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Judiciary Committee
January 29, 2009

[LB36 LB306]

The Committee on Judiciary met at 1:30 p.m. on Thursday, January 29, 2009, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB36 and LB306. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Brenda Council; Scott Lautenbaugh; Amanda McGill; and Kent Rogert. Senators absent: None. []

SENATOR ASHFORD: Good afternoon, everyone. I'm sorry that we're four minutes late but there's more going on than usual, so thank you all for coming and welcome to the Ernie Chambers Judiciary Committee Hearing Room. And we are hearing two bills today. The first bill, LB36, that will be introduced by Speaker Flood; and then LB306 introduced by Senator Council. Let me just go over a few ground rules. Some of you I know I recognize and have been here before, and you are probably generally familiar with the ground rules. But we have a light system on the table, the witness table, and that light system gives you three minutes, in effect, to give your comments. There will be a yellow light that will go on with about 30 seconds or so, or a minute before the red light. When we get to the red light, we would ask you to close your testimony. If some of you in the room are here and do not speak, for one reason or another, but wish to give their opposition or support for any or either of the bills, you can do so by filling out the green sheet. The green sheets are on the table. We ask you to fill out the green sheets before you testify. Today they're behind the table behind the witness area, so if you would fill them out before you come up, put it on the corner of the desk, and the page will pick up the form. We plan to spend about an hour on each side of each bill. I will have some discretion to change that as I deem fit, but I can tell you that if I do change it, it will not be weighted one side or the other. Everybody will get the same amount of time. If I decide that it's appropriate to move over a little bit over an hour, then the other group would also have that same time frame to go over and speak, as well. Speaker Flood, would you like to introduce...first of all, welcome, and would you introduce LB36. [LB36]

SENATOR FLOOD: (Exhibit 1) Good afternoon, Chairman Ashford and members of the Judiciary Committee. For the record, my name is Mike Flood. I am the representative of District 19 which includes the city of Norfolk and all of Madison County. I'm here today to introduce LB36. Last year, the Nebraska Supreme Court, in State v. Mata ruled that electrocution, the sole method of execution authorized by statute, violated the state's constitutional prohibition against inflicting cruel and unusual punishment. The court made it clear, however, that the individual conviction at issue was proper and the sentence of death remained valid until a constitutionally acceptable method of carrying out the sentence was available. LB36 would change the method of execution under Nebraska law from electrocution to intravenous injection of a substance or substances in a quantity sufficient to cause death. A written execution protocol would be created by the Department of Correctional Services to include the processes and procedures by

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which an execution is to be carried out. The creation of the protocol would include the selection of the lethal substance or substances, and the protocol would be exempt from the provisions of the Administrative Procedure Act. LB36 would also provide members of the execution team with protection from disciplinary action by a licensing board, and a level of confidentiality, unless extraordinary good cause is shown to a court in certain situations. In drafting LB36, the state has had the benefit of the United States Supreme Court's 2008 Opinion in Baze v. Rees. In Baze, the court determined in a 7-2 decision that the state of Kentucky's use of a three-drug lethal injection protocol is constitutional. In addition to studying the Baze case, the Nebraska Attorney General's Office spent several months researching the lethal injection protocols used in various states across the country. And in his report issued last December, the Attorney General recommended amending the current statutes to authorize lethal injection. Importantly, the Attorney General's report also recommended Nebraska utilize safeguards, called the consciousness checks, which were also used by Florida, Missouri, California, and Alabama, in order to ensure the convicted person is unconscious before injection of additional drug or drugs. The two dissenting justices in Baze indicated that if Kentucky had used these safeguards they would have upheld the Kentucky protocol as constitutional. I have relied upon the Attorney General's sound legal analysis and agree that the Department of Corrections should adopt the recommended lethal injection procedures to carry out a death sentence in Nebraska. It doesn't make any sense to have a death penalty in our statutes and no constitutional means of enforcing the sentence. I recognize this is a difficult issue. The subject matter is not something any of us enjoy talking about, but the state has a right and a duty to impose a punishment commensurate with the gravity of the criminal offense. Some crimes are so grave and so heinous that the only proportionate punishment is execution. When you look into the eyes of the victims' families and realize the sense of loss and sorrow they have, it is clear to me that a constitutional method of execution must exist in Nebraska. There are those who want to raise the "Beatrice Six" in today's discussion, but I would like to account for the "Norfolk Seven." I am not referring to the convicted men responsible for the savage murders during the 2002 bank robbery in Norfolk. I'm talking about the seven people who were brutally murdered at the hands of these criminals. This is about victims. And the criminals who committed these atrocious crimes are on videotape. There is no doubt about what those men did inside that bank on that day in September 2002. They committed these crimes in such a way that the death penalty does not deserve repeal. For some perspective, I would like to hand out copies of Jose Sandoval's record. I would ask the page to distribute the same, which is available on the Nebraska Department of Correctional Services Web site, using the Inmate Locator: two felony burglaries, seven first-degree murder convictions, five felonies for use of a deadly weapon to commit a felony. Again, some crimes are so grave and so heinous that the only proportionate punishment is execution. The state exercises its authority in capital cases with deliberation, and the county attorneys following me will speak about the legal process, including the aggravators and mitigators under Nebraska law, and the function of a three-judge panel in a penalty phase of the trial. In addition, Kirk Brown, Solicitor

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General of the state of Nebraska, will also be testifying to provide an overview of this bill. Finally, so that the committee is aware, I have been in contact with Media of Nebraska and will work with them, the Department of Corrections, and the Attorney General's Office to resolve issues concerning the transparency and availability of the lethal injection protocols. My hope is that this could be included later as part of a committee amendment. With that, I would like to thank the committee for its consideration of LB36. I'm happy to answer any questions that you may have, and I will be waiving my closing. [LB36]

SENATOR ASHFORD: Okay. Thank you, Speaker Flood. Any questions of Speaker Flood? Thank you. [LB36]

SENATOR FLOOD: Thank you. [LB36]

DON KLEINE: Good afternoon, Chairman Ashford and members of the Judiciary Committee. My name is Don Kleine, K-l-e-i-n-e. I'm the Douglas County Attorney and I've been a practicing attorney for 31 years. I'm testifying in support of LB36. Currently, the books, the laws of the state of Nebraska, we have the maximum punishment for first-degree murder being the death penalty. Our Nebraska Supreme Court has affirmed that we have that penalty. The United States Supreme Court has recently said that the methodology used in LB36 is a constitutional methodology for the death penalty for that maximum punishment, and we support that. You know, Douglas County--I'll speak specifically a little bit about Douglas County--we currently have 34 first-degree murder cases pending in Douglas County, that are either pending trial or been recently sentenced or are awaiting sentencing of being convicted. I think seven of those are already first-degree murder convictions. Some of them are awaiting sentencing, some aren't. As far as aggravating circumstances that have been filed in those kinds of cases, there's only a handful, maybe three of those cases that we have an aggravating circumstance that's filed in this process. And you are all well aware of that process of the prosecutor having discretion in looking at the evidence, filing an aggravating circumstance if we feel it exists in the process. Then the jury has to find the defendant guilty of the crime charged--first-degree murder; then the jury has to make a determination beyond a reasonable doubt with regard to the aggravating circumstances; and then a three-judge panel will weigh the aggravators versus the mitigators to make a determination as to whether the sentence should be life in prison or the death penalty. There is a tremendous amount of safeguards in this process, in the sentencing process, specifically for this type of crime. And there's a range, you know, on first-degree murder cases. I mean, if you look at the spectrum of cases that we have, there's the case where we might have somebody who gets angry at somebody and maybe gets a gun and premeditates and goes and kills that person, which is a horrific act of murder. But there's also those cases on the other end of the spectrum where somebody walks into, say, a bank and kills five people or seven people; somebody rapes and tortures some children. Those are on the other spectrum of those cases. And, you know, in those very

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unique, horrendous cases where there is a tremendous amount of aggravating circumstances, we feel that it's imperative to have a maximum punishment being the death penalty. You know, I've been doing this for 31 years, as a prosecutor most of those years, as the chief deputy Douglas County Attorney, as the head of the Department of Justice for the AG's Office, and I probably have as many first-degree murder convictions, but there's only been one case out of all the ones that I've tried where somebody has been sentenced to the death penalty. He hasn't been executed yet, but that was Arthur Lee Gales, who attempted to kill a lady by the name of Judith Chandler; left her at some railroad tracks at 11th and Grace; went back to the house and raped and then strangled her 13-year-old daughter, Latara Chandler, and then strangled her young son, Tramar Chandler. And for that heinous act, he...a three-judge panel ordered to him for the death penalty. So I mean, so that's how unique it is though. In all my years of practice, one case out of all the different first-degree murders I've handled has been that sentence. So I think, in the way Nebraska does it, it's so unique, it's so specific to those extraordinarily heinous crimes, that it's a proper punishment. So I see my time is up. I'd be happy to answer any questions of the panel. [LB36]

SENATOR ASHFORD: Any questions of Don? Yes, Senator Council. [LB36]

SENATOR COUNCIL: Yes. Good afternoon, Mr. Kleine. [LB36]

DON KLEINE: Good afternoon, Senator Council. [LB36]

SENATOR COUNCIL: Appreciate your testimony today. I think there's no secret that I oppose the death penalty by utilization of any form, lethal injection or otherwise, so I'm not going to be specifically addressing the lethal injection issue, with the exception of the lethal injection protocol. Can you...do you understand or can you explain why the protocols must be maintained secretly? [LB36]

DON KLEINE: No, I think Mr. Brown from the Attorney General's Office is going to kind of go into that area. I'm not...I can't answer that question. [LB36]

SENATOR COUNCIL: Okay. So you wouldn't be able to answer the question as to how many other states would have that level of secrecy with regard to their protocols. [LB36]

DON KLEINE: I don't know the answer to that question, Senator. [LB36]

SENATOR COUNCIL: Okay. Now, with regard to your testimony, you recited 34 first-degree murder cases that are either in the sentencing stage or in the trial stage? [LB36]

DON KLEINE: Right. [LB36]

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SENATOR COUNCIL: Okay. How many cases has your office handled that have involved murder that was not charged at the level of first degree? [LB36]

DON KLEINE: Oh, you know, that doesn't include the second-degree murders or manslaughters, motor vehicle homicides, which are all homicides. There's quite a few of those. I don't know the exact number. [LB36]

SENATOR COUNCIL: Would it be more than 34? [LB36]

DON KLEINE: Oh, I doubt it. I mean, there were a total of 44 homicides committed in Omaha last year, so I know it's not...it's probably in the 10-15 range if you're talking about manslaughters and second-degree murders. [LB36]

SENATOR COUNCIL: Now, with regard to the 34--and correct me if I'm wrong--you testified that only...well, maybe your testimony was with regard to the first-degree murder cases you've handled, only one of those individuals has been sentenced to death. Was that your testimony? [LB36]

DON KLEINE: Right, that I personally have handled. [LB36]

SENATOR COUNCIL: And did you testify as to how many you have personally handled? [LB36]

DON KLEINE: Oh, I think it's in the area of 40-some first-degree murder convictions here in Douglas County, and there's some around the state also, or at least one. [LB36]

SENATOR COUNCIL: Okay. I have concern, as do others who have contacted me either personally or in writing, with regard to the arbitrary, capricious, and discriminatory aspects of the imposition of the death penalty. And I understand the issue with regard to aggravating factors, but wouldn't you agree that the fact that of the number of first-degree murder cases that you have handled and in those where you have sought the death penalty with regard to aggravating factors, that there is a degree of capriciousness that comes into play in determining whether or not factors are aggravating or not? [LB36]

DON KLEINE: Well, I think the aggravating circumstances are very well-set-out in the statute so I don't think there's a capriciousness about what evidence exists if there's an aggravator. You know, if we file an aggravator, it's based on the evidence in the case, and then the sentence isn't implemented unless the jury finds that aggravator, unless a three-judge panel votes unanimously, again weighing the aggravators and mitigators. So I guess I don't agree about the capriciousness of the filing of aggravators. I know that we have prosecutorial discretion, but it's based on the evidence in the case. And, you know, as I said, there's...I can name the cases that...you know, Roy Ellis is awaiting

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sentence; there's aggravating circumstances on Mr. Ellis. Fabian Hands was a fellow that murdered two women after sexually assaulting them last year; there was aggravators filed in that case. He pled to two counts of first-degree murder; we dismissed the aggravators. Joshua Minshall was a fellow that tortured, gagged, and bound a man on Park Avenue, who had stabbed him 110 times, burned him, with some other people. He pled to first-degree murder; but there was one aggravator in that case but we dismissed the aggravator upon the plea because of the state of where the death penalty is today. So I guess from the...I don't see it as...at least from the prosecutors I know, I don't think there is any capriciousness from the standpoint of deciding whether...it's taken very seriously and it's based on the evidence if we're going to file aggravating circumstances or not. I don't know about other states, the way they handle it, but I certainly believe that the way Nebraska does it and the way the people that I know that are in those kinds of cases don't take it...they take it very seriously, obviously. [LB36]

SENATOR COUNCIL: So...but in terms of atrocities or these aggravating factors, you just indicated that there were at least two cases where your office believed that aggravators existed and you presented those aggravators, but due to the fact that the individual pled guilty to first-degree, you dismissed the aggravators, and consequently, those individuals weren't subject to the death penalty. Is that correct? [LB36]

DON KLEINE: Right. Because we'll weigh those decisions as to whether this person would probably get the death penalty or not, and certainly when somebody says I'll come in and I'll plead guilty to first-degree murder and I will take the sentence of life imprisonment without a trial, that's certainly...in talking to the victim's family, the officers involved, the evidence we have in the case, certainly that's a factor that we're going to consider, because it takes away all the appeals process also, if they plea. [LB36]

SENATOR COUNCIL: Okay, so...but the point is, is that that overrides the depravity index. I mean, it's still an atrocious murder, but these other factors have overridden that in terms of whether or not that person is sentenced to the death penalty. Isn't that correct? [LB36]

DON KLEINE: No. I mean there are certain cases where we would say, you know what, we're not going to take a plea to that and dismiss the aggravators, because this is... [LB36]

SENATOR COUNCIL: But in the cases where you have dismissed the aggravators... [LB36]

DON KLEINE: Yes, there are. [LB36]

SENATOR COUNCIL: ...one of them you described as being a most heinous crime...

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[LB36]

DON KLEINE: I agree. It... [LB36]

SENATOR COUNCIL: ...and the aggravator was dismissed. [LB36]

DON KLEINE: Right. [LB36]

SENATOR COUNCIL: So that person wasn't subject to the death penalty. [LB36]

DON KLEINE: Right. But it also was because the person was probably 20 years of age and we didn't think that this person would end up getting the death penalty; didn't think there was maybe...it was a close call. Close enough that we thought a plea was a very good reason, a very good thing to take in that circumstance. [LB36]

SENATOR COUNCIL: So in terms of the impression that's left with the public, that the use of the aggravators provides some uniformity in terms of sentencing, that's not accurate, is it? [LB36]

DON KLEINE: Well, you know, in anything that we charge, there's prosecutorial discretion. Some people...you know, there's cases we file as a first-degree murder, and if we try it to a jury and maybe we get a verdict to second-degree murder, because the jury says, well, there wasn't enough evidence of premeditation. Or, you know, if there's...somebody commits six robberies and we file four robberies, we make decisions. We use our discretion. And I think we have to trust to some extent the people in those positions, that they're doing their job in a fair-minded, just way, as far as filing charges. And that also deals with, obviously, the aggravators too; you're right. [LB36]

SENATOR COUNCIL: Okay. And then...and just recently you had a case where you sought...filed aggravators in a case involving a random shooting of a young African-American woman, and they didn't find the aggravators, notwithstanding the defendant's admission that race was involved. And if I'm incorrect, please correct me. [LB36]

DON KLEINE: Well, yeah, you're right about the case. It was Kyle Bormann who murdered Brittany Williams. I felt an aggravating circumstances case, because I felt it existed based on his statement to the police about race being a factor in why he shot Brittany Williams. We tried that case to a jury. They found him guilty of second-degree murder, so then we never got to the point with the jury as far as the aggravator, because once that happens, the jury makes a finding of second-degree murder, an intentional killing, that's the end of the process. You know, it doesn't move any forward, so the jury never heard anything about the aggravating circumstance in that case, although we felt very strongly it existed and that it was a first-degree murder. [LB36]

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SENATOR COUNCIL: All right. Well, the point that I'm trying to get to, Mr. Kleine, and certainly your testimony doesn't dispel my belief, that there, in this discussion of the death penalty, there are those who, in support of capital punishment, always focus on, quote, what the most atrocious murders, and look what would happen if we didn't have the death penalty; these most atrocious murderers would be sentenced to prison with the possibility of parole. And this is not the bill that's being addressed there at this point in time, but there is a bill to provide for a mandatory sentence of life imprisonment without possibility of parole with any first-degree murder conviction, so you don't have to go through this aggravator filing process. But the point I'm trying to make is that this whole issue of the degree of heinous involved in the crime is not a deciding and a determining factor in whether someone gets the death penalty or not, because we have people who have committed most-heinous and most-atrocious crimes who were offered the opportunity to plead guilty to first-degree murder and avoid the death penalty, and we have had others who juries have not agreed that the crime was atrocious enough to warrant a death penalty, and we've had cases recently where people were threatened with the death penalty to obtain a plea to a lesser offense and then were subsequently exonerated. [LB36]

DON KLEINE: Well, you know, I understand what you're saying, and the thing is, again, you have to trust the process. I think when you say, well, a jury has found that it wasn't, well, that's the process. You know, if you believe that the juries are going to do their job, which they do a tremendous job, and the prosecutors, defense attorneys are going to do their job the way they're supposed to, and then that judges are going to do their job the way they're supposed to, there's all these checks and balances within the system. And I think as long as people are doing the job the way they're supposed to, it's going to work. [LB36]

SENATOR COUNCIL: And if the maximum sentence for a first-degree murder without...would be life in prison without possibility of parole, would the system work? [LB36]

DON KLEINE: Well, sure, the system works. I mean, if that's...it's a legislative issue. You know, the people have to decide what the penalty is here. That's...it's as simple as that. So whatever the Legislature decides, based on what the people want, is what the penalty is going to be, and we'll enforce that penalty, whatever that penalty might be. [LB36]

SENATOR COUNCIL: Thank you. [LB36]

SENATOR ASHFORD: Don, is the death penalty a deterrent, in your opinion? [LB36]

DON KLEINE: Well, that's a good question. I mean, in that Supreme Court Opinion, if

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you read that opinion, some of the justices talk about there are some studies that say it is and there are some studies that say it isn't. [LB36]

SENATOR ASHFORD: What do you think? [LB36]

DON KLEINE: I think it can be to some people. I mean, you know, I haven't done my own study. I haven't...but I think it can be to some people. And again, what we're talking about here is the extraordinary horrible act. You know, if somebody kills this many people or tortures and kills a child, you know, that's, on the spectrum of first-degree murders even, is so heinous, so horrible, that maybe the maximum punishment should be death and that person's life should be... [LB36]

SENATOR ASHFORD: And I, as always, I appreciate your testimony and the candor in which you give it. Is it...Senator Council has picked up on some of the inconsistency in the result, not necessarily in the...I mean, the system, as you suggest, is the system. You will carry out the law as the law is given to you. The inconsistencies are there. I mean, there are heinous crimes that don't get the death penalty, obviously. There are only a few people on death row in Nebraska. I mean, there are lots of other heinous crimes. Is that--we all know that--is that...maybe inconsistency is the wrong word, but is that difference...does that, in your opinion, have any impact on the deterrent effect of a death penalty? If it is rarely used and if there are people who would commit heinous crimes who don't get the death penalty, does that in some way...or is there not a correlation? [LB36]

DON KLEINE: Well, you know, when you say inconsistency, if somebody comes to me and says, my client is charged with first-degree murder; you know, maybe there's an aggravator or not, maybe it's a close call on the evidence and we have to make a determination. But I say I'm going to plead guilty to this crime and tell you that I did it and I'd make admissions to it, you know, a lot of judges, throughout the history that I've been in front of, would say that's almost a mitigating circumstance, that this person will come forward and say I did this; I was wrong; I committed this horrible act. So it's not an inconsistency...it's taking that into consideration, if this person says I'll plea to this, I'll admit that I did this. So, I mean, that's something you take into consideration as a prosecutor in those kinds of cases. It's not maybe that we don't think that something horrible happened. It's, well, we're going to weigh that; we have this person who is going to admit who will plead, who will end this case and we won't have any appeals process, there won't be trial issues that we have to appeal, versus saying, okay, we're going to go forward and we'll see what happens even though we think we have the evidence to prove it. So, I mean, I don't know if it's an inconsistency, but it's again prosecutorial... [LB36]

SENATOR ASHFORD: Well, it's a different...the different results occur because of different circumstances--every case. [LB36]

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DON KLEINE: Every case is different. Every set of circumstances, every set of evidence is different, and we have to make...we make decisions. [LB36]

SENATOR ASHFORD: And I guess, and getting...and my last question, and this, I think, is maybe the seventh one of these public hearings I've been involved in since being in the Legislature, and the one question that keeps coming back to me is, if we...as you suggest, in Nebraska we don't sentence very many people to death, and some of those people that we have sentenced to death do get eventually, you know, their sentence has been altered or modified in some way, is society better off, is Nebraska better off with a penalty that is rarely used than it would be if we didn't have it? [LB36]

DON KLEINE: Well, I think that shows us how significant it is, that it is rarely used; that it's only for those kinds of cases we feel that deserve it. I mean, it's not something that we mete out kind of willy-nilly or, you know, maybe there's other states that you see everybody gets committed to first-degree murder or quite a few get the death penalty. We don't do that here. So I think it's...that does make it significant in that it's something that we believe only applies to those cases that are extreme and unique in the system. [LB36]

SENATOR ASHFORD: Thank you. Yes, Senator Lautenbaugh. [LB36]

SENATOR LAUTENBAUGH: Thank you, Senator Ashford. Thank you, Mr. Kleine, for coming down today. So I think, not to underline the obvious, but every case is different, is it not? [LB36]

DON KLEINE: Every case, you rely on the evidence and the circumstances of that, the particulars of that case; right. [LB36]

SENATOR LAUTENBAUGH: And the judges are different. [LB36]

DON KLEINE: Right. [LB36]

SENATOR LAUTENBAUGH: The juries are different. [LB36]

DON KLEINE: Yes. [LB36]

SENATOR LAUTENBAUGH: The facts are certainly different. It sounds like there's been talk of this being a capricious process, and also it's been criticized as being rarely used. You seek capital punishment when you feel it's appropriate based on the aggravators involved. Is that correct? [LB36]

DON KLEINE: Yeah, I mean...that's correct. Whenever the circumstances justify it, in

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my...in our estimation, our judgment. [LB36]

SENATOR LAUTENBAUGH: Would it be warranted to seek it in every case? [LB36]

DON KLEINE: No, and we don't. That's what I'm saying. It's very unique. [LB36]

SENATOR LAUTENBAUGH: Would it even be capricious to seek it in every case just so there's not the criticism that it isn't sought in every case? [LB36]

DON KLEINE: Well, I think that's very important. It shows that, you know, we go through a thought process. We look at the evidence. We make a decision based on those circumstances and evidence on each every case, not just say, okay, let's take a run at it in all these cases. So, yeah, I think that's important and I think that shows that we don't take it as something capricious. [LB36]

SENATOR LAUTENBAUGH: Thank you. [LB36]

SENATOR ASHFORD: Senator Christensen. [LB36]

SENATOR CHRISTENSEN: Thank you, Chairman Ashford. Thank you, Don. People talk about putting closure to it. Do you believe the death penalty adds closure to cases? [LB36]

DON KLEINE: Well, I hear that term. You know...and if you're talking about victims' families, when I speak--and we meet often with the families of victims of terrible crimes--I tell them that they shouldn't equate what happens to the defendant with the life of their son, daughter, mother, father, because you're never...you're not going to have...number one, that's not the way it should work. You're never going to equate what happened, your son's life or your daughter's life to what happened to the defendant in this case, and you shouldn't. So I don't think people ever get closure, necessarily, from the system. At least they can know, though, that the process is...the criminal justice process is taking place and somebody is held accountable and responsible for what they did to that member of the family. You know, the best thing that the justice system could do, I always tell them, is if we could bring your child back, that would be the answer. We can't do that so don't hurt yourself more by saying, well, this person got so many years; how does that level up with the life of my child or my parent or whatever? And that doesn't work. So you hear the term "closure" as far as the satisfaction or the end of the case, but I don't know that people necessarily get closures from the criminal justice system because the process continues for quite some time. [LB36]

SENATOR CHRISTENSEN: Okay. Thank you. [LB36]

SENATOR ASHFORD: Yes, Senator. [LB36]

