doing time. [LR214]

SENATOR ASHFORD: Right. But that is maybe not your point. [LR214]

SENATOR PIRSCH: Well, just my... [LR214]

SENATOR CHAMBERS: But so we won't take all the time, I'm willing to talk to you about that. [LR214]

SENATOR PIRSCH: Yeah, well, we can do that, yeah. [LR214]

SENATOR CHAMBERS: Yeah, I'm willing to talk to you on that. [LR214]

SENATOR ASHFORD: Thank you, Senator Chambers. Any other questions of Senator Chambers? Thank you. [LR214]

SENATOR CHAMBERS: You're welcome. Should I sit up there? I'll sit out here with the enemy. (Laughter) [LR214]

SENATOR ASHFORD: Well, you may sit here, if you wish. Do we have any other testifiers today? Mr. Kleine. [LR214]

DON KLEINE: Thank you. Good afternoon. My name is Don Kleine, K-l-e-i-n-e. I'm

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

Douglas County Attorney, and I'm here on behalf of the Nebraska County Attorneys Association as a proponent of the resolution put forth by Senator Chambers. I've been involved with DNA evidence, to some extent, since its inception here in Nebraska, starting with the Asa Carter case, in about 1991. The greatest power of DNA and its use is that of exclusion. And, you know, we use it from a prosecutorial standpoint, because if it doesn't exclude the person who might be the contributor, then we have statistics that show how rare or unique this particular DNA profile might be because we don't have the ability yet, science doesn't, to lay out the whole DNA profile and match it with the forensic evidence that's found at the scene, and compare every, single location. So there are certain areas of the genetic profile that we match up. If they don't match up between the forensic evidence and the reference sample of the defendant, then it's an absolute exclusion, which is a tremendous thing for us to have to use with regard to prosecution and defense of cases. So anything that we can do as far as gleaning any information, or learn anything from these cases that have occurred nationwide, where people have been exonerated because of the use of DNA evidence, we currently here in Nebraska have the DNA Testing Act, which is used as a postconviction type remedy, where people who are convicted prior to DNA being available for usage can have articles of evidence tested for DNA, and now come back and have that looked at, their prior conviction, to make sure that it's a legitimate conviction, and so that they had that ability to use DNA testing. The cases that are referred to, I think, in the resolution are from other states. I think that's a sign also that, although we can learn much, and surely there is a possibility that somebody could be an innocent person convicted here in Nebraska, that hasn't happened yet. And we have...that's because we have, I think, very good lawyers in Nebraska. We have...but we need the resources to make sure that we have an adequately funded defense bar so that they have the resources, not only to pay attorneys, but also so they have the resources to do the proper forensic testing that needs to be done, and also for prosecutors. But I think that's at least at this point a sign that we do have good people, and that's what the system is all about from the standpoint of we haven't had a situation where we've had a case come back here, from a DNA testing standpoint, that has exonerated somebody that's been previously convicted. But anything that we can do in the system to learn from those mishaps in the system where some innocent person was convicted and exonerated because of DNA evidence, or for whatever reason, is certainly something that we're listening to...will listen to from the county attorneys perspective. And that's why we're here as a proponent of this resolution. [LR214]

SENATOR ASHFORD: Thanks, Don. Any questions of Don? [LR214]

SENATOR LATHROP: Can I ask just a simple one? [LR214]

SENATOR ASHFORD: Yes. [LR214]

SENATOR LATHROP: Can I ask you just about how long you save stuff? If there

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

is...they find a shirt at a crime scene, or they find it on the victim and it has some bodily fluid on it, the guy gets convicted, how long do they hang onto that? [LR214]

DON KLEINE: Well, if it's a conviction... [LR214]

SENATOR LATHROP: Or do we have some safeguard in place so that whatever need... [LR214]

DON KLEINE: That's come up recently. [LR214]

SENATOR LATHROP: ...in the next generation of DNA, that stuff is going to be around? [LR214]

DON KLEINE: If it's held for evidence, usually we keep it for 50 years. The problem is, at times, is how it's preserved or how it's kept, that can be an issue with regards to DNA evidence. Degradation of the evidence over a period of time, if it's not properly stored, could be an issue. [LR214]

SENATOR LATHROP: Do we do that now? I know you can only speak for Douglas County. [LR214]

DON KLEINE: Well, I mean, the evidence is saved. But I don't know how...you know, if it's a court report that's saving it, it's just put in a storage locker somewhere. Because if it's evidence, it's been submitted in a trial. [LR214]

SENATOR LATHROP: So if it's a blood stain or something like that... [LR214]