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SENATOR LATHROP: I think that's kind of an interesting point that you bring up, Don, and the idea that the death penalty brings closure to people. It's actually quite the opposite for their family, isn't it? [LB36]

DON KLEINE: Well, I don't know that it does. Like I said, I don't...I've never talked to a victim's family about that, if it ever... [LB36]

SENATOR LATHROP: No one ever gets to the place where they're okay with what happened to their son or daughter. [LB36]

DON KLEINE: No. That's what I'm saying: There's not satisfaction, I guess--I don't know if that's the right word--from whatever happens to the defendant. [LB36]

SENATOR LATHROP: But the families of the people whose son or daughter or loved one that was killed, I've read the articles about it's an emotional roller coaster for them. They think it's taken care of at the time of sentencing when the person gets the death penalty, and then it is years of up and down, depending on appeals, depending upon reports of the execution date has been set and then it's been stayed, and in the meantime the families are kind of riding the emotional roller coaster with the appeals process. Would that be...? [LB36]

DON KLEINE: Well, that works whether it's the death penalty or whether it's life in prison or 40-50 years. You know, the people are going to appeal the trial, the issues at trial, or their sentence, so. But as you say, it doesn't ever, you know, close, from their standpoint, because there is an appellate process, there's postconviction process that takes place. [LB36]

SENATOR LATHROP: But certainly for those people who plead the circumstance that you described. The guy pleads, gets life, everybody knows he's got it coming, there's no point in having a trial. A lot of these people have trials just to avoid the death penalty, don't they? [LB36]

DON KLEINE: Well, I suppose that they do. I mean, that might be a reason. The other thing is that they have a right to a trial, and that's their...that's the way our system works and that's great. They...or there might be a question whether there's evidence of premeditation or whether it's an intentional killing. It's all those issues that go to the elements of the crime itself. [LB36]

SENATOR LATHROP: Right. But from the family's point of view, as the person appeals and they're on the television and we find out what happened in the Supreme Court and then we either stay the sentence again or we set an execution date, and they're watching this because it's the person that killed their daughter or their son, and it's sort

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of an up and a down for them for typically... [LB36]

DON KLEINE: Right, it's just an ongoing continuation of the process that doesn't seem like it ends. [LB36]

SENATOR LATHROP: And it's typically 25 years now, isn't it? [LB36]

DON KLEINE: It's a lengthy period of time. [LB36]

SENATOR LATHROP: The average is somewhere in the twenties though. [LB36]

DON KLEINE: Somewhere in the twenties I believe. [LB36]

SENATOR LATHROP: Okay. Thank you. [LB36]

DON KLEINE: Sure. [LB36]

SENATOR ASHFORD: Thanks, Don. Thanks for coming. [LB36]

DON KLEINE: Thank you. [LB36]

SENATOR ASHFORD: Let me...how many in the audience here are, other than the prosecutors that I have listed, how many members of the public are here that would like to talk in favor of LB36 that are not prosecutors or public officials? Is there anybody else here? Okay, go ahead. [LB36]

JOE KELLY: Thank you, Mr. Chairman. My name is Joe Kelly, K-e-l-l-y. I'm the chief deputy county attorney here in Lancaster County, Nebraska. I'm here to support LB36. I think I want to use my limited time to talk and emphasize the current sentencing procedures of a capital case. LB36 will not change those procedures; however, the procedures are relevant to today's discussion of LB36, which is really narrow in nature, because the bill understandably brings into discussion larger questions about the fairness of our capital punishment laws, and I think that's demonstrated by the discussions you all just had with Mr. Kleine. For a first-degree murder, prosecutors are required to charge a notice of specific aggravating circumstances prior to trial. The case goes to a trial to determine guilt, and the jury doesn't hear about the fact that there's aggravating circumstances that have been added. They simply are instructed by the judge, as in any other case, what the material elements are for first-degree murder. You don't need to get to the aggravators until and unless that jury has made a finding beyond a reasonable doubt that the person is guilty of first-degree murder. If they find that the defendant was guilty of first-degree murder, the jury continues to determine if the state can prove the alleged aggravating circumstances beyond a reasonable doubt. Some of those statutory aggravating circumstances are: an offender has previously

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committed a murder or has a history of a serious assaultive behavior; the murder was considered to conceal the commission of another crime; the murder was committed for hire; the murder was especially heinous, atrocious, or cruel; or at the time of the murder, the defendant committed another murder; the victim was a law enforcement officer. At the conclusion of the state's evidence on those aggravators, the jury votes. If they find any aggravators beyond a reasonable doubt, the case goes back to a three-judge panel. The three-judge panel then determines whether the aggravating circumstances justify the death penalty, whether any mitigating circumstances exist which approach or exceed the weight of the aggravating circumstances, and finally, whether the death sentence is excessive or disproportionate to the penalty imposed in other similar cases. So those three judges then have to be unanimous in order to sentence to death. So it is a very deliberative process chock full of due process safeguards. LB36 serves to fix that system. Thank you. [LB36]

SENATOR ASHFORD: Thanks, Joe. Any questions of Joe? Just one: Are you aware of any cases that you're aware of in your experience in Nebraska where the death penalty has been overturned? [LB36]

JOE KELLY: The death penalty has been overturned... [LB36]

SENATOR ASHFORD: Yeah, are you familiar with any cases where the death penalty has been overturned or the case has been overturned and the defendant has been resentenced? Let me ask it that way. [LB36]

JOE KELLY: Um, there are some. [LB36]

SENATOR ASHFORD: Okay. I mean, are you...were you...have you...are you personally familiar with any of those cases? [LB36]

JOE KELLY: No. No. [LB36]

SENATOR ASHFORD: Okay. But there are cases where the death penalty has...in Nebraska. [LB36]

JOE KELLY: I'll say yes. I mean I think there are. [LB36]

SENATOR ASHFORD: I mean I think there are but I just wondered if you...are you...but you're not necessarily personally involved... [LB36]

JOE KELLY: No. And whether it was the Eighth Circuit that did that when they... [LB36]

SENATOR ASHFORD: Fair enough. But that happens. [LB36]

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JOE KELLY: Yes. [LB36]

SENATOR ASHFORD: Okay. And I guess one other question. In your experience, are you aware of any case of a person on death row--and maybe Kirk would be the best person to ask this--where a person was convicted with less than two aggravators or sentenced to death with less than two aggravators? [LB36]

JOE KELLY: Well, I think a case I did, State v. David Dunster, only had one aggravator. Now, I could be off on that, but the aggravator was he had committed two prior unrelated murders. And even though it's two prior unrelated murders, that serves as only one aggravating circumstance, under the statute, and I think that's all I proved in that case. [LB36]

SENATOR ASHFORD: Okay. Thank you. Any other questions of Joe? Thank you, sir. Next proponent. [LB36]

JOE SMITH: (Exhibit 2) I'm Joe Smith, the Madison County Attorney. At the beginning today, Senator Flood had talked about the bill and about what happened at the Bank of Norfolk and a few other places in Madison County with respect to some people we tried over the last four years. That was September 26, 2002, three guys walked into that bank. Those three are on death row now. They killed five people. Mrs. Bryant, who was in a little office, had just been married. She was shot in the leg. After she went down, Mr. Vela walked over to her and put a bullet into her neck and she died miserably. Mr. Galindo walked to another office right away and killed a lady who had planned to make ice cream that night. Mr. Sandoval walked up front and killed three people. That all occurred within the speck of 50 seconds or so. They had actually sent another fellow to do recon. The day after that, a state trooper shot himself because he felt...among other others, he felt guilty about his contact with some of these murderers. In March, we dug up another body, Travis Lundell. Mr. Vela had killed Travis Lundell. The jury determined this, and in his opinion, his sentencing, you can see that he had actually strangled him and boasted that he stomped on his grave. About a year ago, we dug up Robert Pearson, Jr., who had been killed by at least one of that gang and maybe others, not of the ones that are on death row but others. Preparatory, Mr. Lundell was killed to show...Vela killed Lundell to show he could go through with what was going on in the bank. The juries in all those cases found that each of those witnesses or people in the bank were killed because they are witnesses--that is to conceal crimes, which is an aggravator--and they also found an aiding and abetting aggravator, which means they had to agree that there was a plan ahead of time. Not too long ago, the Lincoln Journal Star reported an interview by Jose Sandoval, where he and Galindo had planned to kill a guard, and that, recently at Tecumseh, and that had fallen apart when the guards had found a knife or a shiv. So with respect to the type of crimes we've talked, the type of crimes that do exist, there are those people that, by any analysis...and this was three juries of 12 people, two or four weeks of trial on each, unanimous opinions by a judge

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under this new procedure. These people are on death row. I see their victims' families almost on a daily basis. I know the pain they've been through. It has been five or six years for those victims' families, and one of them is here today, Billy Sun. I was here last year with him. Every year, he asks what's going to happen next on this; when will they start paying attention? Thank you. I do...Senator Ashford, you asked about one aggravator on each. I do have those names for you if you want it. [LB36]

SENATOR ASHFORD: Okay, thanks, Joe. Yeah, you can get those to me after, if you can. [LB36]

JOE SMITH: And I'll leave some of that stuff here. That has a list of people on death row, the number of aggravators each, and some things about the case. [LB36]

SENATOR ASHFORD: Okay. I was just interested in that information, but we can...yeah, I can get it after. [LB36]

JOE SMITH: There's four of them actually. [LB36]

SENATOR ASHFORD: That are there now? [LB36]

JOE SMITH: Yes, four (inaudible); one aggravator each. [LB36]

SENATOR ASHFORD: Okay. Any questions of Joe? Thanks, Joe. [LB36]

JOE SMITH: Thank you. [LB36]

SENATOR ASHFORD: Go ahead. [LB36]

KIRK BROWN: (Exhibit 3) Good morning, members of the committee. My name is Kirk Brown, B-r-o-w-n. I'm the Solicitor General of the state of Nebraska. I'm before you today with the permission of Attorney General Bruning and at the request of Senator Flood. I have been Nebraska's primary counsel in death penalty litigation before the Nebraska Supreme Court and the federal courts for approximately 25 years. I appear here today in favor of LB36. Since February 2008, the state of Nebraska has been unable to enforce valid sentences of death. In State v. Mata, the Nebraska Supreme Court ruled that the previously chosen method of execution by this Legislature, electrocution, did not violate our federal constitution but did violate the Nebraska Constitution. Two months later, the Supreme Court of the United States filed its opinion in Baze v. Rees. In Baze, by a 7-2 vote, the court held that lethal injection as practiced by the state of Kentucky did not violate the cruel and unusual punishments clause of the Eighth Amendment of our federal constitution, and the court also held that a state which enacted an execution procedure, even "substantially similar" to Kentucky's process would not violate the federal constitution. Since April 2008, I have studied the opinion in

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Baze, the opinion in Mata. I've studied method of execution statutes from all death penalty states and our federal government. I prepared an initial draft of what is now LB36 and I have reviewed the current draft of LB36. In my opinion, LB36 is capable of obtaining the approval of all nine members of the Supreme Court of the United States under the standards announced in Baze if that same three-drug protocol is chosen. It's also my opinion that LB36 would be upheld by the Nebraska Supreme Court under its newly created constitutional standard. LB36 is consistent with the approach of all 37 death penalty jurisdictions in adopting lethal injection, and LB36 is consistent with the approach adopted by 22 other death penalty states in its delegation of the details of an execution protocol to the professionals within their respective departments of corrections. If there are any additional questions, I'd be happy to take them and attempt to answer them. [LB36]

SENATOR ASHFORD: Thanks, Kirk. Any questions of Kirk? Yes, Senator Council. [LB36]

SENATOR COUNCIL: Yes, sir. Mr. Brown, you just mentioned comparisons of the language of LB36 to other states. Do all of the other states, that you've testified to that this legislation is consistent with, exempt their execution protocols from the requirements of their administrative procedure act? [LB36]

KIRK BROWN: Very many of them do. I don't think I can...I can't tell you that all of them do, but very many of them do. [LB36]

SENATOR COUNCIL: All right. And is it...would it be your testimony that when the Supreme Court issued its decision in Baze v. Rees that they intended that the execution protocols would be exempt from disclosure? [LB36]

KIRK BROWN: Well, let me say, LB36, as I understand it, does not exempt this execution protocol from disclosure under appropriate circumstances. It does not make it a public record, but that doesn't mean...and it makes specific provision for the protocol to be reviewed in appropriate legal proceedings. But it doesn't make it...our concern about the Administrative Procedures Act is, part of our experience is we had a case that was over 22 years old. We had an execution warrant, and in the eleventh hour a civil action was filed, claiming a violation of the Administrative Procedures Act. And what we are attempting to prevent is an eleventh hour litigation of issues that could have been litigated. If you want to challenge the protocol, the opportunity for anyone sentenced to death is available through the court system at the appropriate time. We're trying to prevent collateral civil litigation from forestalling the enforcement of a valid criminal judgment. That's our concern in that respect, and that, to a certain extent, is an independent question of how this body might decide what level of transparency they want. We're trying to avoid basically unrelated civil litigation that will forestall an execution after 15, 20 years of litigation. [LB36]

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SENATOR COUNCIL: Well, but there's nothing in this legislation that would forestall. I mean, if an individual was sentenced to death, and this legislation is in effect, there's nothing to prevent or forestall that individual from filing litigation and dragging that issue out based upon the Administrative Procedures Act and the issues about the protocol. [LB36]

KIRK BROWN: No. If this legislation were to be passed, litigation under the Administrative Procedures Act could be easily disposed of if someone attempted to do it and would not in all likelihood forestall an execution. Those issues may well...can be...affirmatively can be taken up in other appropriate litigation, but we don't want to add another layer of litigation to a process that too many people complain takes too long already. [LB36]

SENATOR COUNCIL: Okay, and I don't want to...and I guess, backhandedly, you got to the point that I was trying to get to through the question, is that that opportunity exists for an individual through other open and available appeals' means to challenge the protocols under this legislation. You don't eliminate that and you don't eliminate the length of time that it takes or the number of opportunities that that individual has to appeal them though. [LB36]

KIRK BROWN: No. You do eliminate...you eliminate some of it in this respect: You have it taken care of in the course of other procedural reviews that the system already anticipates, instead of adding an eleventh hour layer of review that is really collateral to the merits of the criminal judgment itself. That's what we're attempting. We're not saying this protocol can't be reviewed by the courts. It can; it has been and it will be again. But it will be reviewed in the context of the validity of that criminal judgment, not in an eleventh hour, purely collateral attack upon an administrative regulation. We just don't think that enhances the credibility or the accuracy of the process. [LB36]

SENATOR COUNCIL: And one other question. You were here when Senator Flood made his opening remarks. [LB36]

KIRK BROWN: I was. [LB36]

SENATOR COUNCIL: Okay. And he made available to the members of the committee the Nebraska Department of Correctional Services inmate detail on Jose Sandoval. And I was left with the impression, and I hope that others were not, that Senator Flood made the statement with regard to Mr. Sandoval's prior criminal record, and that prior criminal record being reflected in the document he distributed, and he specifically referenced seven prior homicides. If I hand this...have the page hand this to you...that is not what this document reflects. [LB36]

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KIRK BROWN: I have not seen the document, so I'd have to look at it, and then see if I can interpret it. [LB36]

SENATOR COUNCIL: Well, at least from my reading, what it reflects is that those are the charges for which he is currently incarcerated. [LB36]

KIRK BROWN: Well, if he is incarcerated, those are more than charges; those would be criminal... [LB36]

SENATOR COUNCIL: Oh, those are the convictions for which he is incarcerated. [LB36]

KIRK BROWN: Yes. So I would have to assume from that, that he has been found legally responsible for all of the crimes noted on here. [LB36]

SENATOR COUNCIL: But that's not necessarily his prior criminal record, in the sense that you normally speak to someone's prior criminal record. [LB36]

KIRK BROWN: I'm sorry. I'm losing you as far as...I think we're confused on your use of the term "prior." I think I'm not being... [LB36]

SENATOR COUNCIL: Well, I'm confused on Senator Flood's use of the term "prior" because... [LB36]

SENATOR ASHFORD: I think these are current. These are current. [LB36]

SENATOR COUNCIL: These are current convictions. [LB36]

SENATOR ASHFORD: Current offenses. [LB36]

KIRK BROWN: Well, these would all be crimes for which Mr. Sandoval has been found guilty. Where those convictions happened in point in time with respect to the convictions that put him on death row, my understanding is one or two of these are crimes that Sandoval has pled guilty to that the state was simply unaware of at the time he received the death sentence. If that addresses your question, that's my understanding of the facts. [LB36]

SENATOR ASHFORD: Thank you, Senator Council. Yes, Senator Lathrop. [LB36]

SENATOR LATHROP: Mr. Brown, thank you for coming here today and testifying for us. Do you intend to testify on LB306 or is this you expect to be your only opportunity? [LB36]

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KIRK BROWN: This is it. This is the end of my license today. [LB36]

SENATOR LATHROP: Okay. So I'm going to--even though this really doesn't have a lot to do, and maybe it has more to do with LB306 than it does with the lethal injection--because this is our only time I'm going to have a chance to talk to you, I want to visit with you about the death penalty, generally. You have been the person from the Attorney General's Office, for many years, 25 or so, that has handled the death penalty cases. Am I right? [LB36]

KIRK BROWN: That's correct. [LB36]

SENATOR LATHROP: And so if the convictions come out of Douglas County or anywhere in the state of Nebraska, when they get to the appeals level you would be the person in charge. [LB36]

KIRK BROWN: I have been, yes. [LB36]

SENATOR LATHROP: And you've litigated these issues, both in the Nebraska Supreme Court and in the federal courts in Nebraska, as well. [LB36]

KIRK BROWN: That's correct. [LB36]

SENATOR LATHROP: So you have a significant amount of background when it comes to the death penalty itself. [LB36]

KIRK BROWN: That's my hope, yeah. [LB36]

SENATOR LATHROP: Okay. Well, I think...I think...I'm just qualifying you as an expert witness, all right? [LB36]

KIRK BROWN: Oh, all right. I'll let you do that. [LB36]

SENATOR ASHFORD: I will qualify...I will suggest he's qualified. [LB36]

SENATOR LATHROP: Well, I just...I think it's important because we do have somebody in the room who's spent essentially their professional life working on the death penalty... [LB36]

KIRK BROWN: That's correct. [LB36]

SENATOR LATHROP: And so you might have some observations about the death penalty, or perhaps we could talk about some of them. There have been a lot of studies about whether the death penalty is a deterrent or not a deterrent, and reasonable minds

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could certainly differ on that, and many of the studies have. [LB36]

KIRK BROWN: That's my understanding, yes. [LB36]

SENATOR LATHROP: And there are...in order for the state of Nebraska to impose the death penalty, and certainly people like Mr. Kleine or Mr. Smith from Madison County have been involved in this process, in order to prosecute a case to the death penalty, we have to have a lot more witnesses and a lot more experts brought into the trial than we would if it were simply a first-degree murder trial. [LB36]

KIRK BROWN: I guess that answer would depend on what the particular issues were in that particular case. But certainly there are additional issues that have to be addressed in a death penalty case that are not addressed in, say, a first-degree murder case that wasn't charged with aggravating circumstances. [LB36]

SENATOR LATHROP: Right. And when we get to the aggravating and the mitigating circumstances, for example, we have the involvement of many more experts, typically, not necessarily in each case but typically. [LB36]

KIRK BROWN: Well, I think what we do actually, Senator, is we make a lot more of this information is taken on the record. Issues of mitigation, those types of things are normally taken care of in a criminal sentencing through a presentence investigation report. The distinction I think that exists here is that type of information is taken at a formal hearing. But I think the sources of information and the people that provide those sources of information, either in favor of an enhanced sentence or in favor of a mitigated sentence, in a first-degree murder case much of that will be before the sentencing court. It's just a question of how formal the proceeding is that we get it there. [LB36]

SENATOR LATHROP: Okay. I can agree with that. A long explanation, but you can agree that typically it results in more expense. [LB36]

KIRK BROWN: Uh, I assume it does, and I would have to defer to the prosecutors that actually try these cases. [LB36]

SENATOR LATHROP: So this might not be an area where your expertise is going to help. [LB36]

KIRK BROWN: I can speak a lot more clearly about the time and effort consumed in the appellate process. I have never...I have only tried one death penalty case, and that was simply the penalty phase of one that had been sent back. So I don't consider myself...I haven't been qualified as an expert on the ins and outs of trying these cases. [LB36]

SENATOR LATHROP: Okay. Okay. But you have been involved in the appeals, which

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is... [LB36]

KIRK BROWN: Yes. [LB36]

SENATOR LATHROP: I asked one of the other witnesses, I think it might have been Mr. Kleine, these appeals typically are now...the average is now over 20 years for someone who is getting a death penalty...having a death penalty imposed? [LB36]

KIRK BROWN: The last time I saw a statistic, the national average was over 16; Nebraska was over 20. [LB36]

SENATOR LATHROP: Nebraska. [LB36]

KIRK BROWN: And the national average may have crept up. I don't...I just haven't kept myself current. But I do know at one time it was over 16 years. [LB36]

SENATOR LATHROP: All right. And those appeals are appeals that are...if we tracked a first-degree murder for someone who got life in prison, typically...was someone who has the death penalty imposed as their sentence, typically the appeals for those who have been given the death sentence are going to go on longer than their counterpart who simply received a life sentence. [LB36]

KIRK BROWN: I think you can assume that all of the death penalty cases will run the full gamut of what's available. There is nothing to prevent, and many people sentenced to life...there's no unique appellate remedy for people who receive the death penalty. The options are identical for them as are someone sentenced to life imprisonment without parole. I think it is certain... [LB36]

SENATOR LATHROP: I can appreciate that. But... [LB36]

KIRK BROWN: It's certain that the people that receive death will take every opportunity. Many of the people who receive life do, but I don't think it's 100 percent of them. [LB36]

SENATOR LATHROP: All right. And so going back to my question, which was typically, typically the folks who have received the death penalty are going to have appeals processes that last much longer than would the typical first-degree murder conviction that results in life in prison. Isn't that the case? [LB36]

KIRK BROWN: I, in the most generic of sense, I would say, yes, simply because the death penalty cases will represent the extreme that's available. [LB36]

SENATOR LATHROP: Exactly. It's also true that when we make modifications to the death penalty in whatever form that may take, when we try to shorten the process up,

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whatever we do to try to modify the death penalty process, it typically results in more litigation, more appeals, and longer time from the imposition of the death penalty to the time that...from the time the death penalty has been imposed until the time it's actually carried out. [LB36]

KIRK BROWN: I think that's true. I don't think that is a reality that's unique to death penalty cases. I think that's true in any context. When the statute changes in any criminal case, you may engender additional litigation, but certainly it would be true in death cases as... [LB36]

SENATOR LATHROP: And even as we make these changes...even as we make these changes. And I can appreciate that we can't leave it as is. If we're going to have the death penalty, we can't leave it as is. In order for us to impose the death penalty, we need to have a change, but even that change is going to result in more litigation, more appeals, and a longer time from the imposition of the sentence until the time the person is actually put to death. Would you agree with that? [LB36]

KIRK BROWN: I would agree that it's going to take one more case to solve this problem, and then we won't...the other cases...it will only extend possibly one case. [LB36]

SENATOR LATHROP: One case? [LB36]

KIRK BROWN: That's my impression. And if we get an answer from the state Supreme Court and the federal court that this procedure recommended by LB36 is approved, I'm confident we'll be told that's fine, and that issue will be dead. That issue will not be subject to extensive relitigation. [LB36]

SENATOR LATHROP: Well,... [LB36]

KIRK BROWN: It may be subject to litigation. It would be subject to... [LB36]

SENATOR LATHROP: Reasonable legal minds may differ on whether or not that's the case. We saw people come back and back and back on the electric chair, didn't we? [LB36]

KIRK BROWN: We did. [LB36]

SENATOR LATHROP: We saw that decided and it continued to be litigation, and now the Supreme Court said it's cruel and unusual, did they not? [LB36]

KIRK BROWN: Well, they have. But, I mean, my point is it's not time-consuming litigation. It takes place in the context of a case with 160 issues in it. It's one of the

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issues, and generally one of the issues that will be very readily disposed of once we've had a full and fair hearing on the question. [LB36]

SENATOR LATHROP: I think that's all the questions I have for you. [LB36]

KIRK BROWN: All right. [LB36]

SENATOR LATHROP: I appreciate it. [LB36]

SENATOR ASHFORD: Thank you, Senator Lathrop. Any....? Yes, Senator Lautenbaugh. [LB36]

SENATOR LAUTENBAUGH: Thank you, Senator Ashford. Thank you, Mr. Brown, for coming today. We've received correspondence on the committee, I'll represent to you, decrying the secrecy of this proposed bill, and Senator Council touched on this a little. Just to make it clear, was it your point that the...making the point of this bill where it says it is not subject to the--I want to get the title right here--Nebraska's Administrative Procedures Act, is to just eliminate challenges brought specifically under that act, to the method of execution. [LB36]