DON KLEINE: Though if the police... [LR214]

SENATOR LATHROP: Pardon me. How long can we go back and look at the DNA evidence? [LR214]

DON KLEINE: Oh, we can look at it forever, if it's stored properly. [LR214]

SENATOR LATHROP: Um-hum. Does that have to be in a refrigerated or a humid-free... [LR214]

DON KLEINE: No, it doesn't have to be. Actually, anymore it's just...you can take a buckle swab and have a dry sample that's been on a card, and that will be kept for as long as you need it, as long as it's kept dry and it's put in a place that's not going to be contaminated with anything else. [LR214]

SENATOR LATHROP: Okay. So that stuff is around for 50 years? [LR214]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

DON KLEINE: Yes. [LR214]

SENATOR LATHROP: Okay. Thanks. [LR214]

DON KLEINE: Sure. [LR214]

SENATOR ASHFORD: Thanks. [LR214]

SENATOR PIRSCH: Just kind of following up, in your opinion, is there a difference when you use the legal terms or in your legal perspective, is there a difference between the terms exonerated and proved in this? [LR214]

DON KLEINE: I don't think there is really a difference. And I think in most the cases that we're referring to these are people who there was forensic evidence, say it was a rape, sexual assault case. And many times there are eye witness cases, they're identified, but they've been misidentified. And what's happened is they take the forensic evidence that was...the sample, the vaginal swab maybe from a rape, and it doesn't match with the person who's been convicted. So it is actual innocence in those cases. When DNA is used, that's usually what the answer is. And in many of those cases it's...they've been convicted, maybe there are times where before an actual hearing on that newly discovered evidence or DNA testing, that the prosecutor realizes that, and it's dismissed at that time, or there might be a hearing. But, sure, there is a question of whether in some cases it's a situation of where we can't proceed again, that the person is granted a new trial or if it's a situation where somebody is found to be innocent of the crime in the first place. But I think exoneration and innocence are the same thing in terminology. [LR214]

SENATOR PIRSCH: Okay. Have you gone over, I guess that's why I haven't been...I'm not familiar with the Innocence Project, other than I've been, you know, received e-mails and what not from third parties who are opponents of the death penalty... [LR214]

DON KLEINE: Right. [LR214]

SENATOR PIRSCH: ...and they indicate that there is 200...that DNA evidence has either exonerated or proved the innocence of 200 convicted persons. And so are you familiar...I mean, have you gone over those cases? [LR214]

DON KLEINE: I haven't gone over the numbers. But it's not just Barry Scheck's Innocence Project. There are other states that have DNA testing acts to allow for postconviction relief, and I know there have been other cases, outside of the Innocence Project, where there's been DNA that is found to exonerate or find that the person who's been convicted is innocent. And I'm sure there is that many cases. I mean, like I said,

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

there were many cases in Illinois, Texas, it runs the gamut in many states. I'm not sure if that's the exact number, but I know... [LR214]

SENATOR PIRSCH: Yeah. [LR214]

DON KLEINE: But I know there are quite a few. [LR214]

SENATOR PIRSCH: Well, and there's doubtless case...I don't, you know, for the sake of argument argue that there is quite a number. What I'm saying is, are any of these, is it possible that some of these cases include even one case where a prosecutor, you know, is the case where there is...because of the DNA evidence it calls into question the prosecutor has made the determination that he can't meet his level...high level of proof beyond a reasonable doubt, but otherwise there are other types of evidence that would suggest? [LR214]

DON KLEINE: I'm sure there have been cases where the prosecutor receives the DNA results and it doesn't show a match, and they say then, okay, we're going to dismiss it, and we're not going to push this anymore because we think we might have some other evidence. And I'm sure that for all kinds of reasons they might make those kinds of statements from a civil liability statement, all those kinds of things, and they might say, well, we're not going to move forward anymore. But the DNA was found not to match up with the forensic evidence from the scene, so in effect it has exonerated the person. Maybe there was...there might still be a witness who says, that's the person, but we know, because the forensic evidence doesn't match up, that the...it can't be that person. So there's always going to be, to some extent, those terms used maybe by prosecutors at certain times, saying, well, we're not going to prosecute him because we don't have...we don't think we have enough evidence, but we're not saying they're innocent. [LR214]

SENATOR PIRSCH: Would, in that case, exoneration be a fair term to use, whether or not the prosecutor thinks that there is not enough evidence? I mean, in other words, would it be fair to say whether or not the person is innocent in a given case, the person could still yet be exonerated if the prosecutor feels that there is not evidence beyond a reasonable...is it a legal term of art which means prosecutor...does exoneration mean the prosecutor feels that there is not proof beyond a reasonable doubt? I'm trying to get at the, you know, the subtle difference between the two. [LR214]

DON KLEINE: Well, I think, if a person has been convicted, and a prosecutor later says, because of evidence we found, the conviction is wrongful, then I would say that's...whatever semantic term you want to use, it's an exoneration of the person who's been convicted. There are certain times, certainly, where somebody gets a new trial that it's just a situation where we can't proceed, maybe the witnesses are deceased or the evidence is lost, something like that, that's a different story than a test that comes back

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

and shows that it's not the right person. [LR214]

SENATOR PIRSCH: Thank you. [LR214]

DON KLEINE: Sure. [LR214]

SENATOR ASHFORD: Thanks, Don. [LR214]

DON KLEINE: Thank you. [LR214]

SENATOR ASHFORD: Appreciate all your work in this area and your coming down. Any other...do you wish to close, Senator Chambers? [LR214]

SENATOR CHAMBERS: Yes, yes, yes. [LR214]

SENATOR ASHFORD: Come on up here. [LR214]

SENATOR CHAMBERS: The County Attorneys Association sent a man that they know I respect highly above all others in the prosecutorial arena. But some of the very points he made will establish why we need to look at this entire area, because he talked about the degradation of the evidence. It may not be maintained throughout this state in the way that it ought to be. And, by the way, in most homicides or crimes of violence there may not even be biological evidence on which DNA can operate. So this resolution does not deal with cases where people had a conviction overturned for something other than DNA. This is related only and exclusively to DNA cases. In Nebraska, even under that law that I got put in place that Mr. Kleine referred to, I almost feel like saying Professor Kleine referred to, the Supreme Court is not willing to even allow a new trial, forget about exoneration; they say, unless this will establish that there will be a different outcome from the one that occurred in the first trial. The only way to have a different outcome, if somebody was found guilty, is to say that the person will be found innocent. So the court is making a predetermination that there is no need to have a new trial because the person is not going to be found innocent or if I'm trying to argue for a new trial I have to meet that high standard that the person is going to be found innocent. I can't determine that, the Supreme Court can't determine it. But even in DNA cases by saying this DNA evidence is here, it will cause questions to exist with reference to the conviction. But we do not believe that if there were a new trial the person would be found innocent, therefore there is no new trial. I think that is too high a standard, and it means in effect that nobody in Nebraska is going to get a new trial, no matter what the DNA evidence says, unless it's one of those cases that Mr. Kleine mentioned and that those that are referred to in the resolution would mention where the DNA evidence would say this person is absolutely excluded. But you're not maybe going to have that at that stage of the proceedings, because the trial is what will establish the credibility, the validity of the evidence that will be presented at the new trial. [LR214]

Transcript Prepared By the Clerk of the Legislature
Transcriber's Office

Judiciary Committee
May 29, 2007

SENATOR ASHFORD: Just one brief follow up question. Is the...there is no time limit, is there, in Nebraska on exonerating evidence? It can come in at any time? There's no restriction now? It's always open, the case is always open? [LR214]

SENATOR CHAMBERS: I don't know for a fact. [LR214]

SENATOR ASHFORD: Is that right, Don? [LR214]

DON KLEINE: (Inaudible reply from audience.)...discovered evidence, yes. [LR214]

SENATOR ASHFORD: And it's a motion to do what then? [LR214]

DON KLEINE: (Reply from audience.) Well, (inaudible) trial, which would be (inaudible) except from the standpoint of new evidence. [LR214]

SENATOR ASHFORD: Okay. Thanks, Senator Chambers. I was just trying to understand that. [LR214]

SENATOR CHAMBERS: But to get that, you'd have to establish that this evidence is going to change the outcome, which would mean prove innocence. But innocence is something determined by the jury, not by the judge, unless the trial is had without a jury. And the jury's decision or verdict is going to be based on the evidence that's presented and whether or not proof is found beyond a reasonable doubt. But by the court making that predetermination that no jury could find reasonable doubt, therefore no new trial, Nebraska's Supreme Court has adopted a rule which I think is totally unjust and unreasonable, not just when it comes to DNA, but even where DNA is involved. [LR214]

SENATOR ASHFORD: Thank you, Senator Chambers. [LR214]

SENATOR CHAMBERS: You're welcome. [LR214]

SENATOR ASHFORD: Thanks very much. That concludes the hearing on LR214. [LR214]

Transcript Prepared By the Clerk of the Legislature
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May 29, 2007

Disposition of Bills:

LR214 - Reported to the Legislature for further consideration.

Chairperson

Committee Clerk