KIRK BROWN: That's correct. [LB36]

SENATOR LAUTENBAUGH: Now, someone could still file a challenge under that act even if this bill passes. Is that correct? [LB36]

KIRK BROWN: They could. [LB36]

SENATOR LAUTENBAUGH: And it would be disposed of relatively quickly if this law is clear that that procedure is not subject to the Administrative Procedures Act. [LB36]

KIRK BROWN: In the eleventh hour, which is where we find this problematic, what would happen is you could...someone might seek to litigate this and seek a stay of execution as a result. If this bill were to pass, that stay of execution would never be issued and the execution would take place, and then we could dispose of the civil issues if we had to. But if this bill were passed, we wouldn't have...even if it was attempted, a stay of execution would be utterly unlikely to be issued, and the criminal judgment would continue to be enforced. That's what we're attempting to achieve, is to eliminate that last round of delay. [LB36]

SENATOR LAUTENBAUGH: And if this bill were passed, the procedure would not be kept secret from the defendant or his attorney, would it? [LB36]

KIRK BROWN: No. That would be readily available for them. That would be a legitimate

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issue for them to litigate, either in their trial or in a postconviction proceeding, and the court would surely grant them access to it for those purposes. I mean, there's not an intention not to have this policy reviewed. There is an intention to have it reviewed at the proper time and not as simply an additional mechanism to delay an otherwise valid death sentence. [LB36]

SENATOR LAUTENBAUGH: And in the proper time. When you say that, you mean within the criminal proceedings. [LB36]

KIRK BROWN: Right. They would have an opportunity to...the Nebraska Supreme Court has made it very clear that you can, in a direct appeal, challenge the method of execution. Now, if method of execution changes, you would have the opportunity, if you felt the new process was unconstitutional and your direct appeal was over, you would have a legitimate...the death sentence prisoner would have a legitimate opportunity to raise that in a postconviction action. So there would be a vehicle readily available to challenge this. It just...it takes part in the course of the normal process of litigating that criminal judgment and not outside of that process. [LB36]

SENATOR LAUTENBAUGH: Now you'd agree the death penalty is really the ultimate sanction under the law. [LB36]

KIRK BROWN: It's...yes. [LB36]

SENATOR LAUTENBAUGH: So is it surprising to you that perhaps there are more challenges to death penalty cases than to life imprisonment cases? [LB36]

KIRK BROWN: Well, no, I think...because one of the realities of capital litigation is, if you're sentenced to life imprisonment, every day that prisoner is in prison they're paying part of the penalty the state decided was appropriate for their crime. If you were sentenced to death, every year you're alive is a year or a day you're escaping the penalty that the state thought was appropriate for your crime, and so they have every incentive to extend this as long as they possibly can. I mean, I understand their motivation, but the fact of the matter is, delay escapes the penalty whereas someone sentenced to life or five years, every year they're incarcerated they're paying part of the penalty that the state thought was appropriate for their crime. [LB36]

SENATOR LAUTENBAUGH: But similarly, isn't the very seriousness of the penalty part of what brings about the challenges? [LB36]

KIRK BROWN: Well, it does, and this is the... [LB36]

SENATOR LAUTENBAUGH: I mean, wouldn't you expect a life imprisonment to be more seriously or vigorously challenged than a five-year imprisonment? [LB36]

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KIRK BROWN: Well, the fact of the matter is, many people would be...the number of levels of review through the courts that are available to any convicted felon in this country, there's nothing uniquely available to somebody sentenced to death. The same process is available to you whether you get death or five years or six months for jaywalking. The fact of the matter is, most people are discharged from their sentences long before that process could be completed. It's only people serving extensive periods of time, either long periods of years or a life or death sentence, that are, frankly, in state custody long enough to complete all the process that's readily available to them. [LB36]

SENATOR LAUTENBAUGH: Thank you. [LB36]

SENATOR ASHFORD: I just have a couple questions, Kirk, just for the record, and if you don't know, fine. How many exonerations have there been in last five years in death penalty cases across the country? Do you have that number, or how many...? [LB36]

KIRK BROWN: No, I really...I track it in the paper much like the public... [LB36]

SENATOR ASHFORD: Like we all do. But exonerations occur, obviously, and have occurred most recently. [LB36]

KIRK BROWN: Yeah, I mean I have read that they have in various jurisdictions and I accept that as being true. I just... [LB36]

SENATOR ASHFORD: Well, here's my point; here's the point of my question. I mean, we all know there are exonerations, but the question is on this length of time issue. In Nebraska there have been defendants convicted and sentenced to death who have been removed from death row and sentenced to lesser penalties--in your experience is that correct?--for a variety of reasons. [LB36]

KIRK BROWN: Yes. [LB36]

SENATOR ASHFORD: And oftentimes those changes in the sentence or modifications in the sentence occur after a number of years of litigation. Isn't that also correct? [LB36]

KIRK BROWN: Yes. Yes. I mean, either that or they aren't a death penalty case when we start out with, yeah. [LB36]

SENATOR ASHFORD: Well, right. I mean, if they're a death penalty case, sentenced to death, there are a number of appeals, whatever, at some point in the process, for a variety of reasons--and every case is different and I'm not suggesting they're innocent or whatever--but there have been changes in the penalty or modifications in the penalty, and those changes occur after a number of years. [LB36]

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KIRK BROWN: That's correct. [LB36]

SENATOR ASHFORD: Which is generally an incentive, I would guess, for a defendant sentenced to death to exercise their appeals. And I'm not arguing with you; I'm just... [LB36]

KIRK BROWN: No, certainly...no, I don't believe you are. That's absolutely right. [LB36]

SENATOR ASHFORD: Okay. So length of time doesn't...is a factor or...it cuts both ways. It can be an argument for or against, I mean the death penalty, because length of time is a savior, in many cases, because legitimately, defendants who have been sentenced to death, have...are no longer on death row, having been there for a long time, because of those appeals. [LB36]

KIRK BROWN: Well, no, I would agree, and I guess my point would be, this is the most serious act the state can take. [LB36]

SENATOR ASHFORD: Right. [LB36]

KIRK BROWN: And if we take all the time we can to make ourselves comfortable that what we're doing is appropriate, and if in the course of that we find that some mistake has been made, we have the opportunity to correct it. I don't think anyone is opposed to that. [LB36]

SENATOR ASHFORD: Right. And I appreciate your candor and I think from...and I'm getting at it from a policy perspective, because that's a reality. I mean, whether it's right or wrong or good or bad or...and I think Don has been very candid in his thoughts about it. I mean, each case is different; every appeal is different. These cases go on forever. There are some exonerations, mostly in other states. There are appeals that are sustained at some point in the process and people are removed from death row. So every case is different, and that gets to...to me, it gets to the issue of deterrence. I mean, is it really worth it when we have exonerations, when we have cases that, for a variety of reasons, the result is changed. And that's a...that's not...you don't have to make that decision; that's a policy question... [LB36]

KIRK BROWN: Well, if I could offer a response. [LB36]

SENATOR ASHFORD: But I'd be happy to have your... [LB36]

KIRK BROWN: Just having lived with this, I think the point is, we want to do everything we can humanly do to assure ourselves that if we're going to carry out this sanction, that we're doing it right. But the fact of the matter is, to do that and to do it right takes time.

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[LB36]

SENATOR ASHFORD: Right. [LB36]

KIRK BROWN: And on the deterrence issue, all I can tell you is, in my experience I've worked with the people that we have convicted of crimes that were eligible for the death sentence, and obviously none of them were deterred at all. That's not to say that others...we don't have people calling up the blotter, the sergeant at the desk, and say, I was going to blow up a school bus full of kids, but I was deterred by the death penalty. We don't get that number. We... [LB36]

SENATOR ASHFORD: Right. And the studies are varied...they're varied on the issue. [LB36]

KIRK BROWN: Well, and the methodology is...you can feel whatever way you want to feel about the methodology. All I'm saying is, my experience is limited to individuals who clearly were not deterred, and yet they committed serious, serious crimes. [LB36]

SENATOR ASHFORD: Right. And from a policy perspective, we have that factor, trying to think about...we don't know. We can read 100 studies, and 50 of them, 80 of them will be on one side or whatever it is. We can read studies that say it is or isn't, and then we think about...have to think about the fact that people have been exonerated and think about the fact that people have been removed from death row after years and years of litigating their issues. And then we have to think about cases like the Beatrice case, for example, where there's a total exoneration. That wasn't a death penalty case but it did involve a homicide. So, I mean, as...we're just simple policymakers and all those things have to go into our thinking. But I'm not making a speech but I'm just trying to suggest that these are policy considerations, and you've answered the questions very well. [LB36]

KIRK BROWN: Well, let me just say, I think...the thought that I have is deterrence is a debatable question, as so many issues at the policy level are. I think, in my own mind my thought would be, the death penalty is either justified as an appropriate punishment for the worst crimes or it isn't. And if it is, then it doesn't make any difference how long it takes or how careful we are. If it's an appropriate punishment, then we pay the overhead of that policy decision to make certain crimes merit that punishment. And if they don't, they don't. But I would hate to have a... [LB36]

SENATOR ASHFORD: Well, I think that's a good answer. I mean, I think that is...I think you're putting it quite succinctly and from long years of experience, and I think that is the question. Do we or do we not have the death penalty? If it is, it justifies 20 years, 30 years, whatever it is. Thanks, Kirk, very much. [LB36]

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KIRK BROWN: All right. Thank you. [LB36]

SENATOR ASHFORD: Let me...one more witness on the proponent side, and then we're going to go to the opponents. [LB36]

SENATOR LAUTENBAUGH: Mr. Chairman, are we then going to hear the opponents for an hour, and then hear the proponents of the next bill for an hour? [LB36]

SENATOR ASHFORD: Oh, I don't know. That was my...that was the way...that was the direction I was going to go, Scott. I mean, I think we have to see how many people are going to be testifying on the second bill, but we certainly are going to give the opponents to this bill the same amount of time, so it would be an hour and 15 minutes or so. [LB36]

SENATOR LAUTENBAUGH: So my question was, if you're a proponent of this bill and you don't have the chance to testify. [LB36]

SENATOR ASHFORD: Oh, you can testify as an opponent on the other bill. [LB36]

SENATOR LAUTENBAUGH: The next bill, if that's what your desire is to do. [LB36]

SENATOR ASHFORD: Sure, if that's what you desire to do. Yes, sir, go ahead. [LB36]

BILL SUN: (Exhibit 4) Chairman Ashford, Senators, good afternoon. My name is Bill Sun and I am a victim. My father, Samuel Sun, was a victim. He was in the bank in Norfolk when those murders occurred. I think it's important that you know he's not just one of the "Norfolk Seven." His name was Samuel Sun. He was my father. He was a resident, a citizen of the state of Nebraska. I heard earlier, Senator Lathrop, I think you brought up the closure aspect, and actually I'm glad that you did, because you're right. It's not about closure. I don't wake up every day, thinking I hope the sentence is carried out so I can have closure. What gets me through every day is the hope that the system will work. The system, as it was in place at that time, allowed for the death penalty. As it stands now, we have no way of carrying that out. It is my hope that this bill be advanced to allow for the sentence to be carried out. Again, I'm not looking for closure. Nothing here, nothing that you can do will give me closure. Jose Sandoval and his associates murdered my father, Samuel Sun. They planned this in advance and they carried it out. They were caught in Nebraska. They were tried in Nebraska. They were found guilty by a jury of their peers, citizens of Nebraska. They were sentenced by a three-judge panel made up of judges from Nebraska. And I would remind you that, at that time, the death penalty was the ultimate punishment. It is unthinkable that Nebraska citizens can make a judgment, that judges can make a judgment, and then have the state ignore it by a loophole. This bill needs to be advanced. Again, my name is Bill Sun and I am a victim. My father, Samuel Sun, was murdered in Nebraska. That's all I have. [LB36]

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SENATOR ASHFORD: Thank you, Mr. Sun. Any questions? Thank you, sir. Opponents. Now we'll take the opponent testimony and for an hour and 20 minutes. Senator Chambers. [LB36]

ERNIE CHAMBERS: Thank you. Mr. Chairman, members of the committee, I'll fill out the papers later on. I'm speaking against this bill, and to get around some of the tap-dancing that occurred, the U.S. Supreme Court, other appellate courts have pointed out repeatedly in their opinions that death penalty cases take an inordinate amount of time--more time than any other type of case--and that they exercise extraordinary care in a way that they would not in other cases. This can be found in the opinions written by the courts, so there's not a need to spend a lot of time tap-dancing on that. They also, in death cases, will allow things which ordinarily they would not, and that's why I, who is not a practicing attorney, was not a part of the case involving Carey Dean Moore, was able to inject myself and present a case to the Nebraska Supreme Court that resulted in them giving a stay of execution to Carey Dean Moore, after having set an execution date. They admitted that they made a mistake in doing that, and they would not allow it to be carried out. And the arguments that I made in my letter, three main ones, were utilized by the Nebraska Supreme Court as a reason for not letting that death penalty be carried out. I'm partly responsible for the state not having a death penalty now, because I worked assiduously to prevent there ever being adopted a lethal injection bill. Putting lipstick on a pig, to use the cliché, does not alter the nature of the pig. There are issues that I have with the drafting of this bill. I will not be able to complete them in the time that I have, but maybe I will be asked a question or two. Something that has not been mentioned is that there is language in this bill designed to hasten the carrying out of executions. There is an attempt to compel the Supreme Court to issue a warrant in a certain time frame, then the execution must be carried out no more than 60 days after the issuance of that warrant. But the court can parse legislative language, and they will say, upon our being certified or it's certified to us that such and such a thing has happened, we will set an execution date, but we will not set it immediately. So trying to handcuff the Nebraska Supreme Court is not going to work. One of the obvious things that raises a question in my mind, along with the others that are of greater substance, is how and why Nebraska put a provision in here saying that the application of the United States Freedom of Information Act cannot be utilized to procure information. If under that act information is obtainable, then any act by a state legislature notwithstanding, the federal law prevails. A Nebraska enactment cannot undermine or nullify a federal statute, so I don't know who did the drafting. My time is up. I always play by the rules. [LB36]

SENATOR ASHFORD: Senator Council. [LB36]

SENATOR COUNCIL: Yes, Senator Chambers. I have a number of questions with regard to the drafting and the intent of LB36, but I would be interested in hearing from

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you, other areas that you have identified as being problematic with this legislation so that I can determine whether they are consistent with the items that I have identified as being problematic, so if you could identify any other problematic areas with LB36 from your perspective. [LB36]

ERNIE CHAMBERS: Thank you, Senator Council. And for those who may not know, Senator Council is my representative in the Legislature. This...before I mention those, I have to put an underlining on a comment made by Mr. Brown. The electric chair was struck down in Nebraska, not pursuant to the U.S. Constitution, because the U.S. Supreme Court has said over and over that execution does not violate the U.S. Constitution. The Nebraska Supreme Court ignored what the federal court had said, and struck it down under the parallel state constitutional provision relative to cruel and unusual punishment. So the fact that the U.S. Supreme Court said that a protocol in one state does not violate the U.S. Constitution, does not bind any other state in setting its own standard as to what must be met. The U.S. Constitution sets a floor. It says at least this much must be done to protect the public, but a state can raise that floor as high as they want to; it is not a limit on what the state can do. And the drafting of this bill leaves a lot to be desired when you look at how the Nebraska Supreme Court reviewed the operation of the electric chair, so I wanted to point that out. This state is not bound by what the U.S. Supreme Court ruled as far as Tennessee or wherever it was or Kentucky. And the fact that they upheld a protocol in Kentucky does not mean that a similar case from another state where that protocol is challenged will be automatically turned down by the U.S. Supreme Court. As Senator Lathrop pointed out, you're not going to pass a state statute and do away with litigation on an issue as controversial as this one. But now getting to the bill itself, on page 8, beginning in line 22 where you're talking about enforcing "the intravenous injection of a substance or substances in a quantity sufficient to cause death," now based on that language, you can use one drug or you can use any number. Then you go to the next sentence in line 24, "The lethal substance or substances," when you use that term "lethal," if it's one substance you know that that substance alone must be lethal. This language does not say substances in combination shall be lethal. It says the lethal substance or substances. Does that mean that if you have one of these so-called cocktails, each of the substances individually must be lethal? And when you look at language of this kind dealing with death--and it is a criminal statute--every criminal statute is strictly construed and it is never expanded in its scope through interpretation or construction by the court. The court is never going to let it go beyond the words. And if the words are vague, if the words are ambiguous, if the words are not clear in what they mean, the court is not going to make up for a deficiency in the drafting. So the question that I would ask and the committee should consider, in line 24, when they talk about lethal substances, do they mean a combination of substances which together will produce a lethal effect, or must each substance itself be lethal? That's in talking about the protocol. When we get to the next page, starting in line 21, "The director shall create, modify, and maintain a written execution protocol describing the process and procedures," and so forth. You

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know why they want the director to be able to change it? Mr. Brown didn't mention it, but I'm the person who brought the last-minute civil action challenging the absence of APA consideration of the execution protocol. It went to court and, as it turned out, the court ruled that I did not have standing to make the challenge, but it did not rule that the challenge could not be made. And when the judge struck down my lack of standing, he pointed out it probably doesn't matter to me now, since the Supreme Court had granted a stay of execution, and that lower court judge and everybody in this state knew that I was trying to prevent Carey Dean Moore from being executed, and that was the impact, so that became a moot question as to whether or not because of the nature of the protocol it was subject to APA examination and scrutiny. I think that it should be. You know why they put in here that they can modify it? Along the way I pointed out the difficulties of carrying out the execution protocol as adopted by the Department of Corrections. If they had followed it and kept a current of electricity passing through a person until that person was dead, if the person didn't die they could not do anything about it. They would have violated the law because they had not carried out the execution the way the law said. But on the other hand, if they applied it long enough to ensure death, then the body would be ignited. And there were so many problems that in trying to get around what I was doing, the Department of Corrections contacted their so-called expert down south, who was...he was discredited. He said, then use fewer seconds. So they changed it without knowing whether that was going to be effective or not. So it's a catch-as-catch-can, ad hoc, slipshod methodology, and the state is going to kill somebody and it should be done with greater care than that. If there's such a thing as maintaining the dignity of a human being while you're killing that person--and I don't think there is when the state does it--that dignity certainly is not recognized when you have a slipshod, catch-as-catch-can system as envisioned in this bill. Then when you turn to page 10 you talk about the secrecy. And if you go to line 9, "The execution protocol shall require that the first or only substance injected be capable of rendering the convicted person unconscious and that a determination sufficient to reasonably verify that the convicted person is unconscious be made before the administration of any additional substances, if any." Now before I go forward, there have been documentaries on various channels pointing out that individuals subjected to operations were administered anesthesia and a paralytic, so you won't be thrashing around. The person was not taken to a deep enough level of unconsciousness and she heard everything that was said, she felt everything that was done to her. She could not move because she was paralyzed. She could not cry out. She could do nothing and she suffered while they performed an operation, some of it done with a laser knife. Excruciating agony, and they said they thought, because they had an anesthesiologist right there, that she was indeed in a deep enough state of unconsciousness not to feel, but she felt. Now here you don't even have doctors. You don't have anesthesiologists. You have jail people carrying this out. As far as the substances, is there any prohibition in this statute against using rat poison? No. Pesticide? No. Is there anything that says it cannot be slow acting? No. Is there any guidance sufficient here for the state to transfer this responsibility to the Department of Corrections? [LB36]

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SENATOR ASHFORD: Senator. Senator Chambers. [LB36]

ERNIE CHAMBERS: Yes. [LB36]

SENATOR ASHFORD: I'm going to ask Senator Council to ask another question and just to keep it... [LB36]

ERNIE CHAMBERS: Okay. [LB36]

SENATOR COUNCIL: Okay, I'm going to ask two questions, Senator Chambers. First of all, the point you made with regard to the language on page 9, lines 21 through 24, and page 10, lines 9 through 13, was one of the areas that I have a question about. Because you accurately point out, in one place it talks about the "lethal substance or substances," and then on page 10 it talks about the "first or only substance." So if it's the only substance, according to page 9 it has to be lethal. So it doesn't matter whether it makes you unconscious or not because it has to be lethal. [LB36]

ERNIE CHAMBERS: Exactly. [LB36]

SENATOR COUNCIL: So it has to be...so it has to make you unconscious and be lethal... [LB36]

ERNIE CHAMBERS: Yes. [LB36]

SENATOR COUNCIL:if it's one substance. [LB36]

ERNIE CHAMBERS: Yes. [LB36]

SENATOR COUNCIL: Okay. Number two: with regard to the cocktail or the substance itself, it is my understanding, from discussions with anesthesiologists and others who are familiar with euthanasia, that in order to euthanize an animal the substance used must be a substance that results in a humane death. There is nothing in this language of this bill that requires that the substances used result in a humane death, or do you... [LB36]

ERNIE CHAMBERS: Correct. [LB36]

SENATOR COUNCIL: ...do you find that anywhere? [LB36]

ERNIE CHAMBERS: No, I don't. [LB36]

SENATOR COUNCIL: So it would be fair to say that animals would be more likely to be

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treated humanely than a human being under LB36? [LB36]

ERNIE CHAMBERS: Yes. And there's a veterinarian in the body, Senator Dierks, who's pointed out that a substance that will not be allowed to be used by veterinarians to euthanize animals is used as a part of this cocktail on human beings. [LB36]

SENATOR COUNCIL: Okay. Is there... [LB36]

ERNIE CHAMBERS: I will try to wrap this up because I don't want to... [LB36]

SENATOR COUNCIL: Okay. [LB36]

ERNIE CHAMBERS: ...carry too long because I'm a speaker on the other bill. But you have to be careful how you draft language. On page 11, in...starting in line 12, "obtaining, preparing, compounding, dispensing," and so forth does not violate the Uniform Controlled Substances Act. This is introduced by language on line 25 on page 10, "Notwithstanding any other provision of law." When you get to line 12, it does not say that the obtaining of these substances will be only in connection with an execution. This is a freestanding provision, lines 12 through 15, so you can obtain these substances. The statute does not require that they be obtained in connection with an execution nor does it limit the obtaining of these substances to any person. Anybody, if that person is able to get these substances, can do so without violating the Uniform Controlled Substances Act. So if it is not pursuant to a prescription but it's one of the substances that would be designated as a substance used in the execution protocol, if it's one of those substances and you get it then you're not violating the Controlled Substances Act and you don't have to get it in connection with an execution and you don't have to get it as the one who's going to carry it out. Those are just some of the things that I think ought to be looked at, plus this notion of trying to say that the federal Freedom of Information Act doesn't apply. And I don't see the need for the secrecy. There should be transparency, and if an execution is carried out in the name of the public then there should be the application of the Administrative Procedures Act, which requires public notice, a hearing. Anybody is allowed to present testimony and you would have doctors, you would have scientists, you would have others who can determine from a scientific and medical standpoint whether what they are offering is going to act in the way that they said it would. Now there had been many cases, as Senator Ashford pointed out, challenging the electric chair and they were not successful, but many, many years later there were lawyers who developed a record by pointing out what electricity actually does to the human body, and it was on that basis that the Nebraska Supreme Court said it violates the state law. So you have this cocktail... [LB36]

SENATOR ASHFORD: I think my...may I just ask a question, just interject? [LB36]

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ERNIE CHAMBERS: Yes. [LB36]

SENATOR ASHFORD: Because I think the point that I was trying to make and probably didn't make it very well is that the length of...that there is no art to this; that... [LB36]

ERNIE CHAMBERS: Right. [LB36]

SENATOR ASHFORD: ...every case is different and that it may take 20 years, 25 years, 30 years, 10 years for something to occur either within that case or somewhere else that will impact the ultimate sentence that was...or the sentence that was given in the case. You can't...I mean...and there's evidence in Nebraska and other states where that has happened. [LB36]

ERNIE CHAMBERS: Yes. And this final point, then I will terminate mine,... [LB36]

SENATOR ASHFORD: Yeah. [LB36]

ERNIE CHAMBERS: ...unless somebody has a different kind of question. Mr. Brown made a great point...tried to make a great point of being very careful at the outset. Then you can prevent certain things from cropping up in the future that will lead to litigation. Why then not subject the protocol to the Administrative Procedures Act at the outset so you will know or at least have an indication of what it is that's going to be used to kill these people, instead of having it done in secret? Then the only way you can challenge it is by way of additional litigation in each case that comes up. Because you don't know whether the director has changed or modified the protocol--it's not made public--so you have to raise that every time because a prudent litigator crosses every T, dots every I, and touches every base. So the very secrecy might lead to additional litigation. [LB36]

SENATOR ASHFORD: Thank you, Senator Chambers. Thank you. And you're going to... [LB36]

ERNIE CHAMBERS: And I am against the bill, if I didn't make that clear. (Laughter) [LB36]

SENATOR ASHFORD: I think you were in the opposition part so, thank you, so noted. Yes. [LB36]

RANDY STEIDL: My name is Randy Steidl. I spent...almost 18 years in prison for a crime I did not commit. Twelve of those years were on Illinois' death row. During my appeals process after my conviction, which were an exercise in futility, I watched as 12 men were executed. I watched these 12 men. None of them had their head hanging, none of them went kicking and screaming. During my time, after I lost my postconviction appeal, they brought me a protocol by an assistant warden that I had to sign for in

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person to assure that I was aware what they were going to do to me. In this protocol they had very offensive language that I'm sure is secret in Illinois and still remains secret. There was language referring to the fact of diapers and or rectal plugs, plastic sheets, all in the course of making it sound sanitized for Department of Corrections. Well, I kept that for years until 1999. I was resentenced to a term of natural life in prison. They'd found that my attorney was ineffective at sentencing but not at trial. I went on to do my natural life sentence and about two to three years into that natural life sentence I realized why I watched those 12 men walk to their death with dignity. They weren't kicking, they weren't screaming. They were being released. That natural life sentence, as harsh as death row was for five and a half years with no possibility of ever getting out, was far harsher than death row was. Two to three years into my natural life sentence, if I'd have been afforded the opportunity to get on that gurney I'd have buckled myself on it. The monotony was maddening. The treatment that the inmates received was horrendous. Whatever a person does, whatever kind of crime, believe me, a natural life sentence is punishment enough and you don't risk executing an innocent person, which I am just 1 of 130 across this country that are actually innocent. They say that 65 percent of all death sentences are returned for procedural issues. I say if 65 percent or even 2 percent of Social Security checks didn't show up, this Capitol would be flooded with phone calls and outrage. I see my time is up. [LB36]

SENATOR COUNCIL: I just have a... [LB36]

RANDY STEIDL: Anybody have any more questions? [LB36]

SENATOR COUNCIL: I just have a question. [LB36]

SENATOR ASHFORD: Any questions? Senator Council. [LB36]

SENATOR COUNCIL: And it may delay it. Mr. Steidl, I appreciate your coming because you did travel here from Illinois for the purpose of sharing your experience with this committee. Do you intend to remain to testify for...on LB306 that... [LB36]

RANDY STEIDL: I can. [LB36]

SENATOR COUNCIL: Okay, if you would do so then I'll defer my questions to that time. [LB36]

SENATOR ASHFORD: Thank you, sir. [LB36]

RANDY STEIDL: Thank you. [LB36]

SENATOR ASHFORD: Senator Dierks, would you come on up and speak? I know you wanted to speak and, if you would, next. [LB36]

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SENATOR DIERKS: (Exhibit 5) Good afternoon, Senator Ashford. This is the first time for me to be in Judiciary Committee for some time. I am appearing in opposition to LB36, but would like to offer a friendly amendment to Speaker Flood's bill. My amendment simply places into law a requirement that court-appointed lawyers in death penalty cases have at least five years of experience, with an additional requirement of experience in the area of capital offenses. When the state of Nebraska accuses someone of murder and the sentence can be death, it is imperative that experienced counsel represents the accused. I am pro-life, which means I support life from natural conception to natural death. Adopting my amendment will not gain my support for the bill, but I believe it makes LB36 a better bill. The majority of my colleagues have indicated their support for the death penalty in preseason surveys. It is vital that we have in place statutes that ensure a fair trial, including experienced lawyers for the accused. For the record, I am still researching mandatory access to DNA testing for defendants accused of homicide. I've been told this already exists through the DNA Testing Act, but I may bring additional amendments to the bill when it is heard on the legislative floor. Thank you for your time. I'll try to answer any questions you may have. [LB36]

SENATOR ASHFORD: Thank you, Senator Dierks, and I appreciate your testimony and you've been here before and testified on this issue and I appreciate it. If you do have other amendments or think about other amendments, please share them with us if you get them at the, you know, the next few weeks. That would be great. [LB36]

SENATOR DIERKS: We'll do it. [LB36]

SENATOR ASHFORD: Thank you. Any questions of Senator Dierks? Thank you. [LB36]

SENATOR DIERKS: Thank you, all. [LB36]

MICHAEL RADELET: Senator, I'm sorry. I'm a college professor. I always have to have handouts. [LB36]

SENATOR ASHFORD: Well, that's okay. [LB36]

MICHAEL RADELET: (Exhibit 6) Thank you for allowing me to speak. My name is Michael Radelet. I'm chair of the Sociology Department at the University of Colorado in Boulder. Over the last 30 years, I've published 7 books and nearly 100 scholarly articles on different aspects of the death penalty. Until recently I was on the board of directors of a Colorado group called Families of Homicide Victims and Missing Persons, which is a group of some 400 people who have lost a loved one to murder and where the murder has not been solved. Thus far, my students have documented something like 1,400

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unsolved homicides in Colorado. So here we are again debating the death penalty in Nebraska. We've come a long way since 1979, when Nebraska Legislature led the United States in innovative thinking about the death penalty when it voted for abolition. But today, instead of being an innovative leader, Nebraska is following the pack, as the last in line to institute lethal injection. There are certain advantages of being a follower rather than a leader. One advantage is that we all know that today's debate, while seemingly about methods of execution, is much more about whether the state of Nebraska should spend millions of dollars more than they are already spending trying to make the death penalty work. This is a bill about spending millions of dollars on litigation. Yesterday's newspaper in Raleigh reported that North Carolina is continuing a three-year moratorium brought on by a legal dispute now in the North Carolina Supreme Court. The North Carolina Medical Society objects to a state requirement that a doctor be present at lethal injections because it violates the tenet of doing no harm. The proposed bill you are debating offers this and many other things for lawyers to quibble over, and I've handed out a list of 29 botched executions that will give plenty of lawyers plenty of fodder to chew over for plenty of years. Clearly, if the Nebraska Legislature changes to lethal injection, you'll need to commit bundles of cash to the attorneys who will be litigating this issue for the next several years. The bill before you should be called the 2009 Nebraska stimulus package for lawyers. (Laughter) Debating lethal injection today is a bit like debating what size screen to get on your new analog television. Other states are finally beginning to follow the lead of Nebraska, such as New Jersey, New York, Illinois. The Gallup Organization, a respected institution in this state, now reports in their last survey that actually more Americans support life without parole than support the death penalty. On the other hand, the money involved in this bill is needed by families of homicide victims and badly needed to deter criminal homicides. In 1960, over 90 percent of homicides in the United States were solved. That had dropped to 79 percent in the late seventies when Nebraska voted to abolish the death penalty. By 2005, it had dropped to 62 percent. That is four out of ten killers today are not apprehended. Since 1973, about 1 out of every 140 murders in Nebraska are sentenced to death, and this bill focuses only on that small group, not on the 40 percent who are never apprehended and who are still on the streets. Senators, I'm absolutely positive that if you asked a sample of families of homicide victims in Nebraska, you will find exactly what we found in Colorado. The vast majority would want you to use the money, instead of on the death penalty, to fund cold case squads that can solve some of these murders. For victims' families, finding the killer is much more important than taking a small handful of those who will already die in prison and strapping them on the gurney. And anything you can do to increase the certainty of the punishment has far more deterrent effects than increasing the severity of punishment for a person who already will serve life without parole. And so I ask this committee to get serious about helping families of homicide victims and get serious about actually doing something that might deter crime, rather than wasting the taxpayers' money on a technique that you know will result in endless litigation. Thank you. [LB36]

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SENATOR ASHFORD: Thanks, Dr. Radelet. Any questions? Yes, Senator Council.
[LB36]

SENATOR COUNCIL: Just quickly, and I thank you as well for appearing today and providing the information, particularly the fact sheet because it addresses about every argument that members of this committee and the legislative body as a whole will have to take into consideration in reviewing this. But I just want to be sure that I heard your testimony correctly. Is it based upon your experience or the work that you've done that you find that the certainty of life in prison without possibility of parole being a greater deterrent than the death penalty? [LB36]

MICHAEL RADELET: Yes. I was shocked to see something passed around here earlier today about a deterrent study done by Professor Naci Mocan that people handed out. That study has been thoroughly discredited by some of the country's top criminologists and Professor Mocan himself has acknowledged it by refusing to respond to the critics. In 1996, a coauthor and I surveyed some of the top criminologists in the United States, 100 top criminologists--we actually just replicated it last month, it will be published in March--and we asked these 100 top criminologists--these are presidents of the top criminology associations and people who have won the top scholarly awards--how they read the literature, how they read these studies. And I've heard today some studies say this and some studies say that. It's really not true. If you ask the criminologists, and you've got many of the country's best criminologists here in the state of Nebraska, you could not find one who would say the death penalty is a greater deterrent than life without parole. Ninety percent of our criminologists, expert criminologists, are voicing the opinion that if you've not deterred somebody with life without parole there is no added deterrent effect with the death penalty. It's like if you wanted to deter somebody from sitting on this bench and it was a stove, medium heat works just as well as high heat. After awhile, increases in the severity of punishment no longer add to the deterrent effect. On the other hand, if you want to deter people, whether it be speeding on the highway, I slow down when there's a police officer behind me. I don't know what the fine is, but I slow down because of the certainty of punishment. If I have an exam and I have 100 students, it's the certainty of punishment, I record the...you know, videotape the exam. If they know they're going to get caught, they're not going to cheat, regardless of the penalty. And every criminologist who's ever studied deterrence will say that if we want to deter homicides we need to do something about these 40 percent of murderers who prosecutors never see, it's still in the police department, because these guys literally are getting away with murder. And that's why the families of homicide victims, if you ask...you can easily find some that say, yeah, I support the death penalty, and a lot of them will say, yeah, I support the death penalty but if I could trade that and find out who killed my loved one, they would trade it in a minute. Forty percent of these victims are being totally ignored. They report things like the police department doesn't even call them back, you know, the case has been cold for five or six years. That's why the state of Nebraska, like my state in Colorado, needs these cold case squads. This

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morning's Denver Post has a huge article about it, a bill sponsored really by...it's not sponsored by Families of Homicide Victims but being pushed by Families of Homicide Victims to do just that. Abolish the death penalty, quit focusing on this small handful of cases and, instead, let's talk about the 40 percent of homicides that are not being attended to and let's find the killers. [LB36]

SENATOR COUNCIL: Well, thank you very much, Professor Radelet. [LB36]

SENATOR ASHFORD: Okay. Thanks, Doctor. Thank you. [LB36]

MICHAEL RADELET: Okay. Thank you. [LB36]

SENATOR ASHFORD: Next opponent. Go ahead. [LB36]

MARK HEATH: (Exhibit 7) Mr. Chairman and members of the committee, thank you. I'm Mark Heath. I'm an anesthesiologist from New York City. I'm a practicing anesthesiologist, which means that I use drugs that are very much like the drugs that are used for lethal injection on humans, and I've also done animal research so I'm familiar with animal euthanasia. I have served as an expert in federal and state court about lethal injection. I have reviewed the lethal injection protocols from around the country. I've talked with many executioners and I've listened to many executioners testify about what they do when they execute prisoners. I've been on about a dozen court-ordered inspections of lethal injection facilities where, usually with the judge, there's a tour of the prison's lethal injection chamber. The most important thing to understand about lethal injection is that it is a humane way of killing so long as it is done properly. If you need to put an animal to sleep and if you want to give it a humane death, lethal injection will achieve those goals so long as you know what you're doing and you do it the right way. How do veterinarians put animals to sleep? Generally, they use a very large overdose of a drug called pentobarbital, which makes the animal fall asleep peacefully and stops all breathing. Pentobarbital used by itself is a very reliable and very humane way of putting an animal to sleep. The problem is that the kind of lethal injection that is used for executing humans is very different from what is used for animals. With humans, a drug called Pentothal is used and that's a very poor choice. Pentothal is a very short-acting anesthetic, so if you don't receive enough you'll wake up before the execution is completed. Another big problem with lethal injection for humans is that prisons are administering a paralyzing drug. Veterinarians avoid the use of paralyzing drugs when they put animals to sleep, and many states have laws expressly prohibiting the use of paralyzing drugs during animal euthanasia. The problem with paralyzing drugs is that if you wake up after you've received one of those drugs, you will not be able to move, you will experience suffocation, you won't be able to cry out or tell anybody you are suffering, and the executioners or witnesses won't realize you're in agony because the paralyzing drug will make you look peaceful. Prisons use a third drug which is to stop the heart, a drug called potassium. There are drugs that can stop

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the heart without causing a lot of pain, but prisons are using potassium, a drug that burns the veins and is extremely painful. A big question people are asking me is, is lethal injection humane? Is Nebraska enacting a humane method of killing prisoners? And I don't know the answer to that question because LB36 keeps the drugs and the dosage and the type of IV line a secret from the public. LB36 says there would be no hearings to inform the public about how the prisoner will carry out...how the prison will carry out lethal injection. LB36 says the public can't know the qualifications of the people who are doing the lethal injection. So I'm in opposition to LB36. It requires secrecy when there should be transparency. It allows the use of agonizing drugs, drugs that paralyze and burn, it medicalizes the execution, and because it doesn't meet the standards that are held for animals. [LB36]

SENATOR ASHFORD: Yes, Senator Council. [LB36]

SENATOR COUNCIL: Yes, Mr. Heath, I thank you for traveling to provide the information to enable us to thoroughly and objectively consider this measure. The question I have, you are a licensed anesthesiologist, correct? [LB36]

MARK HEATH: Yes, I'm board certified. [LB36]

SENATOR COUNCIL: Are you subject to any national licensing board? [LB36]

MARK HEATH: I'm subject to the state medical board. I'm licensed in New York State. I'm also, because I specialized in anesthesiology and underwent training, I took specialty boards and I'm certified by the American Board of Anesthesiology, which is a national body, to be a board-certified anesthesiologist. [LB36]

SENATOR COUNCIL: As a board-certified anesthesiologist, could you carry out the protocol set forth in LB36 without sanction? [LB36]

MARK HEATH: I don't believe so. The American Society of Anesthesiologists, I believe the American Board of Anesthesiologists follows the recommendation or the guidelines of the American Medical Association, which prohibit physician participation in executions. [LB36]

SENATOR COUNCIL: Okay. So when Senator Chambers was testifying and he indicated that LB36 basically provides for prison officials to carry out execution based upon the inability of an anesthesiologist or, for that matter, anyone who's a member of the American Medical Association would be prevented from carrying that out. Is that correct? [LB36]

MARK HEATH: That's right. And furthermore, if I may, all of the medical professions, not just physicians but also the American Nursing Association, emergency medical

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technicians, physicians' assistants, all of the various medical professions are prohibited by their national organizations from participating in executions, including lethal injection. [LB36]

SENATOR COUNCIL: Okay. Now you opened your testimony by saying that you have testified as an expert witness in various federal and state litigation involving lethal injection, and there's been some question from the committee as to whether with LB36 we'd see an increase or a decrease in legal activity with regard to the imposition of the death penalty. Based upon your experience as an expert witness in these litigations, what would be your opinion as to the effect on litigation if LB36 is enacted? [LB36]

MARK HEATH: So I'm a physician, I don't make policy and I'm not an attorney, but having been involved in these cases what I expect would happen is that all the attorneys who represent inmates on death row would initiate litigation to challenge this method of execution. I think also, from what I've seen in other states, attorneys who are representing clients preconviction, pretrial would be raising objections to this, to this method. [LB36]

SENATOR COUNCIL: Final question: You've...we've had distributed to us a set of photos. Can you just briefly tell me and my fellow members of the committee what these photos depict and what it is that you're trying to demonstrate to the committee with regard to lethal injection. [LB36]

MARK HEATH: Yes. So what's happened over the last few years is that, as the litigation has unfolded, courts have ordered prisons to provide discovery, to provide the attorneys with documentation and information about what has happened during lethal injection procedures, and these are a few photographs from many hundreds of photographs that have been produced that show what is actually happening during lethal injection procedures. One of the challenges is that, in some people, it's impossible to get IVs into their arms and so the state has to rely on a physician or another expert to put an IV in. This first picture shows a prisoner from Georgia. The top shows a failed attempt to put an IV in his elbow. They then put a catheter in his hand. That's the second picture there. If you turn the page, they try to use the IVs in his hand but they blew out. And at the bottom of that page it shows a catheter that goes into a vein near the heart, the subclavian vein. They needed an intensive care unit physician to put that catheter in. The next page shows a prisoner from Arizona. The red arrows point to dressings on his arm where there were multiple failed attempts to put in IV catheters. And so the bottom picture shows what they ended up doing. They got a surgeon who did what's called a cutdown procedure, where they do surgery and expose the vein over the...in the ankle to put the catheter in. The next page, the top picture shows a general execution scene after the execution took place, and the subsequent pictures are photographs of his arms. The picture at the bottom shows a circle with the number three. The medical examiner has taken a photograph and is marking off each IV access attempt, that is the

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third attempt. The next page shows the fourth attempt, the fifth, sixth, seventh, and eighth, ninth attempts. These are all failed attempts. And eventually a cutdown was performed, again on the front of the elbow, to access the vein, which you may be able to see in the photograph. It's quite deep down because this patient had a lot of...was an obese patient with a lot of fatty tissue. The next page shows from an execution in Missouri where a surgeon was attempting to put a catheter into the femoral vein. That's the large vein in the groin. And from this picture it appears that he accidentally punctured or lacerated the femoral artery, which is under high pressure, and so, as you can see, there's been a lot of bleeding. The gauzes are all soaked. The last picture just shows the drugs that are used in all states that are doing lethal injection proceedings. Again, we don't know what Nebraska might be planning to do for its lethal injection procedure so I don't know if this applies here. [LB36]

SENATOR COUNCIL: Okay. And one final question, Mr. Chairman. And correct me if I'm wrong. I don't do well at pronouncing medical terms. Is it pancuronium? [LB36]

MARK HEATH: You did well. That's it. [LB36]

SENATOR COUNCIL: Thank you. Is that, in and of itself, a lethal substance? [LB36]

MARK HEATH: Yes, if it's given in a dose that would paralyze a person, then that person would be completely still and be unable to draw breath. So they would be wide awake, trying to draw breath, but because they could not respire they would suffocate and be dead. [LB36]

SENATOR COUNCIL: Would pancuronium be a substance that a veterinarian could use to euthanize an animal? [LB36]

MARK HEATH: A veterinarian could use it if they were experienced in assessing anesthetic death and they had the proper equipment to do so. I don't believe any self-respecting veterinarian would use pancuronium if they didn't have some method of knowing throughout the procedure, not just at the beginning but throughout the procedure, that the animal was kept comfortable or unconscious. [LB36]

SENATOR COUNCIL: Thank you. That's all, Mr. Chairman. [LB36]

SENATOR ASHFORD: Thank you, Doctor. Dr. O'Brien. [LB36]

RICHARD O'BRIEN: (Exhibit 8) Thank you, Senator. My name is Richard O'Brien. I'm a physician, a member of the American Medical Association, and a fellow of the American College of Physicians, and a member of the Center for Health Policy and Ethics at Creighton University. I'm here in opposition to LB36. There's several things about this bill that are very troubling to me. The use of lethal injection involves...for execution

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involves the use of medical procedures to cause death, in spite of the fact that the bill says: means necessary to perform lethal injection shall not constitute the practice of medicine or any other profession relating to healthcare which is subject by law to regulation, licensure, or certification. And yet many of the procedures and activities required for lethal injection may not be practiced by anybody other than health professionals who are licensed or certified to do so. It's basically a farce to think that you can determine something as a practice of medicine in one context and then declare in another context that it is not. The reason for licensure and certification is to assure competence. The competence or the competent administration of lethal injection will necessarily involve health professionals. This bill assigns the director of Correctional Services the responsibility to describe the training required in order to administer this lethal injection. Now is the director likely to determine that health professionals are not required to assure the competent administration, or is the director of Correctional Services likely to call on somebody whose competence is in doubt? I suspect not the latter. To declare that procedures are not the practice of medicine is nothing more than a pretence to shield health professionals from being held accountable for actions that violate their professional ethics. Many, most health professions organizations, including...and I won't read the long list that I have appended, have determined that participation in the death penalty is a violation of professional ethics, and they are opposed to the death penalty altogether or have called for a moratorium. And those include the Society of Correctional Physicians and the American Correctional Health Services Association, the people who provide healthcare to our correctional system now. Some of the steps that are...that require professional competence that are specifically proscribed by professional organizations are: determination of competency; treatment to render incompetent persons competent to be executed; selection of fatal injection sites; starting IV lines to be used for injection; prescribing or administering drugs to be used in the process of lethal injection; inspecting, testing, or maintaining lethal injection devices; consulting with or supervising lethal injection personnel; monitoring vital signs on site or remotely; and attending, observing, or witnessing executions as a physician. I doubt that the Legislature really wants to induce health professionals to violate their ethical codes. And I will say in closing that the American College of Physicians has also recommended that laws and regulations of all death penalty states should incorporate AMA guidelines; laws should not be enacted that facilitate violations of medical ethical standards, such as on anonymity clauses; and state medical boards should define physician participation as unethical conduct and take appropriate action against physicians who violate ethical standards. Do we really want to encourage health professionals to violate their professional codes? I doubt it. [LB36]

SENATOR ASHFORD: Thank you, Dr. O'Brien. Any questions of Dr. O'Brien? Thank you. [LB36]

RICHARD O'BRIEN: Thank you. [LB36]

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SENATOR ASHFORD: Next opponent. [LB36]

SADIE BANKSTON: Hello, and thank you for allowing me to speak to you. My name is Sadie Bankston and 20 years ago my son was murdered. And before he was even born, I was against the death penalty. After he was killed, I was still against the death penalty. I started an organization that provides services for families for homicide victims and PULSE does not impose the abolishment of the death penalty but I always pose the question when the opportunity presents itself to family members who have lost their loved ones, and more so than not that they are always against the death penalty. And I have...there are seven members here who have lost their loved ones to homicide, and if you would please stand. Mr. Mesner, he lost his sister; Mimi lost her brother; Mr. Mays lost two sons to homicide; Mr. and Mrs. Cook (phonetic) lost their son to homicide; Ms. Johnson lost her daughter to homicide; and then we have the young lady, Ms. Phonethip, she lost her son Jess last month to homicide and she's against the death penalty. And I have a letter that was written by a mother who lost her two daughters to homicide in the year of 2007: You never think of your children dying before you. Well, the awakening came to me on December 24, 2007. My two daughters, Renota Arlene and Saundra Lynn, were stabbed to death. There are no words to describe what I felt and the heartbreak I suffered. I came to grips that they are both gone, physically out of my life, but they will always be in my heart. I'm not for the death penalty because the death penalty will not bring them back into my life. I knew when friends and clergy said they were proud of me and my decision for life without parole, Mr. Hands has a greater jury to answer to for his deed. God has given me the strength to go on living and be strong for my other four children and my grandchildren. I ask you to pray for me and my family that we grow stronger in our daily lives. We always need prayer. And I say to the ones who are for the death penalty, life is a precious gift from God, a sacred gift that no man here on earth should have the power to take that life. And like the other families who have lost their children, I went a step beyond. I have forgiven the young man that killed my son and to forgive is divine. And that's all I have to say. And I don't have the time, we have to leave, but I am a proponent for Brenda Council against the death penalty, so if I could leave that. And I thank you for taking the time to hear me. [LB36]

SENATOR ASHFORD: Thank you, Mrs. Bankston. Do we have any questions of Mrs. Bankston? [LB36]

SENATOR COUNCIL: I just want to thank Mrs. Bankston for the work that the PULSE organization does and to thank all of the victim families who took the time to come down and express their opinion on this issue. Thank you. [LB36]

SADIE BANKSTON: Thank you. [LB36]

SENATOR ASHFORD: Next opponent. [LB36]

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ERIC BERGER: (Exhibit 9) Members of the Judiciary Committee, my name is Eric Berger. Thank you very much for the opportunity to speak before you. I am an assistant professor of law here at the University of Nebraska in Lincoln and much of my research recently is focused on lethal injection. I'm going to make three points today about LB36 and I ask that you refer to my written testimony, which is being passed around, for detail and substantiation of these points. My first point is that Nebraska is a state that has a proud tradition of open and transparent government, but many of the features of the proposed statute violate these principles by concealing the creation and implementation of the execution protocol from public view. In so doing, these provisions create the likelihood that the protocol will be poorly designed and implemented. The experience in many other states is that procedures designed in secret, without the benefit of expert advice and without administrative processes, have serious problems with them. Multiple provisions of LB36 contribute to this problem, including exempting the protocol from the Administrative Procedures Act, keeping the protocol entirely secret, failing to specify qualifications for personnel, failing even to provide for media attendance at executions, and other provisions that I discuss in my written testimony. As currently drafted, LB36 therefore creates a serious risk that Nebraska's execution procedure will be poorly designed, dangerous, and unconstitutional, and additionally these features of LB36 therefore risk protracted and expensive litigation challenging these flaws. My second point is that it would be a mistake to think that a procedure designed to mimic the Kentucky protocol that the U.S. Supreme Court approved last year in Baze v. Rees would necessarily be humane and constitutional. Baze v. Rees dealt only with a Kentucky procedure at issue in that case, and the plaintiff's trial attorneys in that case had uncovered very little evidence about how the protocol was actually carried out in practice. Even if another state had an identically written protocol, a lawsuit challenging that method of execution could very well come out the other way if there was evidence that the implementation of that protocol created problems. In other words, the constitutionality and safety of a lethal injection procedure hinges as much on how the protocol is implemented as it does on how it is written. In particular, the qualification, the competence, and the training of the execution team members are crucial. So before deciding whether to proceed, this Legislature should keep in mind that designing a safe and constitutional lethal injection procedure is much more difficult and complicated rather than just mimicking the written details of the Kentucky protocol that was at issue in Baze. My third and final point is that litigation is ongoing in several states around the country. I, therefore, respectfully suggest that the Legislature follow that litigation closely before making a decision, before voting on this bill. In particular, I respectfully suggest that this Legislature pay close attention to the results of this litigation that's currently ongoing to see what procedures are found dangerous and which ones are not, but also, as other people have noted, the costs of this litigation and the death penalty generally, because it's costing those states a great deal. Thank you very much for your consideration and I'm happy to answer any questions. [LB36]

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SENATOR ASHFORD: Thanks, Professor. Senator Lathrop. [LB36]

SENATOR LATHROP: I do have questions for you, and I appreciate your last point which is it may look like we've got the final pronouncement of lethal injection and we may think we are following the last pronouncement, but there's a lot of litigation going on around the country. [LB36]

ERIC BERGER: That's exactly...that's exactly right. You know, people think we have the final pronouncement because the Supreme Court weighed in, in Baze, but in the Baze case really all the Supreme Court did was articulate a legal standard by which future lethal injection claims would be judged. It did rule that the protocol, the procedure at issue in that case from Kentucky, did meet constitutional standards. But as I said a moment ago, there was very, very little evidence on how that was carried out in practice. Kentucky, if I remember correctly, had only executed one person using their protocol, so there really wasn't very much of a record from which the Supreme Court or any court could have found problems in that case. By way of contrast, there are other states with a longer record and where discovery is ongoing in several states: Arizona, Ohio, Oklahoma. The federal government protocol is also currently being challenged. So there's discovery going on in all those places that's looking into the details of implementation and it's quite possible that that discovery will uncover problems in how those procedures are carried out. [LB36]

SENATOR LATHROP: And for the nonlawyers, the discovery means that somebody has filed a lawsuit in these other jurisdictions to challenge lethal injection, including the federal standard and the means used in federal prosecutions as well as these various states, and discovery means that they're in the case of investigating those but we haven't had a trial or a decision and they're forthcoming. [LB36]

ERIC BERGER: That's correct, Senator. Forgive me for speaking in legal parlance, but that's exactly right. They're using the trial court processes to get evidence from the state about how they carry out their execution procedures. [LB36]

SENATOR LATHROP: And if we pass LB36, we may very well be stepping into a trap we could avoid if we hang back a little bit and watch how the other litigation unfolds. [LB36]

ERIC BERGER: I believe that's the case. I think it's almost certainly the case that LB36, as currently drafted, would provoke extensive litigation that would cost Nebraska taxpayers an awful lot, and my own view is that it would be wiser to wait and follow that litigation, again, both to see how it actually comes out, to see what we learn about those lethal injection procedures, but also to assess how significant the costs are in those states. [LB36]

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SENATOR LATHROP: You have brought up the subject of cost and you told us that you've done a good deal of your research relative to lethal injection. Have you looked at the cost of the death penalty as an institution? [LB36]

ERIC BERGER: This is not an area that I've researched specifically and I'm not an expert in it, but I have read some studies and the studies I've read suggest that it costs between \$1 million and \$4 million more to execute somebody than to sentence that person to life in prison. [LB36]

SENATOR LATHROP: And that would be studies done in Kansas and in North Carolina, I believe. [LB36]

ERIC BERGER: Kansas, North Carolina, New Jersey, which no longer has a death penalty but used to, Illinois. Some of those studies were done by the state itself. Some of those studies were done by independent organizations studying it. [LB36]

SENATOR LATHROP: And I might take this opportunity to visit with you generally about how that...how they come to the conclusion that it costs more to put someone to death than it does to incarcerate them for the rest of their life, which may be counterintuitive. But what those studies have reflected is this; that we, because these people have a right to appeal, they have...in Nebraska that's something like 25 years worth of appeals. And while they're appealing, we are paying defense lawyers and we are paying prosecutors and we are paying expert witnesses. And so by the time we finally get through the appeals process, we have actually spent more on these lawyers and more on the expert witnesses than it would take to just leave them in prison for the rest of their life. [LB36]

ERIC BERGER: That's correct, Senator. That's my understanding from those studies. There was also evidence in California that it costs more even to house the death row inmates in that state because they were separated from the rest of the prison population. I suppose that would differ on a state-to-state basis. But you're correct... [LB36]

SENATOR LATHROP: And perhaps... [LB36]

ERIC BERGER: ...that the bulk of that extra costs comes from litigation expenses. [LB36]

SENATOR LATHROP: And perhaps one more final point about cost and that is--and Nebraska has certainly had this track record with respect to those who have been sentenced to death--many of them have a lot of this expensive litigation and all these appeals and then have their sentence commuted to life in prison. So we've spent all that money trying to execute them and they prevail in one of their appeals and end up

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on...with a life sentence. [LB36]

ERIC BERGER: Yeah, I understand that that certainly does happen and I'm aware that it's happened in Nebraska, yes. [LB36]

SENATOR LATHROP: Okay. Thank you. [LB36]

SENATOR ASHFORD: How many states have moratoriums now? Do you know? [LB36]

ERIC BERGER: Um, well, as I said, there's...I'm not sure of the precise number, the answer to that question. There's litigation ongoing in several states. There's discovery ongoing in... [LB36]

SENATOR ASHFORD: Well, let me ask this. Is...and you've listed some of the states in your brief. [LB36]

ERIC BERGER: Yes. [LB36]

SENATOR ASHFORD: Does Illinois have a moratorium still or...they do? [LB36]

ERIC BERGER: Yeah, I believe Illinois is on permanent. [LB36]

SENATOR ASHFORD: Does Florida? No. [LB36]

ERIC BERGER: Florida was on hold for quite awhile. I believe they are no longer on hold. I'm not positive about that. [LB36]

SENATOR ASHFORD: Okay. Okay. But there are moratoria somewhere? [LB36]

ERIC BERGER: Yeah, moratorium, I don't know if moratoria is exactly the right word, but there are several states at which... [LB36]

SENATOR ASHFORD: That have stays in place. [LB36]

ERIC BERGER: ...exactly, where there are stays in place so they're not executing anyone pending the outcome of this litigation. [LB36]

SENATOR ASHFORD: Can you get that information for me, Professor? [LB36]

ERIC BERGER: Um, sure. [LB36]

SENATOR ASHFORD: Or maybe you've already given it to me in this. [LB36]

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ERIC BERGER: Well, my written testimony mentions several of the states where there are...where there's litigation ongoing and where discovery has taken place. [LB36]

SENATOR ASHFORD: And what I'd be interested in is knowing whether there's a...whether...where the stay exists, how broad the stay is, well, I assume it's broad enough to stop the death penalty from being carried out, but the stays or moratoria I guess, moratorium, those states. [LB36]

ERIC BERGER: Okay, either I or somebody else here will get you that information. [LB36]

SENATOR ASHFORD: Okay. Thanks. Thank you, Professor. Thanks. [LB36]

ERIC BERGER: Okay. Thank you. [LB36]

AMY MILLER: (Exhibits 10, 11, 12, 13) Good afternoon, Senators. My name is Amy Miller. I'm legal director with ACLU Nebraska and, although I'm usually here to talk about the constitution, today I'm going to violate Midwestern etiquette and talk just about money, which is an issue that's been discussed here. You've already heard the general testimony from several other testifiers regarding cost. I wanted to provide you with some hard facts and figures that you have in my written testimony. The most shocking figures are from California. They indicate that it costs their system every year \$137 million to have the death penalty, whereas if they didn't have the death penalty that would be \$11 million; again, \$137 million compared to \$11 million. In order to fix the system, their commission indicates it will cost an additional \$200 million a year to fix the system and correct the injustices. To be fair, though, California is a very different situation than Nebraska. They have a huge death row. So I've also given you the statistics for two states whose death rows looked a lot more like Nebraska's. We have ten men on death row so we can compare ourselves to New Jersey, which just abolished the death penalty. New Jersey only had eight men up until January of last year. The New Jersey Death Penalty Study Commission, a commission set up by the New Jersey Legislature, not an outside advocacy group but a legislative study commission, found that the costs associated with death penalty cases were significantly higher than those for life without parole. In fact, it would be an estimated savings of the state to over \$1 million per inmate to have life without parole rather than the death penalty. You can also compare Nebraska to Maryland. Maryland has only six men on death row and, therefore, looks a lot like us. They had a cost study done by the Urban Institute in March of last year reporting that it costs the state about three times more to try a death penalty case than to try a nondeath penalty case; says that the average case will cost about \$3 million if it's a death penalty case, only \$1.9 million more than a case where the death penalty is not sought. So for each individual case in large states and small states, you're talking about millions of dollars. And obviously, the cost of living does not stay static. Any economist will tell you that if Nebraska passes lethal injection today and then we're

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looking at 20 years worth of appeals before another execution is conducted, the cost of living will continue to increase. You've already heard testimony suggesting where that hard-earned money could go. Nebraska ACLU suggests that the exonerations of the six individuals from Beatrice indicates perhaps we should be spending that money on criminal justice reforms to ensure we never again face the specter of putting someone innocent on death row or behind bars for their life. We need to improve the DNA testing system. If you've followed the articles about Beatrice, those men and women had to fight tooth and claw to get the courts to recognize their innocence claims. Although the pardons process went very smoothly and we thank the government for that, they came within a hair's breadth of not getting a DNA test to prove their innocence. We've given you, on page 2, the actual costs of installing lethal injection. You need to consider the actual costs and see whether the fiscal note truly reflects that. The construction of a new death chamber is not an insignificant one. My time has run out. I can stop, if you'd like, or I can answer questions. [LB36]

SENATOR LATHROP: Thank you, Ms. Miller. Does anybody have questions? [LB36]

SENATOR COUNCIL: I just have a question. [LB36]

SENATOR LATHROP: Senator Council, please. [LB36]

SENATOR COUNCIL: Ms. Miller, is the remaining testimony reflected in the document that you've...is there anything that's not in the document that you would want the committee to be aware of? [LB36]

AMY MILLER: I would only suggest, we touched in the document on the litigation quagmire. You asked questions earlier of Professor Berger about how many jurisdictions have that. Please notice in footnote 3 we actually have listed all the states that have the pending lawsuits. You really are looking at 17 jurisdictions, including the federal government, that will have the opportunity to reach the U.S. Supreme Court. We would suggest that you use Nebraska's taxpayer money on a study to actually find out how much it costs in Nebraska and let 1 of those 17 jurisdictions take the bullet at the U.S. Supreme Court rather than us. [LB36]

SENATOR COUNCIL: Thank you. [LB36]

SENATOR LATHROP: Okay. I think that's it. No other questions? Thank you for coming,... [LB36]

AMY MILLER: Thank you. [LB36]

SENATOR LATHROP: ...your testimony today. [LB36]

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CRAIG GROAT: (Exhibit 14) Craig Groat. I have in front of me a copy of the charter of fundamental rights of the European Union. [LB36]

SENATOR LATHROP: Sir. [LB36]

CRAIG GROAT: Yes. [LB36]

SENATOR LATHROP: Can we have you spell your last name so we have it for the record? [LB36]

CRAIG GROAT: It's Groat, G-r-o-a-t. [LB36]

SENATOR LATHROP: All right. Great. Thanks. [LB36]

CRAIG GROAT: Could I have some additional time since... [LB36]

SENATOR LATHROP: Well, we try to stay with that light system because there's a lot of people that want to testify today. [LB36]

CRAIG GROAT: Well, I had a lot of time. I didn't expect to be interrupted. Chapter I, official journal of the European Union: Dignity. "Article 1, Human dignity: Human dignity is inviolable. It must be respected and protected. Article 2, Right to Life: Everyone has the right to life. No one shall be condemned to the death penalty, or executed."
"German Presidency of the Council of the European Union, Statement of the European Union on the Death Penalty. The EU reiterates its longstanding and active opposition to the death penalty in all circumstances. As declared on many occasions and recently on the occasion of the Third World Congress against the death penalty in Paris in February 2007 and at the fourth session of the Human Rights Council in March 2007, we consider that the abolition of the death penalty contributes to the enhancement of human dignity and the progressive development of human rights. While we are aware of the suffering of the victims of violent crime and their families, we strongly believe that capital punishment tends to further a casual attitude to the right to life. The EU wishes to stress that in our view the death penalty does not serve as an effective deterrent, and any miscarriage of justice, which is inevitable in any legal system, would be irreversible."
"Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty," European Union again: "The member states of the Council of Europe signatory hereto, Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings; wishing to strengthen the protection of the right to...guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on November 4, 1950." Number one, "Article 1, Abolition of the death penalty: The death penalty shall be abolished. No one shall be condemned to

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such penalty or executed." This extends to the extended European Union, which includes Russia. In a response to very substantial correspondence to the U.S. from the European Union on the abolishment of the death penalty, this comes from the United States Diplomatic Mission to Germany. The response of the U.S., "Response to EU Statement on the Death Penalty, May 29, 2003. Delivered by Charge d'Affaires Douglas A. Davidson to the OSCE Permanent Council: The death penalty is a political issue that must be decided domestically." In other words, we have people being executed for political gain by a certain party. Suspending the Death Penalty: The death penalty was suspended by the Supreme Court by a judgment in June 29, 1972. I watched the Republican Party work very hard in states to reconstitute those...well, I'll have to leave here. [LB36]

SENATOR LATHROP: I interrupted you. You can take a few more seconds to wrap up your thoughts, if you'd like, sir. [LB36]

CRAIG GROAT: Okay. Well, I watched the Republican Party reconstitute the death penalty state by state. There was a ten-year moratorium and it started again. This has been nothing but a political agenda for political gain by a certain party that has recognized the vicarious need of certain people for a psychological gain through death, which has been well-documented over the years from lynch mobs on. Basically, we have a lynch mob legal that is being used for political gain by a certain party. It needs to be stopped. The European Union has outlawed this. It is one of their main concerns. They are developing...they are donating a substantial amount of time and money to stopping the death penalty in the United States, and the common word that they all use is "barbaric," "barbaric." [LB36]

SENATOR LATHROP: Okay. Thank you. And I think we understand the point you are making and we appreciate your testimony today. Let's make sure there are no questions before we let you get away. [LB36]

SENATOR COUNCIL: And my only question... [LB36]

SENATOR LATHROP: Oh, I'm sorry. Senator Council. [LB36]

SENATOR COUNCIL: The only question, Senator Lathrop, is if you have documents there that you would like for the committee members to have available to them, you need to leave it with the page so we can...we can get copies. [LB36]

CRAIG GROAT: Right. Okay. I have a substantial amount more here that I'll provide to you too. And also, this summer I discovered that the documents that are being provided to these committees are not being put in the record. They're being disposed of. I was searching for some in the Clerk's Office and they aren't there, and I was told that unless it's read into testimony it is not put into the record. And so I would like to make a formal

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request at this time that this be put in the formal record, besides being given to each member. [LB36]

SENATOR LATHROP: To the extent that can be done, we'll do it. I don't know if the rules allow for it. Apparently, there's some question about that, but it's not because... [LB36]

CRAIG GROAT: It needs to be changed. [LB36]

SENATOR LATHROP: ...we're not interested in the documents that people bring and provide the committee. [LB36]

CRAIG GROAT: People are under the impression that they're going into the record and, apparently, they're not. So... [LB36]

SENATOR LATHROP: Okay. [LB36]

CRAIG GROAT: ...thank you. [LB36]

SENATOR LATHROP: Thank you for your testimony, sir. We'll have a page pick those up. [LB36]

SENATOR LAUTENBAUGH: Mr. Chairman, I was out of the room briefly. We are still on the first bill, are we not? [LB36]

SENATOR LATHROP: We still are. Sir, before we...before we have you begin, is your testimony specifically related to the lethal injection or is it... [LB36]

CHUCK BENTJEN: I simply want...I'm representing four church bodies and I simply want to go on the record as being in opposition. I will speak more... [LB36]

SENATOR LATHROP: To the death penalty? [LB36]

CHUCK BENTJEN: ...to the... [LB36]

SENATOR COUNCIL: LB36 [LB36]

CHUCK BENTJEN: ...to LB36. [LB36]

SENATOR LATHROP: Okay. What we'll do is, just to keep this moving and so that the next bill has a fair hearing as well, we'll allow this gentleman to testify and then we will have...close the hearing on LB36. Now we will next hear LB306, which is Senator Council's bill to repeal the death penalty, and if you are a proponent or an opponent of

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that measure, you will be afforded an opportunity as time permits, given rules that were set out by Senator Ashford at the outset. So with that, why don't you start with your name and you may testify. [LB36]

CHUCK BENTJEN: Thank you, Senator Lathrop. My name is Reverend Chuck Bentjen and I'm here today representing the Evangelical Lutheran Church in America; the Christian Church, Disciples of Christ in Nebraska; the Presbyterian Church, U.S.A.; and United Methodist Conference. And I will give more detailed testimony in relation to LB306. I just simply want to go on the record and note that these four church bodies, which are made up of about 300,000 Nebraskans, oppose LB36. Thank you. [LB36]

SENATOR LATHROP: Very good. Thank you so much, Reverend. Brad, we're ready for Brenda. [LB36]

SENATOR ASHFORD: I think...I think Speaker...we have neutral, any neutral testifiers? I believe Speaker Flood has waived his closing. [LB36]

SENATOR LATHROP: He did. [LB36]

SENATOR ASHFORD: So the next bill we will take up, Senator Council. I believe she's right outside the door, I saw her there, so... [LB306]

SENATOR LATHROP: In your absence, we didn't run out of witnesses or people with an interest. We simply said it was time to introduce LB306 and... [LB306]

SENATOR ASHFORD: Oh, I see. Okay. [LB306]

SENATOR LATHROP: ...and encouraged them to talk after that. [LB306]

SENATOR ASHFORD: Thank you. [LB306]

SENATOR LATHROP: Sure. It's mob rule in here. (Laugh) [LB306]

SENATOR ASHFORD: I'm not the...I'm not the bad guy then. [LB306]

SENATOR LATHROP: Mob rule on the committee while you were gone. [LB306]

SENATOR COUNCIL: Mob rule. Now that's not an attempt at potty break. [LB306]

SENATOR ASHFORD: Senator Council, introducing LB3...what is it? [LB306]

SENATOR COUNCIL: LB306. [LB306]

SENATOR ASHFORD: LB306. [LB306]

SENATOR COUNCIL: (Exhibit 15) Thank you, Senator Ashford, Mr. Chair, fellow members of the Judiciary Committee. As you know, I am Brenda Council, the senator representing the 11th Legislative District, which is the area commonly known as north Omaha. I occupy the unenviable position of being successor to the undisputed master of the policymaking process in this state, Ernie Chambers. Needless to say, there are obvious differences between myself and Senator Chambers. What may not be as obvious are the similarities and one of those similarities is our unwavering opposition to the death penalty, and it is that opposition that brings me to the microphone this afternoon to introduce LB306. The core and unequivocal intent of LB306 is to put the state of Nebraska out of the business of killing human beings. LB306 not only provides for the repeal of the death penalty. It also provides that life imprisonment without possibility of parole is the sentence to be imposed if a person is convicted of first-degree murder, subject only to the possibility of an exception for juvenile offenders if LB307, which has also been introduced, is enacted. LB306, further, holds the offender accountable through restitution to the family of the victim. I and the numerous other citizens of this state and the world who have called, written, sent e-mails, and will testify today in support of repealing the death penalty share the fundamental belief that, while it is morally wrong for any human being to take the life of another human being, an equal if not greater moral wrong is committed when the state takes a human life. No one disputes the fact that the state has a responsibility to ensure the safety of its citizens. The question is, at what price? Is it at the expense of another human life? Is it at the expense of basic fairness? Is it at the expense of common decency? We who support the abolishment of the death penalty think not, and we are not alone in this belief, as has been indicated by the testimony with regard to the number of industrialized nations who have abolished the death penalty and abolished it decades ago. It is also evidenced by the number of states who have recently abolished the death penalty and those who are currently considering abolishing the death penalty. I will ask that the pages distribute to each of the committee members, they'll find it at my desk, a document entitled "The Death Penalty in 2008 Year End Report, Death Penalty Information Center, December 2008." And, Senator Ashford, it addresses some of the questions you asked specifically. You were out of the room when Ms. Miller from the ACLU testified, but much of the data that she referenced in her testimony is set forth in this document. Specifically, a report from the California Commission on the Fair Administration of Justice estimated that the state was spending about \$138 million per year on the death penalty and another \$95 million per year is needed to repair a system they describe as, quote, broken, dysfunctional, and close to collapse. It goes on further to discuss the cost associated with just housing inmates who are awaiting their first appeal from a death penalty conviction. But what is I think most compelling with regard to the information that is set forth in that document is a quote from Senator, excuse me, from Justice Stevens, one of the Supreme Court Justices who was on the concurring side of the decision in Baze v. Rees, and in that opinion Justice Stevens wrote, while

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concurring, he announced he no longer believes the death penalty is constitutional: "I have relied on my own experience in reaching the conclusion that the imposition of the death penalty represents the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the state is patently excessive,...cruel and unusual punishment violative of the Eighth Amendment." In addition to the fact that any killing is wrong, it is an undeniable fact that mistakes have been made and would continue to be made relative to the imposition of the death penalty. While there has been testimony with regard to LB36 regarding personal instances of being falsely convicted and to having been exonerated after several years of incarceration, that individual will hopefully return to the...and testify in this matter. While we can look to that personal testimony, I think we also must look to the arguments that I know are going to be made and have been made that such mistakes may be eliminated or minimized in the future as a result of other legislation that was championed by my predecessor, and that is the DNA legislation. However, that ignores the fact, first and foremost, that the act of execution is final and irreversible so the result of the discovery of any mistake after that point nevertheless results in the loss of an innocent life. And as to the effect of the use of DNA in identifying the guilty and exonerating the innocent, the reality is that DNA is not available in all criminal homicide investigations and, therefore, it should come as no surprise that of the approximately 130 persons who have escaped death since 1973 due to the discovery of evidence of their innocence, DNA provided evidence of innocence in only 14 of those 130 cases. While I could use all of my allotted time and more to address the issues of deterrence, crime rates, and relative costs, much of that is set forth in the document that has been distributed. And instead of addressing those issues any further, Mr. Chairman, I would at this point wish to yield the remainder of my time to my predecessor. [LB306]

SENATOR ASHFORD: Would that be Senator Chambers? [LB306]

SENATOR COUNCIL: Yes. [LB306]

SENATOR ASHFORD: (Laughter) It's as if he appears from over there. [LB306]

ERNIE CHAMBERS: Oh. I'm Ernie Chambers. I'm from Omaha, Nebraska. All I can say is wow. But because there are people here who are going to deal with various aspects of this bill and the death penalty, I'll touch on some things briefly that others may not hit the same way. First of all, the rich and powerful never are eligible for the death penalty. They're never going to be charged with a crime that would carry a death penalty. If they are charged, they will never get it. The worst murderers, we're always told, are those who are murderers for hire or murderers to keep other people from testifying. The ones who do that to the greatest extent are those connected with organized crime, and you will not find one of those who has been executed. Rather, that person becomes a snitch for the government, is put into the witness protection program, and the public, through their tax dollars, help keep the worst murderers alive. There are differences that have

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been touched on before that occur when cases are substantially similar, as far as the brutality, the heinousness of the crime. Some people say, as my former colleague Senator Lautenbaugh said, circumstances are different, lawyers are different, jurors and judges, which is all true. But remember this: The system, because of the way it's structured, allows for these wildly varying differences. The defect is in the system. There are poor counties in Nebraska which cannot afford the cost of a capital case because they have to pay the cost of the prosecution and the defense, so in those counties you will not find a capital case brought. There are other counties in Nebraska where the prosecutor does not believe in the death penalty, so those prosecutors will never seek a death penalty. And with the untrammelled, practically speaking, discretion that prosecutors have, they don't have to seek the death penalty if there are ten aggravators. So the system allows all of those differences to take place and they do take place in Nebraska. When you have ten people on death row and literally hundreds of murders that have been committed and hundreds of murderers in the general population in the prison, and some of them have committed the most atrocious murders...they have brutalized people through beating, cutting. They have dismembered people. One man beat his wife so...this was in a rural area, beat her so badly that blood was everywhere. She may have been a coach or a teacher. Schnabel or something I think was the name but I'm not sure. Don't hold me to that. Wrapped her in barbed wire, put her under a vehicle, set it afire and the autopsy showed she was alive at the time he set that fire and she was burned to death--second-degree murder. So don't tell me--I've been here 38 years and I've read cases--that the death penalty is reserved for those who commit the most atrocious murders. That's not true. The most atrocious murderers are walking around in the general population at the prison and some of them were not convicted of first-degree murder so they're eligible for parole because they got a term of years in their original sentence. There is a situation which I don't want to see undone and it relates to plea bargains. There was a visceral reaction of the prosecutor in Beatrice, in that county where Beatrice is found, because of those six people who were wrongfully convicted, wrongfully incarcerated for a crime they did not commit. There was much prosecutorial misconduct, much law enforcement misconduct, snitch testimony was used to get people convicted of crimes they didn't commit. So he said there will be no more plea bargains. A prosecutor's office, there's a reality and there's a dream world and there's a delusionary world. It is delusionary to feel that a prosecutor's office can function without the tool of plea bargaining. That's going to be done away with. They will have plea bargains; they will have to. But when it comes to death-eligible cases, any time you see somebody charged with first-degree murder, you can count on there probably being a plea bargain. The person is not going to have a prosecutor certifying to the court certain aggravators that can be a basis for imposing the death penalty. When a prosecutor was up here on the other bill explaining to you all, whom he feels are neophytes and may not understand the system, that when the jury gets one of these cases that is death-eligible, meaning that there are aggravating circumstances that would allow the death penalty to be imposed, he said this jury doesn't know anything about that, they're not told about it. They can read. They can hear. These cases are

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written about in the newspaper. They are discussed on television and the radio, and the accounts always point out that a death penalty is going to be sought and the prosecutor has taken the steps to file the appropriate notice to the court so that a death penalty can be imposed. So they want you to live in a Barnum and Bailey world and ignore the reality. People know. And in this state, as every state in this country, a person who is opposed to the death penalty can be kept off a jury on that basis alone. So it results in what they call juries that are inclined to favor death and they're made to feel that it's their responsibility, their obligation, and they're expected to do that. So in concluding, I have always been against the death penalty since I was old enough to remember anything. I just never thought anybody should kill anybody even when I was too young to know that there was a death penalty and the state did it. During all of my years at Creighton, all of my years at Creighton Law School, all my years down here and prior to that, I've been against the death penalty. And before I even got here, I had written to former Governor Morrison asking him to seek a pardon for a man who had robbed a bank and was facing the death penalty, but as it turned out, due to some changes in the law and the application, he did not get the death penalty. So I hope that this committee will avoid all the litigation, all these other problems that I know are going to develop if you run a lethal injection bill out there and if it's passed and if the Governor signs it. Just do away with the death penalty. Is it a pipe dream? Maybe so. Am I jousting against windmills? Somebody has to do it, but I'm not alone in doing it. Thank you, Mr. Chairman and members of the committee. [LB306]

SENATOR ASHFORD: Thank you, Senator Chambers. Any questions? Question? Yes, Senator Christensen. [LB306]

SENATOR CHRISTENSEN: Thank you, Chairman. Senator, I didn't get to ask Senator Council this. She said you get to answer, so I'll ask you. You've reiterated the same comment--any killing is wrong. The first line here says life is a valuable possession of a human being. The state..of being...exercise utmost...to protect the residents from homicide acts or accidents, arbitrarily taking by the state. Would that include abortion? [LB306]

ERNIE CHAMBERS: That's an entirely different issue. When we... [LB306]

SENATOR CHRISTENSEN: But it is a life. [LB306]

ERNIE CHAMBERS: ...when we talk about executing a person, it's a person, as they say in Latin, in esse, a person who is in being, a full-fledged individual. When we talk about abortion, when I talk about it, I'm talking about the rights of a woman to make a determination as to whether or not she's going to carry a pregnancy to term. And I've always said, even while I defend vociferously a woman's right to decide to terminate in abortion, people can say all they want to that it's a crime under their religion, they can say it's a sin, but they will never get me to vote, as a member of the Legislature, that it's

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a crime. The two issues are not the same, in my view. [LB306]

SENATOR CHRISTENSEN: Thank you. [LB306]

ERNIE CHAMBERS: And the state, by the way, does not carry out an abortion. The state cannot participate in an abortion, and a woman is not sentenced to an abortion. This killing by the state is entirely different. [LB306]

SENATOR ASHFORD: Thank you, Senator Christensen. And, Senator Chambers, thank you. Alan. [LB306]

ALAN PETERSON: Mr. Chairman and members of the Judiciary Committee, I'm Alan Peterson, A-l-a-n and P-e-t-e-r-s-o-n. I'm a lawyer. For about 25 years now I've been one of the defense lawyers in capital cases, primarily on the appellate level but also some below. I represent Carey Dean Moore; I have since '88, when I was appointed. While the state now has a Commission on Advocacy to handle many of those crimes, many of those capital cases, once it gets past the trial and sometimes the appeal it's necessary to appoint separate attorneys because of possible conflicts of interest at that point. So the federal courts and sometimes the state courts appoint private attorneys like me. I regard it as a sacred duty. I swore to uphold the constitution and I agreed, when a judge said would you take this case. I thought, well, there's probably a year's work. That was in 1988. Mr. Moore has given up a couple of times, changed his mind. He was about to die when the Supreme Court, on its own, saved his life a little while back saying they weren't going to use that chair anymore. Was pretty clear when they said that, Senator Chambers helped indeed. My client wants to fight now. He doesn't think he's supposed to give up his life and, I guarantee you, it won't be one case if you pass...if the Legislature passes the lethal injection, it won't be one case, as Kirk Brown said. All of us will file suits. Let me just mention one point nobody has noticed. On page 9 of LB36 you show language struck out from the old law and this law was the one that said you always will use the electric chair to kill people. Right in the middle, line 12, it says, "A crime punishable by death must be punished according to the provisions herein," meaning the electric chair, "and not otherwise." You think I'm going to litigate that? You change the game, you change the penalty. Of course, we'll all litigate that and many other issues, including those you've heard about today. The Baldus Study, sponsored by this Legislature and paid for by this state, said there is discrimination with respect to social and economic status of the defendant or of the victim, there is discrimination, and geographically, as Senator Chambers mentioned. You think this is a fair system? Uh-uh, it's not. Finally, let me mention it's about vengeance, and I'm afraid occasionally about politics, but mostly it's about vengeance. That's what the death penalty really amounts to, is appeasing usually the folks in a local area where there's been a horrendous murder. And I understand it and it's probably natural, but it doesn't get us anywhere. You don't teach people not to kill by having the state kill. My time has expired. I had another point but I...my time has expired. [LB306]

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SENATOR ASHFORD: What would that point be? (Laughter) [LB306]

ALAN PETERSON: This senator and I probably tried the first lawsuit each of us tried against each other about 40 years ago, and I appreciate that. [LB306]

SENATOR ASHFORD: Yes. Yeah, I didn't appreciate it very much. (Laughter) [LB306]

ALAN PETERSON: Well, he got a little money. [LB306]

SENATOR ASHFORD: A little money. [LB306]

ALAN PETERSON: The point is this: You know, you hear people talk about justice meaning, oh well, they killed, then we must kill them. Would you just think for a moment, is there any other crime where that's the definition of justice? Yeah, I know you've read eye for an eye, tooth for a tooth. You know, do we rape rapists? Do we burglarize burglars? Do we hang paper on check writers? Nuts! That's just a slogan. Let's get real. Let's end this farce. I'm tired of it, for one. I know you all are. It doesn't deter anything. The studies that were left you by Mr. Radelet show that really conclusively. So you're great to listen to me and thanks for the extra minutes. [LB306]

SENATOR ASHFORD: Yes, thank you, Alan. Senator Lautenbaugh. [LB306]

SENATOR LAUTENBAUGH: Thank you, Senator Ashford. Sir, does Mr. Moore maintain his innocence? [LB306]

ALAN PETERSON: No, he never has. He confessed very promptly after he was caught. [LB306]

SENATOR LAUTENBAUGH: To murdering those two cab drivers. [LB306]

ALAN PETERSON: Yes. [LB306]

SENATOR LAUTENBAUGH: Am I thinking of the right case? [LB306]

ALAN PETERSON: Pardon? [LB306]

SENATOR LAUTENBAUGH: Am I thinking of the right case, to murdering those two cab drivers? [LB306]

ALAN PETERSON: Yes. Yes, that's right, in Omaha, that's correct. [LB306]

SENATOR LAUTENBAUGH: Thank you. Thank you. [LB306]

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SENATOR ASHFORD: Thank you, Alan. [LB306]

ALAN PETERSON: You bet. Thank you very much, committee. [LB306]

SENATOR ASHFORD: Further proponent testimony. Judge. [LB306]

RONALD REAGAN: Senator Ashford, members of the committee, my name is Ronald Reagan. I'm a practicing lawyer on a part-time basis now. I spent 32 years or a little more as a district judge in Sarpy County and served in various other counties also. I was a trial judge, former member of a three-judge panel in probably six to ten death penalty cases, which I think gives me a little bit different perspective than most of the people that have been here. And one of those cases included State v. John Joubert, which was a sentence of death that's been carried out. Obviously, during my 32 years on the bench I was constrained by judicial ethics from ever expressing my opinion concerning the death penalty. But a number of judges that were good friends of mine, one of them now deceased, Jim Buckley and I frequently talked about it and we kept our fingers crossed that at some time the Legislature would simply abolish the death penalty. And I support repeal of the death penalty not because I believe it can't be fairly imposed, I think it can, but for the reason that it's more of a state-sanction form of revenge that has no value whatsoever on a deterrent basis. Now I understand that you can't argue that it doesn't have a value on a specific deterrent basis, it certainly does. But on a general deterrent basis it has none whatsoever. And I could point that out more clearly, I think, with the first murder that Mr. Joubert committed and confessed to. It was of Danny Joe Eberle. And from the point of kidnapping to the point where he took him to be...his final place of execution, I suppose, it would have been a much shorter trip to simply go across the river to the state of Iowa where there was no death penalty. And that just sears in my mind that there is no general deterrent because the people that commit these heinous acts think not that they're ever going to be caught. Now with that I'll gladly answer questions. I'm sorry, I do have one more point to make. I think that when Kirk Brown testified, he indicated that there was one case that...on appeal where the death sentence had been reversed and had been sent back for a hearing. And he was the trial lawyer at the new sentencing hearing. That was one of my three-judge panels. And at that sentencing hearing the three judges that sat with me listened to the evidence. And we concluded that in fact there weren't aggravating circumstances or at least not in the weight that the original panel had given. With that, I'll answer any questions, if there are any though. [LB306]

SENATOR ASHFORD: Thank you, Judge. That's important testimony. Yes, Senator. [LB306]

SENATOR LATHROP: You know I don't have any questions other than to thank you for your service on the bench all those years, terrorizing Omaha lawyers, (laughter)

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including me, and for taking the time. You really truly come here with a different perspective having sat. And, I think, John Joubert is a poster child for people who advocate for the death penalty because of the nature of those killings. And to have you come here today and express your thoughts after the years on the bench are appreciated. [LB306]

RONALD REAGAN: Well, thank you, Senator Lathrop. For other members of the committee, I want it understood that I wasn't sought out when this bill came up. I called Senator Lathrop and I said, I don't know who's supporting it, but I can make my views known if it's of any worthwhile measure. And I might also indicate that I've told other people John Joubert was one of the most intelligent people that I've ever met, had an IQ of over 140 degrees...or 140 degrees, 140 points. But for what the psychiatrist said was unemotional and was engaging in some testing to see if he could raise emotions in himself. That was the purpose of the killings. So with that, anybody? [LB306]

SENATOR ASHFORD: No. Thank you, Judge, as well for your service and thanks for coming. [LB306]

KATHLEEN HAWK NORMAN: Good afternoon. My name is Kathleen Hawk Norman and I am from New Orleans, although I have long, deep roots in Nebraska. I was a jury foreperson in a capital murder case in New Orleans in 1996. And in 2000, I came to find out that I had sentenced an innocent man to death. I think that we don't consider the juries when we talk about the kind of effect that capital murder cases have on society. In our case, there would have been 14 of us for 1 murder victim and 1 murder defendant. Since that time I've come to work with jurors across the country who are, without exception, traumatized by their experience--marriages breakup, people need counseling, people commit suicide, even the people who believe that the person that they sentenced to death was guilty of the crime are traumatized by the experience. It's a horrendous responsibility to put on volunteer citizens, to ask them to make the determination of life or death about another fellow human being. I am and have been proud of Nebraska for your forward thinking, for the work that you've done on the death penalty, the retirement of "Old Sparky," the efforts of Senator Chambers and now Senator Council and all of you. I thank you for the opportunity to be here. I sincerely hope that Nebraska takes the lead and abolishes the death penalty. And I'm happy to answer any questions. [LB306]

SENATOR ASHFORD: Thank you, Kathleen. Any questions of Kathleen? [LB306]

KATHLEEN HAWK NORMAN: Thank you, all. [LB306]

SENATOR ASHFORD: Thank you for coming. [LB306]

ROBERT CREAGER: Mr. Chairman, members of the committee, my name is Bob

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Creager, C-r-e-a-g-e-r. I appear today in my capacity as president of the Nebraska Criminal Defense Attorneys Association. And for the record, we oppose LB36 but I'll direct my testimony in support of LB306 on the repeal. It's presumptuous of me to say that I can sit here and tell you why the members of our organization generally oppose the death penalty, but I think I can characterize it in two ways. The imperfect nature of the process, that is can we get to a point in our history where there are no mistakes? And what do we do if there is a mistake? And in looking for a couple of stories or anecdotes that best represent the way that issue was developed in the law I just looked back to Justice Harry Blackmun's decision in a Supreme Court case that he dissented in, called Callins v. Collins, out of Texas, 510 U.S. 1141. When I was in law school I learned that Justice Blackmun wrote the opinion in the Supreme Court's decision that reinstated capital punishment and by his signature started the process of executing hundreds if not thousands of people. In one of his final acts as a justice, he wrote to say, I've watched the system from the high court for more than 25 years, and I have concluded that it is time to start tinkering with the mechanics of death. And he said, I have watched all cases from all states, the process is flawed, it can't be administered fairly and we should stop it. And with that decision he left the bench. You can't discount the view of the judge who started the process of execution, who watched it for 25 years, without concluding that his view matters. And if you look at the cases that the Supreme Court is engaged in, it's been in retreat. We don't execute the retarded, we don't execute the insane, we don't execute juveniles, we go down and we get to the point where we finally say we shouldn't execute anybody. That's the path. I think most of us would agree that the single most...the scariest problem is that of the innocent. And we all know by our own experience that witnesses lie, cops plant evidence, overzealous prosecutors suppress evidence, judges standing for retention may be law and order versus defense. We know all those things exist, all you have to do is read the newspapers. So what has Nebraska's response been? There is actually a provision, and I'll read it, from the first-degree murder statute which, by the way, I've submitted a bill to kind of hopefully look at all homicide statutes. It says you commit murder in the first-degree if, by willful and corrupt perjury or subornation of the same, he purposely procures the conviction and execution of an innocent person. This body has not only seen the possibility that that may happen but has enacted in its statute a provision for what happens to that person, which I presume would mean that person would be eligible for the death penalty. I think Justice Blackmun had it right. It's really time to stop tinkering with the mechanics of death and move on to a better way to handle these problems. If you have any questions, I'll be happy to answer them. [LB306]

SENATOR ASHFORD: Thank you, Mr. Creager. Any questions? Thank you, sir. Next proponent. [LB306]

VIRGIL JACOB: (Exhibit 16) Senator Ashford, committee members, my name is Virgil Jacob and I'm here representing a very wise legal aide who says that this bill violates the Nebraska Constitution, Article IV, Section 13, by assuming the Legislature can

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create a penalty of "life without parole." Over 50 years Attorney General's Opinions have said the Legislature cannot create "life without parole" because the constitution provides parole for any offenses against the criminal laws of this state, except treason and impeachment. The conditions the constitution talks about are the conditions offenders must abide by while on parole. Section 83-1, pages 116 and 117, this does not allow limitations to be created. This bill also shows a violation of the law. The current penalty for Class IA felonies is not life without parole, as this bill says. The Nebraska Supreme Court declared the statute, Section 28-105, unconstitutionally changed in 2005. But the Revisor of Statutes illegally reprinted the statute in 2006 Cumulative Supplement anyway. There is a lawsuit in the district court of Lancaster County about this. The number is CI 08-3614. After the Revisor was sued to correct it, now she has incorrectly printed it in the hard bound 2008 volume of statutes. This committee should investigate how that happened instead of trying to make believe something that is not true. Now if there's any questions, please read the handout that I have for each one of you. It's called "The Meaning of Life" and another called "An Impeachable Offense." These were taken from the Web site of www.nebraskapen.org. The answers are in these articles. I'm not that familiar with anything else on this because I got this information from somebody who really well knows what he's doing. I'll try to answer a question, but I am afraid I'll be very...probably not be able to. [LB306]

SENATOR ASHFORD: Thank you, sir. Any questions, anyone? Okay. Good, thank you. [LB306]

VIRGIL JACOB: Okay. [LB306]

ROGER WELLIVER: My name...thank you Senator Ashford and Chairman Ashford, I should say, and all the senators of the committee. My name is Roger Welliver. I reside at 2474 North 45 Avenue in Omaha, Nebraska. I am in total support of Senator Council's bill, LB306. This...oh my, I'm nervous. [LB306]

SENATOR COUNCIL: Roger, can I stop you a minute? Can you spell your last name for the record. [LB306]

ROGER WELLIVER: W-e-l-l-i-v, as in Victor, e-r. [LB306]

SENATOR COUNCIL: Okay. [LB306]

ROGER WELLIVER: When we executed the last three people, the person...personal cost of appeal, including pro bono work, came to \$5 million per person, or \$15 million total. By using the then current per year cost of incarceration of \$30,000 and actual life term with a 50-year average time spent in incarceration, the total cost of incarceration, minus potential medical bills, would be \$1.5 million. This would have allowed the state to incarcerate a total of ten people for 50 years after I figured this out. If the average

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number of years incarceration were to be increased to 60 years then only eight people with a \$60,000 remainder could be incarcerated for that time period with a...this would be...in the total \$15 million, \$60,000 would be left over. And in this instance it should be a term of life without the possibility of parole. As the former...gentleman before me spoke about the constitutionality, I did speak to former Governor Nelson twice on this issue and he said there was a constitutional issue that would have to be addressed. And that probably is what the gentleman before me talked about. I didn't investigate it. Hold on. The death penalty being a...form of death...consider the death penalty to be a form of retribution. It also is a form of keeping a person from being able to perpetuate their crime upon another person. Life without parole would achieve the same result only at a lower cost to the state positively, thereby saving the taxpayer money. I strongly urge the committee to pass this out from committee to General File and strongly urge the Legislature as a whole to pass this bill. If the Governor vetoes it, I strongly urge the Legislature to override this veto because this is very, very costly to execute one person, let alone nine to ten more and it's long-term litigation. I am totally against the death penalty on that basis and that basis only. [LB306]

SENATOR ASHFORD: Thank you. [LB306]

ROGER WELLIVER: If there are any questions, I'm willing to answer them. [LB306]

SENATOR ASHFORD: Thank you. Any questions? Thank you. [LB306]

CRAIG GROAT: (Exhibit 17) Craig Groat. I have a number of newspaper articles here. This one is from Associated Press, state and local... [LB306]

SENATOR ASHFORD: Craig, could you just...Craig, could you spell your last name? [LB306]

CRAIG GROAT: ...okay, I already did that once, but G-r-o-a-t. The Associated Press, state and local wire: Europeans express outrage over Williams execution. Dateline Vienna, Austria: At the Vatican, Pope Benedict's top official for justice matters denounced the death penalty for going against redemption and human dignity. "We know that the death penalty does not resolve anything," Cardinal Renato Martino told AP Television News. "Even a criminal is worthy of respect because he is a human being. The death penalty is a negation of human dignity." Capital punishment is illegal throughout the European Union, and many Europeans consider state-sponsored executions to be barbaric. The National Conference of Bishops have also repeatedly come out against capital punishment, as has the previous pope. I would refer people to the Web site for the state Legislature and most of the state senators have their religion listed. But in the past, certain senators have gone against the pope and the National Conference of Bishops on this. Another one, Europeans condemn U.S. death penalty barbarism. Execution comes on eve of Bush's first visit overseas, The Ottawa Citizen.

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The Irish Times, landmark judgment, the decision by the United States Supreme Court to abolish the death penalty for juveniles under age 18 is rightly seen as a landmark judgment. It should be seen as a step on the way towards abolishing the barbaric punishment in the U.S., as has been done in many other states around the world--notably in the European Union, where this is a condition of membership. The Washington Post: Many Europeans see Bush as executioner extraordinaire. However successful the president-elect may be in his push for reconciliation and healing back home, he is facing political fire in Europe because of his close identification with a practice that people here consider widely barbaric. On a continent where capital punishment has been designated as abuse on par with torture and genocide, all three are banned by the European Convention on Human Rights, signed by 34 countries, George W. Bush is seen as one of its leading proponents. Associated Press, Europe holds U.S. to a high standard. Even though China puts far more prisoners to death each year than any other country, it is executions in the United States that spark the real outcry in Western Europe, where capital punishment has long been outlawed. Europeans are troubled that the United States, with its deeply ingrained democratic values, takes a punishment many consider barbaric and medieval. Europe's strong distaste for capital punishment is reflected in many institutions. Abolishing the death penalty is a requirement for membership in the 15-member European Union and the 43-nation Council of Europe. United Press International feature, execution raises ire abroad. [LB306]

SENATOR ASHFORD: Craig, thanks, Craig. I'm going to ask you to just sum up, if you would, please. [LB306]

CRAIG GROAT: Okay. I have a number of these articles. I'll give them, I would like them to be copied... [LB306]

SENATOR ASHFORD: We'd be happy to take them. [LB306]

CRAIG GROAT: ...and put into the official record. All across Europe the leaders consider capital punishment to be barbaric. They've outlawed it, that's it. [LB306]

SENATOR ASHFORD: Thank you, Craig, very much. We have 20 minutes left. I'm going to...the committee would like to hear again from the gentleman from Illinois. So I want to reserve some time for that. Let's proceed, but I'd like to leave about seven minutes or so for the gentleman from Illinois to speak. [LB306]

MIRIAM THIMM KELLE: (Exhibit 18) Good afternoon, Senators. My name is Miriam Thimm Kelle, M-i-r-i-a-m T-h-i-m-m K-e-l-l-e. I am a sister of James Thimm. Last year I talked about the "Jurassic" jawbreaker. And I wanted to be kind and spare you the details of what plagues me as a murder family victim member. This is a group I wish I was not a member of. For a speech like this I get chest pain. Last year I took

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nitroglycerin, and it got so bad I had a heart catheterization. However, you'll have to know that I've got the heart of a 20-year-old, that it is just stress, stress of 20 years of court litigation. It's money and time spent and puts this family through more things than you can imagine. Twenty years we've waited with nothing, 20 years, it's our sentence too. You're not going to...you're fooling yourself if this will get over more than 20 years, because we're now at 24 years into what's going on with our family. It tears at my very soul how the death penalty could even be an answer to murder at this point. The murder, I feel, in the cold days as I trudge to the Capitol once again. I remember Jim's last winter, tied to a deck by his neck and called the mongrel, him without a coat. The honor I give his memory more than 20 years ago when Michael Ryan led the group to shoot off his fingers one by one, torturing many months before killing him. The honor I give Jim for loving his friends and helping them recover from the brainwashing of the cult. The honor I give Jim for making his heinous death really mean something. I want to celebrate the weddings of my two children this year. Gas money that should be going to the weddings and time away from work too. I am committed to continue in honor of Jim. Nebraska's death penalty will end or I will die. I am committed. I think of our family and other families who have listened to the trials of their family members and thinking that that will be hope and will be end. I know they're waiting and listening and reading the details over and over again. I know that they will also wait 20 years, a sentence with a murderer as they wait and see. I did look at LB36, which I didn't get to testify for, and see it as more and more time in litigation and more and more time waiting without solutions. And this is kind of funny, because I thought of Senator Chambers and laughed a little. And I heard him, and I just imagined him argue the legislation so long, but we managed to find a way anyway. So I'm glad that he's still trying. If we could spend this money for something else, let alone the traumas that...as our families. As a nurse, I see a host of problems to anything else but abolition being the cause to the solution. I spoke last year as someone who tried to make it work, but the hope withered and died. One thing is we remain murdered family victim members on either side of this issue. And further torture of reliving the pain over and over and over is universal on both sides. Life without parole would end the horror we all live. The death penalty holds out a false hope for a solution, a hope I agreed with for 20 years, and a solution that we do not have. Please stop this use of families, I'm sorry, I'm over my time. I'm almost done. Stop this use of families as we try to survive. My own sister once told me she could flip the switch herself. But what do these laws do but promote anger for 20 years. It's not healing, instead it sends a sister against a sister, a mother of the dead against the mother of the condemned. Please look along the initial angers, the crime, and just see how the system really works and ask yourself how we can use the murder victim's family members anymore. Thank you for the time. And any questions will be welcomed and answered. [LB306]

SENATOR ASHFORD: Thanks, Miriam. Why don't...Ben, why don't you come up, and then Jim after that. And then we're going to ask the gentleman from Illinois to speak. [LB306]

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BEN GRAY: I'm going to try and go as fast as possible here, Senator. First of all, my name is Ben Gray. I reside in Omaha, Nebraska, 5217 North 60 Street. I am currently the interim executive director of a gang intervention program. Prior to that I was in television for 35 years as a producer as well as a photojournalist. And it was in that capacity that I want to talk today because I want to share with you at least two documentaries that I have done in relationship to the death penalty. But most of all, I want to talk to the group about what, in my judgment, the responsibility of this body is. And as you saw with the previous speaker, this can be an emotional issue and oftentimes is an emotional issue. But this body has the obligation, not just the right but they have the obligation to go past the emotion and look at an issue from the perspective, and especially when you're talking about an issue like this one, from the perspective of is it fair, does it work, and is it cost-effective? You have heard all kinds of testimony about the fairness of it and the fact that there are a number of people who are walking around now who have committed greater crimes than some of the people who are on death row today, and they never will see any form of electrocution or any form of the death penalty. We've also seen and we've also heard from individuals who talk about the fact that this...that there are a number of issues related to the death penalty itself that are not fair. But more importantly, Senator Lathrop, as you have asked on a couple of occasions about the cost-effectiveness of it, in both documentaries that I did where we talked about...where we had the opportunity to talk to several states, and people on both sides of the issue all agree that the cost is somewhere in the neighborhood of between \$1 million and \$10 million more to execute someone than it is to put someone on death row. And just as an anecdotal side conversation here, just very briefly, I've had the opportunity to go to court with a number of especially African-American young men who have been facing, not charges like these, but just charges that are not as severe as these, but minor charges. And I have heard prosecutors say, I have heard law enforcement people say that, to these young men, that if you don't plead in some capacity you will go to trial, we will find an all-white jury, and that all-white jury will convict you. If that is the mind-set that people have for these minor offenses, I'm wondering what kind of mind-set they have when it comes to these kinds of things. And as Senator Chambers and others have pointed out the kinds of things that people will do to seek a conviction. I'm concerned about this. And I am very much in favor of the elimination of the death penalty and in support of Senator Council's bill, LB306. Thank you all very much. [LB306]

SENATOR ASHFORD: Thank you, Ben. Any questions of Ben? And thank you for your work in the gang intervention area. [LB306]

BEN GRAY: Thank you. [LB306]

SENATOR ASHFORD: Hopefully, you'll be back and testify on... [LB306]

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BEN GRAY: I will be back, Senator. [LB306]

SENATOR ASHFORD: Okay. Jim. [LB306]

JIM CUNNINGHAM: (Exhibit 19) Senator Ashford, members of the committee, good afternoon. My name is Jim Cunningham. That's spelled C-u-n-n-i-n-g-h-a-m. I'm the executive director of the Nebraska Catholic Conference, which is a state level entity, operated jointly and cooperatively by the three dioceses of the Catholic Church in Nebraska under the leadership of the diocesan bishops. The Nebraska Catholic Conference supports LB306 and urges its advancement to the full Legislature. Our opposition to the death penalty and support for abolishing it also prompts us to oppose LB36 because it is intended to have the opposite effect of restoring authority for the death penalty. I've submitted written testimony, which I will not read. It is not substantively different from testimony that I've submitted on numerous previous occasions on legislation proposing to abolish the death penalty. Heretofore our consistent approach has been to offer a standard, a test if you will, for judging the legitimacy of the ultimate penalty of death. Relying upon the modern catechism, we at numerous times articulated the test of absolute necessity; that is, given its ultimate consequences and their irreversibility, is the death penalty absolutely necessary as the state's recourse for its unarguably legitimate purposes of punishing offenders and protecting society from unjust aggressors? We have argued and continue to argue the conclusion that, no, of course not, there is no absolute necessity for the state of Nebraska to resort to death, not in this modern society, not in this technologically sophisticated age. The death penalty fails this reasonable test and should therefore be abolished. But this emphasis on the test of absolute necessity, while a worthy attempt on our part to address the issue in practical terms, probably has fallen short of emphasizing enough, another essential element of Catholic teaching regarding the death penalty; namely, that nonlethal means of punishment and deterrence better correspond to the concrete conditions of the common good and are more in conformity to the inherent dignity shared in common by all humankind. As a means of elaborating this posit, I would like to quote for you one paragraph from a statement presented on behalf of Pope Benedict XVI and the Catholic Church at the World Congress Against the Death Penalty in Paris nearly two years ago: Every instance of capital punishment incurs a number of risks: the danger of punishing innocent persons; the tendency to promote a violent form of revenge rather than a true sense of justice in society; a clear offense against the inviolability of human life, which offense promotes the culture of death and violence; and for Christians, contempt for the Gospel teaching on forgiveness. The taking of life never attains the worthy objectives for which societies punish offenders, although it may temporarily assuage the appetite for vengeance. Each time the state puts a human being to death, society reaches in the direction of its basest urge for revenge. That is not the common good. As the Catholic Bishops in the United States wrote in 1998, our witness to respect for life shines most brightly when we demand respect for each and every human life, including the lives of those who fail to

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show that respect for others. The antidote to violence is not more violence. As legislators, upholding dignity and promoting the common good are in your realm of influence. This is another reason why we urge you to advance LB306 to the full Legislature and to either indefinitely postpone LB36 or leave it right here in this committee. Thank you for your time and attention. [LB306]

SENATOR ASHFORD: Thank you. Any questions of Jim? Thank you. [LB306]

JIM CUNNINGHAM: Thank you. [LB306]

SENATOR ASHFORD: Randy, can we ask you to come up a bit more here? And if you have another comment you'd like to make, go ahead and... [LB306]

RANDY STEIDL: Yes, I would. We are 1 of 20 western nations who carry out the death penalty, yet the United States carries the banner for all humanities. Our government helps spread democracy through other countries, and I say how can we have such a barbaric system in place when we are the leaders of the world? I cannot tell you the devastating effects that the death penalty had on me, my family. I couldn't begin to tell it to you in three minutes, how it destroyed my children's lives. I went to death row, did 12 years. Each, every execution I saw carried out, I knew one day the captain of the guard is going to be coming for me. When I got the second execution date, if it had not been for talented, dedicated people who had my case and got it back into court and stayed it, the state of Illinois would have had their way. I'd be dead today. I've always said that you can release an innocent man from prison but you can't release him from the grave. Eighteen of us out of a hundred and sixty on Illinois' death row were exonerated. Now you can do the math. You wouldn't put your children on a school bus, you wouldn't take that flight if there was 18 chances out of 160 that it's going to crash or that your children would die in a bus crash. Sooner or later...you have the power today of life and death. You have the power to abolish, repeal this death penalty, because sooner or later you're going to be killing an innocent man. And the old saying goes, it's better to let ten guilty go free than for one innocent man to go to prison or to die. I believe that with all my heart. There's an alternative. It's natural life without parole. There are so many systemic problems with the death penalty, not just in Illinois, not just in Nebraska, but Texas. They've exonerated over 30 so far and they've executed about 490 in the last 15 years. Now how many of those 490 weren't as fortunate as Randy Steidl or the other 17 in Illinois? I'm a survivor, not by...it's just the fact that we know if we go back before even DNA was invented and look at people's cases, you know they've executed innocent people before and they're going to do it again if you keep practicing this barbaric system. And I'd be happy to answer any questions that any of you have. [LB306]

SENATOR ASHFORD: Well, I think some of the committee members may have some questions. Does anyone have? Yes. Yes, Senator Coash. [LB306]

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SENATOR COASH: Thank you, Senator Ashford. Randy, thank you for your testimony. I want to ask you a question about...you're a good person to speak about what life is like on the inside of prison, and I wanted to ask you a question related to the previous testimony about protecting society from people. [LB306]

RANDY STEIDL: Exactly. [LB306]

SENATOR COASH: As a person who's been on the inside, do you...what's your opinion on a currently incarcerated person's ability to further carry out crimes from inside prison, and do we...and do we need that method to protect ourselves from people who are currently incarcerated? [LB306]

RANDY STEIDL: The Department of Corrections is not like it used to be. The inmates don't run the asylum anymore. When they did sweeping changes in Illinois in 1996, after Richard Speck's spectacle, they came in and revamped the prison system. The stabbings, the abusive guards, the assaults on guards went down to almost nothing because of the procedures they put in place. Any infraction resulted in solitary confinement, loss of all privileges. Inmates doing life in prison value those privileges. That's why they behave. They want their baby-sitter, which is the TV, and guards don't want those TVs taken away. Because if they're not focusing on something, they're focusing on guards. They found that to be true. So there's procedures in place that protect staff and other inmates. And I saw more violence on death row than I did in general population. I was stabbed seven times one day on the yard, and I got the scars to prove it, simply because I didn't protest John Wayne Gacy's execution like the other gangbangers, we used to call them, because I didn't follow their rules and protest John Wayne Gacy's execution. I ate my meals, I took my shower, and I went to the yard, because I was not hooked up in any street gangs. So there's plenty of protection for staff and inmates in the penitentiary. They're doing life; they want jobs. They want to be able to get out of those cells as much as possible. That's why they behave. I hope that answered your question. [LB306]

SENATOR COASH: One follow-up to that: You mentioned the safety of other inmates and safety of the corrections officers. What about the community's safety? [LB306]

RANDY STEIDL: What about...? [LB306]

SENATOR COASH: What about the community's safety and the ability of an inmate to commit, to obviously direct a crime from inside of...from inside a prison? [LB306]

RANDY STEIDL: There is really no...all phone calls, all visits are monitored, even they have gang specialists now on...in corrections to where even letters are deciphered. If gangbangers and gangsters and troublemakers on the outside and on the inside communicate in code, they have code breakers for corrections people. They monitor

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everything the inmate does 24/7. A natural life sentence means just that--natural life. An inmate tries to make the best of that natural life, whether it be education, schooling, work, some kind of educational program where he can try to contribute, make a little money, try to have somewhat of a life in that cage besides just vegetating or playing basketball. [LB306]

SENATOR COASH: Thank you. [LB306]

SENATOR ASHFORD: Senator Council. [LB306]

SENATOR COUNCIL: Just a quick question, Mr. Steidl, and again I thank you for traveling here... [LB306]

RANDY STEIDL: Thank you for having me. [LB306]

SENATOR COUNCIL: ...to share your experience with us. But there have been some discussions about elimination of the concern about executing innocent people because of the increased use of DNA. I want to know was DNA a factor in your exoneration? [LB306]

RANDY STEIDL: No, DNA was not. DNA is a great safety net, but it's a small safety net. As was reported, only 14 out of 130 of us that's been exonerated from death row across this country had DNA that exonerated us. In my case, my family scraped together the money to run DNA tests on physical evidence found at the crime scene that the state should have did. Before I could even walk out the prison gates five years ago, they wanted testing done and they wanted the defense to do it. Well, I did it because I didn't have anything to hide. There was no DNA there of mine, my codefendants, no physical or forensic evidence, hair, anything tying me to that crime. The state made my family do that. [LB306]

SENATOR COUNCIL: Okay. And from a conversation I had with you when you first arrived this morning, your conviction was based upon recanted eye witness testimony? [LB306]

RANDY STEIDL: The alleged eye witness of a town drunk and a drug addict woman. Shortly after a \$25,000 reward was passed through every bar in town, and what did they come up with--a town drunk and a drug addict. [LB306]

SENATOR COUNCIL: And what was the population? Your... [LB306]

RANDY STEIDL: Paris, Illinois, was 9,000 people, so you can imagine the effects of a rumor mill in a small town. [LB306]

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SENATOR COUNCIL: And as I recall, a member of your family was law enforcement. [LB306]

RANDY STEIDL: My brother is a 31-year veteran of law enforcement. He's got 24 years on Illinois State Police. [LB306]

SENATOR COUNCIL: And correct me if I'm wrong, didn't you tell me that the local authorities attempted to have your brother convince you to confess to the crime? [LB306]

RANDY STEIDL: The night of my arrest, he had just become a rookie Illinois state police officer, hadn't been on the force but about eight months. They notified him that they just arrested his brother for the Rhoads' murders. He came into the jail. I was being held in a holding cell. They patted him down. He pulled up a stool and set it in front of me and he says, well, you might as well tell me about it; they got to have some kind of evidence on you; you know something about this murder; they said if you tell them now they'll spare you the death penalty. I cannot explain to you how devastating it was for my little brother, although he was a rookie state police officer, he had been a state...or a police officer for many years, how devastating that was to have my brother look me in the eyes and want me to confess to something I didn't do. They used him as a tool, just like they used the alleged drunk and drug addict eye witness, threatened them with the death penalty unless they finger me and my codefendant, Mr. Whitlock. [LB306]

SENATOR COUNCIL: And...and... [LB306]

RANDY STEIDL: And my brother felt that way for two or three years before he came to realize that the state's case is full of holes, especially when they recanted not once, not twice, but five times over the years. But yet I was still denied in state court and still received a second execution date. But this is systemic problems that we have in this country. Even if you have prosecutors that are totally aboveboard, police officers that do everything correctly, you're still going to have that minute chance that you've got the wrong person. But we know police misconduct, we know prosecutorial misconduct, we know (inaudible) suborn and perjury, fabricated evidence. Why have a system in place? You good people have the power in your hands to this very day to repeal that death penalty. You don't even have a method that's not...it's cruel and inhumane, that lethal injection is. I know you all saw the pictures. You don't even have a method in place that ensures that you're not causing more pain and suffering. You have the power now to repeal the death penalty. [LB306]

SENATOR ASHFORD: Thank you, Randy. [LB306]

SENATOR COUNCIL: Thank you. [LB306]

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RANDY STEIDL: Thank you very much. [LB306]

SENATOR ASHFORD: Now, when I was out of the room there was a promise made, so I'm going to...(laugh) Reverend, come on back up here. Give us a little...just try to keep it kind of short. [LB306]

CHUCK BENTJEN: Thank you. I'll keep it very, very brief. [LB306]

SENATOR ASHFORD: And then we're going to move on to the opponents and they have equal time, so. [LB306]

CHUCK BENTJEN: (Exhibit 20) Good afternoon. Again, my name is Chuck...Reverend Chuck Bentjen and that is spelled B-e-n-t-j-e-n, first name Chuck, C-h-u-c-k, and I am the director of justice and advocacy ministries for the ELCA in Nebraska and I should also tell you that I am an attorney as well. I have with me today a letter from the judicatory heads of the ELCA in Nebraska; the Christian Church, Disciples of Christ in Nebraska; the Presbyterian Church U.S.A. in Nebraska; and the United Methodist Conference in Nebraska. Senator Ashford and members of the Judiciary Committee, we, the named judicatory heads of the largest Protestant Christian Church bodies in Nebraska, write to you in support of LB306 and opposition to LB36. Together, our church bodies are made up of more than 300,000 Nebraskans from all walks of life, backgrounds, ethnicities, and experiences. While we are confident that not all of those 300,000 Nebraskans agree on the death penalty, we are equally confident that they take their faith quite seriously and utilize it in living out their daily lives. They look to church leadership for guidance and direction on difficult issues, such as the death penalty. Sadly, we have been too quiet for too long regarding the death penalty in Nebraska. Each of our church bodies has independently evaluated the death penalty from a Christian faith perspective and concluded there is no Christian justification for its use. We want that to be heard loudly and clearly by you, our policymakers, and by all Nebraskans. As Christians, we believe we are redeemed and reconciled with God through the sacrifice of our Lord and Savior Jesus Christ. We believe that we must always follow...always allow for redemption, repentance and redemption, obey the biblical mandate to not seek retribution for evil, be committed to reconciliation and rehabilitation, and to pursue justice and reject a penalty that is imposed most often on the poor and vulnerable. We are further concerned about the sheer number of exonerations that have occurred since the outset of DNA testing. According to the Death Penalty Information Center, 130 people in 26 states have been released from death row with evidence of their innocence. Recently, we discovered that six people spent more than 20 years of their lives in Nebraska prisons for a murder they did not commit. We are troubled to learn that our state challenged their request for DNA testing. Had the state prevailed, they would still be in prison. While it was not a death penalty case, it is an excellent example of how flawed the system can be. And that's signed by each of the bishops of those individual churches. [LB306]

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SENATOR ASHFORD: Thanks, Pastor. [LB306]

CHUCK BENTJEN: Thank you. [LB306]

SENATOR ASHFORD: That concludes the proponent testimony. We'll move to the opponent testimony. [LB306]

JOE SMITH: I guess... [LB306]

SENATOR ASHFORD: Yeah, go ahead. I'm sorry. [LB306]

JOE SMITH: ...I may be the only one. [LB306]

SENATOR ASHFORD: How many opponents do we have over here? Okay. Okay. And one neutral? Okay. [LB306]

JOE SMITH: My name is Joe Smith. I testified earlier on the previous bill so I won't go over everything I went over then, but I've heard today the DPIC study stated, the 130 people exonerated on innocence grounds. The state of Florida actually looked at that study, and I think that's in my materials. That study shows 22, I think, from Florida. Florida, the Legislature appointed an independent commission. They found there might be four. So in that state, the DPIC study was, like, 80-some percent off. The DPIC study in Nebraska shows one case and that is State v. Sheets. Sheets did not get the death penalty. His conviction was overturned on a hearsay issue. It was not overturned on an innocence deal. So in the state of Nebraska the DPIC study was entirely wrong. In the state of Florida, an independent, bipartisan type commission found it was 80-so percent off wrong. There has been talk today, and I know everybody...and I think a lot of people think a natural life sentence would be a wonderful thing. But the law in Nebraska, and you've had two proponents of this bill testify today, we don't have that option. We've actually litigated that when we did some LB1 litigation when the issue was...had the penalty be increased. We still have those requirements. There was asked, one senator, what about people on death row, on death row, you know, killing other people. David Dunster has killed I think two people since he's been in. Galindo and Sandoval, was reported by the Lincoln paper, Sandoval admitted that they had planned to kill one guard. The guard stopped that when they found, on death row in Nebraska, a shiv or knife. So that's certainly a possibility. The comments I made earlier today, and I don't think that the whole world should revolve around what happened in Madison County, but what happened in Madison County shows, I believe, that there are people that will kill and kill and kill again and plan to kill again. They'll enjoy killing about it, they'll laugh about it, and they'll do it in gruesome ways. We had on one of my juries, all of them but one for sure, people who are very much opposed to the death penalty who sat there and deliberated and cried and threw up, agonized over their guilt. While they were doing

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that, Mr. Vela was back bragging that he should get credit for seven deaths because a state trooper had killed himself. I think the death penalty should not be gotten rid of. I think it can be fixed. But I know there's a study out by Department of Justice about five years ago that went through the different states. There are different time frames. Some states are shorter, some are longer, but it can be approved. The people that we talk about that we exonerated, that I understand was a plea case. That did not go through all the tests we have on a death penalty case now. All the LB1 stuff, if you plead guilty you don't, you know, you don't have all that stuff, you don't have the aggravation, you don't have all the requirements of endorsing witnesses ten days before trial and all the new stuff we have with respect to... [LB306]

SENATOR ASHFORD: Joe, you can finish. Do you have other points you want to make? [LB306]

JOE SMITH: All the stuff we have with jailhouse snitches, we have a bill that now on homicide cases we have mandatory recording of confessions. All bills that I think most prosecutors don't have a problem with. I think we can do a better...no prosecutor that I know of likes homicide cases, likes dead bodies, likes talking to families or likes asking juries for death penalties. But there are some cases when your duty as a prosecutor and I think your duty as a citizen compels it. Thank you for the extra time. [LB306]

SENATOR ASHFORD: Any questions of Joe? This...in this...in the Norfolk case, was there prior evidence, I assume there was, of some of these individuals had been engaged in other criminal activity prior to this time... [LB306]

JOE SMITH: Actually... [LB306]

SENATOR ASHFORD: ...or no? [LB306]

JOE SMITH: ...there was. As you know, the aggravators in Nebraska, LB1 passed before my first trial. I think Sandoval had some, Galindo certainly had some, Vela. We didn't offer those at trial. At trial the only aggravator...the only prior history we offered on each of them was the murder of Travis Lundell. Three of the...or two of the juries came back on that murder as well. Mr. Sandoval's jury did not come back. Later on, after some negotiations, Sandoval confessed to that murder, although and another one. [LB306]

SENATOR ASHFORD: And there were...and excuse me for being not as knowledgeable... [LB306]

JOE SMITH: No, that's fine. [LB306]

SENATOR ASHFORD: ...of this, as certainly I never will be as you are, but there were

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other homicides, not at the scene, involving related parties. [LB306]

JOE SMITH: Two before. We didn't...one we knew about. Well, both we knew about. One was missing, one was missing, presumed a homicide. [LB306]

SENATOR ASHFORD: Was later discovered... [LB306]

JOE SMITH: March of that year. Once we figured out that those guys had been involved in murders, we were able to do some things. Eventually one of...Galindo took us to the body that was Travis Lundell. That was a Vela killing. [LB306]

SENATOR ASHFORD: And that individual was...and he had been in this original group that was tried for the bank. [LB306]

JOE SMITH: No, he had...he was kind of... [LB306]

SENATOR ASHFORD: He was in the bank. [LB306]

JOE SMITH: Lundell, the victim? [LB306]

SENATOR ASHFORD: Yeah. No, not the victim. The...had there been... [LB306]

JOE SMITH: Yeah. Vela was one of the murderers and the juries found on Vela beyond a reasonable doubt that he'd also killed Lundell. Later on this year, last year I guess we found Mr. Pearson and so far Sandoval has pled to that one. [LB306]

SENATOR ASHFORD: Okay. Thanks, Joe. Any other? Yes, Senator Lathrop. [LB306]

SENATOR LATHROP: Maybe just briefly, Joe. [LB306]

JOE SMITH: Yeah. That's fine. [LB306]

SENATOR LATHROP: I guess my first comment would be I know you've worked awfully hard on these prosecutions up in Madison County. I've known you for a long, long time and I know it's kind of, in some ways, taken a personal toll on you, too, just... [LB306]

JOE SMITH: Well, I appreciate that. [LB306]

SENATOR LATHROP: ...the responsibility of it. Today, as you give us the reasons for your opposition to repeal, you're using as kind of the reason why we need it around is for those people who we can't safely incarcerate or keep from stabbing or killing somebody else. And I think it's interesting because we had some discussion about that a year ago as a standard for who should or shouldn't be...shouldn't receive the death

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penalty, and that is those folks who have...who we can't safely incarcerate, or as Mr. Cunningham said, absolute necessity. [LB306]

JOE SMITH: Oh, I think that is one thing. I know last year we talked about that, how do we make death row safe or prisons safe, and I don't know whether you can do that. Certainly in Mr. Dunster's case, had the first state, I think it was Colorado death penalty, he'd have two more people alive. But I don't think that's the only reason, maybe not the biggest reason. I think there was talk about Justice Scalia's concurring opinion in Baze today and about the cost. You and I have discussed how many millions of dollars it costs to convict somebody and I think he pointed out that deterrence in cost, but what price do you put on retribution, you know, what value is a human, the victims are worth? I also believe in deterrence. I mean I know that's an issue and I know that there was some talk about getting the Mocan studies. Actually, those are three studies. He addressed those issues. But I truly believe you can justify death on any of those grounds, but I honestly believe you have an obligation to victims, you have an obligation to people that suffer in those same...Vela, for example,... [LB306]

SENATOR LATHROP: And I think... [LB306]

JOE SMITH: ...laughing about killing people... [LB306]

SENATOR LATHROP: Yeah. [LB306]

JOE SMITH: ...on death row... [LB306]

SENATOR LATHROP: ...as we try to decide what the right policy is or should be, we can inject into it some horrible person, some horrible person no one would defend, no one would say what he's said, done, or the way he's behaved is right by any measure, but ultimately, and Madison County experienced this and I think you're a good person maybe to address this, it's expensive for the county to try these cases. And you, probably as much as anybody, can appreciate the fact that the trial of these fellows from...involved in this Norfolk bank robbery increased the cost to Madison County dramatically. [LB306]

JOE SMITH: I will say that it was very expensive and the exact numbers I don't recall but you have those and I agree with those numbers. But in Madison County, for example, we didn't raise taxes or anything. We had that money set...we had money set aside, emergencies. I realize other counties may not have had that. [LB306]

SENATOR LATHROP: And that brings us to maybe one of the things that's less obvious about the death penalty but, nevertheless, true. Because I think they ran into that with those Rulo homicides. Those people... [LB306]

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JOE SMITH: I know they did. [LB306]

SENATOR LATHROP: ...I mean they were selling off buses and things down in some of those...in that county, Richardson County I think, in order to pay attorney fees. [LB306]

JOE SMITH: Defense lawyers. [LB306]

SENATOR LATHROP: Yeah. [LB306]

JOE SMITH: Yeah. [LB306]

SENATOR LATHROP: Because they'd chosen or elected to make it a death penalty case rather than life in prison. And that is a...it isn't for many of us, I think, so much about whether we should or shouldn't put people to death for...or they do or don't deserve the ultimate punishment. It's about whether the system between the time of the homicide and the time we put somebody to death, whether that's broken and whether we as a state get our money's worth when the statistics that we went through a couple years ago showed that since 1973 we probably had 2,800 death-eligible homicides, some people that committed a homicide in the state of Nebraska with an aggravator, and of those we only put 39...we only sentenced 39, and of the 39, several of them had their sentences reversed and they ended up getting life in prison. And I think we ended up having more die of natural causes or as many die of natural causes, after they spent millions of our dollars on appeals, than we actually put to death for their crimes. And as we struggle with...as we struggle with the policy here, Joe, it isn't do I believe that somebody deserves the ultimate punishment, but do we have a...do we have a judicial system that doesn't make mistakes? Are we going to get our money's worth after we spend \$1 million to \$10 million extra dollars to try to put one of these people to death? And we know the batting average is for the state of Nebraska more of them will end up in one of those appeals getting their death reversed, putting them in prison for life, and all that effort and those resources will have been expended for no good reason. So... [LB306]

JOE SMITH: Well, there's a number of corrections in there and... [LB306]

SENATOR LATHROP: You're free to correct me. [LB306]

JOE SMITH: Well, no, I'm not correcting you. I agree... [LB306]

SENATOR LATHROP: No, no, I trust... [LB306]

JOE SMITH: You've mentioned to me we can plant people who are terrible. Who on death...well, ten people on death row I think, maybe less than that, but we studied those people, people like Ryan who tortures and kills people, like Mata, like Harper, I think he

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actually died, as you said, before, who poisons little kids to give them cancer. So we have those. You mentioned the Baldus Study. I...you were referring to the Baldus Study. The Baldus Study has been referred to today and, as I recall, that study did not say there was a...discrimination based on race or economics of the defendant. I think it said it may have been on the victim. But keep in mind that was a study that you had a bunch of postgraduate or graduate students looking at files and determining, was this death-eligible, was it not death-eligible. That was the methodology. With respect to cost and...go ahead. [LB306]

SENATOR LATHROP: No, well, go ahead, because I'm... [LB306]

JOE SMITH: With respect to cost, I think that's a very...and I think somebody else said it today, can we pay the freight, you know? And you said the same thing. [LB306]

SENATOR LATHROP: And here's the...here is the second part of the cost and that is you have the affluent counties or the counties that are better able to pay the cost: Douglas County, Lancaster County, Sarpy County. Madison County, I don't know how many of these you can afford to do, but the high...the places that can afford to do a death penalty case, from start to finish, are the places where we...the more affluent counties and the more affluent counties are where we find the greatest minority population. So we could have somebody commit a deplorable, deplorable homicide in a small county and have the county attorney say, we can't afford to do this, and so that person pleads and ends up with life in prison. And in those communities where we have the resources and the highest minority population, we're not constrained by those kind of problems and sort of in a left-handed way we end up discriminating or...well, discriminating in the manner in which we impose the death penalty. [LB306]

JOE SMITH: I agree, cost is a fair issue and I believe, certainly there are small counties and, I think Senator Chambers said, maybe even counties that the county attorney doesn't believe in capital punishment. But we've made some changes since Baldus. We have the Advocacy Commission now so we have...doesn't help on multiple defendants a whole lot, but we have relief for the counties. When I started this case, you know, as you know, I have an office of two or three people and I've got...you know, I had calls from a lot of prosecutor's offices--Joe, you need help, we'll send you down a prosecutor. But cost is an issue. Cost was an issue for us, not as far as going or not going, not as far as making that decision, which I thought the duty required, but as far as it's going to hurt. But how do you tell somebody when you walk in a bank like I did, you have a lady who gets...how do you tell her little boy, well, we, you know, we're trying to save money here? And I think it's a duty. And I think the cost is a very good thing, but I think duty is. I think we have a duty and I don't think we should scrap the whole system because of that. Thank you. [LB306]

SENATOR LATHROP: Thanks for your remarks, Joe. [LB306]

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SENATOR ASHFORD: Senator Council. [LB306]

JOE SMITH: Senator. [LB306]

SENATOR COUNCIL: I have three questions, Mr. Smith. [LB306]

JOE SMITH: Yes, ma'am. [LB306]

SENATOR COUNCIL: Number one, you referenced this Dunster incident. Is it Dunster, David? [LB306]

JOE SMITH: David. David Dunster. [LB306]

SENATOR COUNCIL: And your statement was if Colorado had had the death penalty,... [LB306]

JOE SMITH: I think it was Colorado, whatever state he came from first. [LB306]

SENATOR COUNCIL: But Iowa, we know they don't have the death penalty. [LB306]

JOE SMITH: He was transferred. [LB306]

SENATOR COUNCIL: Iowa...if Iowa...if the state he committed his first homicide in didn't have the death penalty, he wouldn't have been able to commit the offense he committed in Nebraska. That was your premise, right? [LB306]

JOE SMITH: Yes, basically. [LB306]

SENATOR COUNCIL: So my question is, is if the state he committed his first offense in had life in prison without possibility of parole, it would be equally possible, isn't it, that he could not have committed another offense? [LB306]

JOE SMITH: No, ma'am, what I meant was he actually killed persons inside prison, so if he was on life without parole he would have been in the same spot. What I meant to say is if he had been executed after his first murder, he wouldn't have been alive to do the next two. [LB306]

SENATOR COUNCIL: So he was transferred to Nebraska. [LB306]

JOE SMITH: Transferred to Nebraska, killed somebody here then, another cellmate. First one murder, then a cellmate, then a transfer, as I recall. [LB306]

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SENATOR COUNCIL: And doesn't that speak to the--Mr. Steidl, where is he--doesn't that speak to the issue of correctional center practices and procedures? You know, you know you have someone who has committed a homicide within the correctional facility, you transfer that person into your facility and don't take appropriate steps to ensure...at a minimum, I know that the Corrections Department has the ability to isolate and segregate prisoners. [LB306]

JOE SMITH: Oh, I think...I'm sorry. [LB306]

SENATOR COUNCIL: Now isn't that possible? [LB306]

JOE SMITH: No, I think if you talk to the wardens of the prison, and I have before, they're under tremendous constraints. Keep in mind, and it was reported by the press, Sandoval admission, these guys on death row, after receiving convictions for five people, and they're able to plant a guard and they're able to obtain a knife or shiv to do it. And the only thing that keeps a guard from being killed is not their morality. It's that the guards find the...you know, the knife find and that falls apart. [LB306]

SENATOR COUNCIL: So your testimony is that there is no way for the correctional facility to safeguard or to implement practices to safeguard the correction officers or prisoners. [LB306]

JOE SMITH: I believe if you talk to the wardens of the prison, they will tell you that the constraints they're on do not allow them to put somebody in a room 24 hours a day away from everybody else. So I'm saying, yes, that is my answer. [LB306]

SENATOR COUNCIL: Okay. I'm saying safeguard and I'm not necessarily saying isolation or segregation. So what do we do, Mr. Smith, and I wanted to get to this because you're talking about Sandoval walking around, laughing about killing people that... [LB306]

JOE SMITH: That was Vela. [LB306]

SENATOR COUNCIL: Which ever one of the...Vela, whomever. The point is that we have more than 200 people in the Nebraska correctional system now who are there for murder and I wish that Don Kleine was still here from Douglas County as to the number of individuals who are in the general population right now who are there after having either previously killed someone or on more than one occasion previously harmed someone seriously by gun, by knife. But they're in general population, which gets to the point, one of the concerns and one of the reasons I have been violently opposed to capital punishment is that the system tends to determine whether someone gets the death penalty by the value they place on the life of the victim. Now I can tell you there are a ton of gangbangers from my district who are in general population because they

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weren't charged with anything more than second-degree murder and it was their second or their third homicide, or their second or their third, leading up to the homicide, two or three times, felonious assault with a weapon. These guys are walking around in general population, but I don't hear the same kind of concern about the safety of the guards or the safety of fellow prisoners. [LB306]

JOE SMITH: Well, I believe if you look at the stats from the prison you'll find that guards and other inmates are throughout. As far as general population, and you may want to check this with the prisons, general population is not just general population. They have control units and control one, control two, control three, those type of things. But it's my understanding, and you'd have to talk to a warden, we have prisoners on a life sentence, are not on death row, they are in general population or a control unit and that's where these things are happening. [LB306]

SENATOR COUNCIL: Well, we have people who have committed murder who got definite term of years who are walking around in general population. [LB306]

JOE SMITH: Well, I understand that. [LB306]

SENATOR COUNCIL: Now what is the current penalty for a Class IA felony? [LB306]

JOE SMITH: You're talking about murder one. It's a death or life without parole. [LB306]

SENATOR COUNCIL: Class I felony, death; Class IA felony, life imprisonment without parole. [LB306]

JOE SMITH: And that was changed during LB1, as you recall, and we litigated that issue... [LB306]

SENATOR COUNCIL: Right. Right. [LB306]

JOE SMITH: ...because in my cases the defense, after LB1, argued that that raised the penalty for a life sentence. The judge ruled it didn't because we don't have life/parole and we can't have life without parole, at least under the present system, which is I think executive and constitutional. [LB306]

SENATOR COUNCIL: Well, I think there's a question as to whether or not you're talking about removing the ability for clemency and LB306 doesn't do that. [LB306]

JOE SMITH: That's my... [LB306]

SENATOR COUNCIL: And the question is, at least in my 32 years of practicing law in the state of Nebraska, appearing before the Pardons Board, somebody help me, I

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cannot think of one occasion where an individual who was sentenced to life in prison without possibility of parole had their sentence commuted. Are you aware of any? [LB306]

JOE SMITH: I'm aware that before I became a prosecutor I was doing defense work with other people here and we used to tell defendants and so that second degree was 12 years and I think first degree was 27. And I forget what it was, but they had that rule and no one knew where it came from, but it came out of parole someplace. And now I don't...now you're right, I don't know of anybody who has been, under the last three or four administrations, pardoned for a first-degree murder other than for a, you know, insanity or... [LB306]

SENATOR COUNCIL: I'm not aware of one for insanity. [LB306]

JOE SMITH: Well, not insanity, but I know we had one released now... [LB306]

SENATOR COUNCIL: Well, I don't have one for mental retardation. [LB306]

JOE SMITH: Well, like...well, there's only been one on mental retardation. [LB306]

SENATOR COUNCIL: That's all. [LB306]

SENATOR ASHFORD: Well, you're probably generally in, if you have life in prison without parole, you're probably generally there for a pretty good... [LB306]

JOE SMITH: Well, you're in there for quite awhile, but you're still subject to all the executive. [LB306]

SENATOR ASHFORD: (Laugh) No. No, I appreciate your...I think you're giving great, great comments and I'm learning from this. I have a question and I'm going to follow up with Senator Coash's comments. But first, Senator Lautenbaugh, if you'd... [LB306]

SENATOR LAUTENBAUGH: Thank you, Chairman Ashford. [LB306]

JOE SMITH: Yes, sir. [LB306]

SENATOR LAUTENBAUGH: Thank you, sir, for testifying today. We just heard a conversation about the fact that there are people that are convicted for first-degree murder that are out in the general population. If they're not on death row, isn't that where you'd expect to find them? [LB306]

JOE SMITH: That's what I understand. I understand that somebody comes off death row, they are in general population. And they have jail standards. They have all kinds.

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You should talk to one of the wardens and ask, what are your constraints, and they'll tell you. [LB306]

SENATOR LAUTENBAUGH: Are you... [LB306]

JOE SMITH: Now I'm not saying that's the only reason to support the death penalty and that's not... [LB306]

SENATOR LAUTENBAUGH: Right. [LB306]

JOE SMITH: ...my main reason but...I'm sorry. [LB306]

SENATOR LAUTENBAUGH: Are you familiar with the layout of the prison? [LB306]

JOE SMITH: I am familiar with the layout of LCC, I've been through that, and to some extent the old pen. [LB306]

SENATOR LAUTENBAUGH: Is it set up that all these individuals could be kept in isolation if they were sentenced to life without possibility of parole? [LB306]

JOE SMITH: I have been to...where they have death row and some of the control units, particularly one of the control units at the old pen which was in the basement and it was a circle, and none of those provided for that type of, you know, 24-hour being alone, being watched type thing. [LB306]

SENATOR LAUTENBAUGH: We've heard a lot about the cost of this. What would the cost be of making that possible? You probably have no basis to answer and I apologize but... [LB306]

JOE SMITH: Well, I assume what it means is you have to be one person watching one person all the time, or you lock somebody up in a room all the time. We had an...not we had an issue but I was trying to think, one of the other people mentioned today, people in death row have TV and TV are like baby-sitters. They give them rewards so they don't do it (inaudible). We had some angry people in Madison County not too long ago because one of our murderers was in watching and it came out that he eats cheese popcorn and watches subscription prize fights on death row. But...and you talk to the warden, I did: Hey, Joe, what are we going to do? We can't watch these guys all the time. We have constraints. [LB306]

SENATOR LAUTENBAUGH: We heard testimony or a questioning, I guess, and the fellow was questioning of you regarding the fact that some counties are in better position to afford this than others of prosecuting a capital case, if you will. [LB306]

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JOE SMITH: I believe that. But I also believe it shouldn't be that way. It can be changed. You can get...do like we did with the defense, maybe have district attorneys, whatever. Our system has been changed a lot since Ring, Apprendi, LB1. It has been changed and I think, I really think that every prosecutor in this state wants to do the right thing. I know some case in particular where money was an issue. And one guy is on death and there was money an issue in that case. But I don't think that's the guideline used on how we measure justice and how we treat victims and how we punish people who enjoy killing other citizens. [LB306]

SENATOR LAUTENBAUGH: Thank you, sir. [LB306]

SENATOR ASHFORD: You know, it's late, Joe, and first of all, I think...I appreciate your comments, I think your candor and Don's candor on the prosecutorial side. I mean I think I agree with you, I believe you. I mean I think you do absolutely all you can do under the law, and you got to follow the law and I agree with you. I just want to follow up. We struggled with this issue last year. We struggled with the idea of how do you get to the worst of the worst, how do you get to the cases that are so, so terribly heinous that there is no other option other than the death penalty. I mean that's something we struggled with mightily last year... [LB306]

JOE SMITH: Yeah. [LB306]

SENATOR ASHFORD: ...and you remember that. I mean... [LB306]

JOE SMITH: And I think our system now is designed to... [LB306]

SENATOR ASHFORD: It's getting there but maybe, maybe not. But I mean there is no real way to predict, and I've looked at this, this is my seventh hearing on this issue, looked at this for years, I mean, but not in any great depth like you have and I've never experienced what you have. But it seems to me that it is hard, not impossible to predict what someone is going to do in prison. It's possible maybe in some cases to do that. In your case, how many aggravators did you have in your...? [LB306]

JOE SMITH: We had five deaths on each. On Sandoval, he had 4 aggravators per death, so he had 20. The other ones... [LB306]

SENATOR ASHFORD: Was that per death? [LB306]

JOE SMITH: Per death, yeah. [LB306]

SENATOR ASHFORD: So it was five aggravators and four per death. [LB306]

JOE SMITH: Per person. [LB306]

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SENATOR ASHFORD: And what were the aggravators in that case? Do you recall?
[LB306]

JOE SMITH: Well, there was...I'll take Sandoval first off because he only had four: and...was another person killed, was it to conceal the identity of another person, heinous was one, and was somebody else jeopardized, because they had shot...they had...one stray bullet hit a Burger King across the way and they tried to kill people coming in the bank. The other two, not Sandoval but Vela and Galindo, both got an additional aggravator for prior violent criminal history and the only evidence we did on that was the murder of Lundell. We submitted that so we had to essentially prove up a homicide case and a homicide case. Lundell, we didn't find that body till March. I did not prosecute him separately because I didn't want to delay, obviously, my first trial and I was able to use it as an aggravator. Later on, Sandoval admitted to the Lundell death so he essentially caught up with Vela. [LB306]

SENATOR ASHFORD: So in all the cases there were three or more aggravators, or am I miscounting? [LB306]

JOE SMITH: In all the cases there were 4, 4 per death; in 2 of them there were 5 per death, so 20, 20, and 25, if you multiply victims by death. And keep in mind... [LB306]

SENATOR ASHFORD: And those were...and those were proven beyond a reasonable doubt in all. [LB306]

JOE SMITH: As was the aiding and abetting instruction. The aiding and abetting instruction required us to prove, say, for example, Vela did not kill Sam Sun. We had to prove that he knew Sandoval intended to kill, that the killings were, you know, prearranged or had planned. So that was a...that was a tough part of it. [LB306]

SENATOR ASHFORD: Okay. Senator Lathrop. [LB306]

SENATOR LATHROP: Can I ask you one more question? [LB306]

JOE SMITH: Sure. [LB306]

SENATOR LATHROP: When we were looking at LB36, I'm just going to pick your professional judgment, there was also a change to the competency. Do you remember? Did you read LB36 before you got here? [LB306]

JOE SMITH: I honestly don't recall seeing something about competency. I saw a draft...
[LB306]

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SENATOR LATHROP: Well, it talked about competency and they set up a commission and if two or more members of the commission decide the person is competent, in other words, you could have two people say, yes, he's competent, and one person say no, then you can put him back on a date for execution. And given that we're dealing with criminal law and beyond a reasonable doubt and the standards that the courts have enunciated over the years and the strict requirements for death, do you think we're okay constitutionally by allowing two of three people to make a judgment about someone's competency to be executed? [LB306]

JOE SMITH: Well, I haven't read that part but I think I can comment on it. Remember years ago on a three-judge panel it did not have to be unanimous? I think Sheets came out, there was one dissent. Then later on, I forget the case, the Supreme Court ruled the three judges have to be unanimous, just like a jury. That was on constitutional grounds. I think competency at this trial stage is a...is handled at the trial stage and that's where the constitutional aspect comes on. I think you have a statutory remedy, you don't involve the constitution, because you're doing another remedy. So whether you make it two of three or one of three... [LB306]

SENATOR LATHROP: This, if I'm reading it right, has to do with competency to be executed. In other words, we're not going to execute somebody who's incompetent. We wait for them to be competent. And you think we're okay, if that provision remains and LB36 goes to...becomes law, two of three commissioners who conclude the person is competent is enough. [LB306]

JOE SMITH: I think the way you've described it, it's a legislative remedy or procedure that does not affect this. Constitutions would not require unanimity. You can talk to Kirk. [LB306]

SENATOR LATHROP: And I guess I'm going back to your observation that we have...when we did three-judge sentencing panels, all three of them had to agree. You don't think that we have a similar requirement with respect to these people? [LB306]

JOE SMITH: Not in a statutory type issue, no. [LB306]

SENATOR LATHROP: Okay. [LB306]

JOE SMITH: And I think, and I'm really not sure if the Supreme Court ruled on state constitution grounds or federal constitution grounds when it went to the three-judge thing. [LB306]

SENATOR LATHROP: All right. [LB306]

SENATOR ASHFORD: Thank you, Joe. [LB306]

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JOE SMITH: Thank you. [LB306]

SENATOR ASHFORD: Any other opponents? Mr. Sun. [LB306]

BILL SUN: I'm Bill Sun. I really only want to talk about two points. I'm not going to argue the whole morality of the death penalty. I would just like to start by saying that I do agree with Senator Council, and I think Senator Chambers said it perfectly when he mentioned that the system is the problem. But that's going to remain whether there's a death penalty or not. The system is the problem, I understand that. It is unfair. I think we could be spending better use of our time trying to fix the system to make it more equal across the board. You know, and the second point I want to make is, and Senator Lathrop brought it up, the cost. I think abolishing the death penalty is a slippery slope, especially if we use the argument that it is cost effective, because prices increase, costs increase. Who's to say in 20-30 years that a natural life sentence would be too costly to maintain? I believe, I truly believe it is a slippery slope. If we start at the top, it is only a matter of time before we start working our way down to try and meet budgets and just blatantly say we're just trying to cut costs, we're trying to make the budget. The other thing I wanted to bring up, and I may have heard incorrectly from the individual who was incarcerated in Illinois when he said that when he was in general population it was maddening, just the natural life sentence. Who or what is to stop someone else from saying that that is cruel and unusual punishment; that the thought of being locked away in a cell for life is not right? As far as solitary confinement, it goes back to cost. How can you say that the death penalty costs too much but then we need to make individual cells and add more guards to maintain a one-on-one, one-on-two just to maintain order in a prison? I think we really need to make sure that we understand why you advance this bill. If it's a moral issue, I can't argue against that. That is your choice. But if you're going to argue costs or, you know, blame the system, then there are other ways to do it. We need to fix the system. And we need to be very aware of the slippery slope of arguing cost when it comes to punishment for crimes. That's all I have. [LB306]

SENATOR ASHFORD: Thanks, Mr. Sun. And I'm truly impressed by your comments and the way you've presented them here and before when you were here last year, so... [LB306]

BILL SUN: Thank you. Thank you, Senators. [LB306]

SENATOR ASHFORD: Neutral? I mean we could have taken neutral first (laugh) I was...but you've stayed and... [LB306]

MARK YOUNG: Yeah. [LB306]

SENATOR ASHFORD: ...so now it's your turn. It's good to see you. [LB306]

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MARK YOUNG: Good afternoon or good evening, Senator Ashford, members of the committee. My name is Mark Young. I'm the Hall County Attorney. I came here today on LB36 on a promise to some victims' families that I would come and ask that be sent to the full Unicameral for consideration. In past years, I've testified that I feel like I'm your foot soldier and you tell me what path to march down and I'm going to go there as fast as I can. That's still my position. If you...and I want to actually echo what was just said. In my experience, if you choose to advance or to debate whether or not to have a death penalty, it should be probably done solely on moral grounds. Because I'm here to tell you, in my experience of roughly 20 years of prosecuting and another 5 of defense, in my experience, cost is going to be the same. In my murder trials, I don't think the presence or absence of the death penalty has made any difference in cost. Ironically enough, at 8:45 this morning I was on a postconviction pretrial hearing on a gentleman who pled guilty not once but twice to the same second-degree murder. He was on his third postconviction. He's done one federal habeas. That murder took place 16 years ago, I believe. So in terms of delay and cost, I just would urge you, I think it's a disservice to the public to think it's going to change much on that, but it's an issue, either we need the ultimate sanction for the ultimate crime, or you want to take us out of the death business. But in terms of cost, time, it's not going to make any difference. Thank you. I'd answer any questions you might have. I know it's late. [LB306]

SENATOR ASHFORD: None other, other than to...your comments last year and your analysis of the issues were very helpful and we appreciate you coming back. Thank you. [LB306]

MARK YOUNG: Thank you. [LB306]

SENATOR ASHFORD: Any other neutral testifiers? That concludes the hearing. (See also Exhibits 21, 22) Senator Council, do you wish to close? [LB306]

SENATOR COUNCIL: Just a couple of comments. Would it be allowed to... [LB306]

SENATOR ASHFORD: You better... [LB306]

SENATOR COUNCIL: Oh, he'll have me go there. (Laughter) [LB306]

SENATOR ASHFORD: Yeah. Well, you can comment there, but you can't close there. [LB306]

SENATOR COUNCIL: Okay. No, I'm going to close. Mr. Chairman, members of the committee, first of all, I'd like to thank all of the members of the public who came and provided testimony, either in favor or against LB306. That is exactly what is needed as we address this very serious issue facing our state. We need to have this kind of open

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debate and an opportunity to seriously consider all aspects of any action we take with regard to the death penalty, and that's why I am urging the committee to advance LB306 to the floor, so that we can continue to debate the matter. I truly appreciate Mr. Sun's testimony and Mr. Smith. And in response to the Hall County Attorney, if you listen to my opening statements with regard to the reason I introduced this bill, and I want to make that clear, this was a bill that as soon as I decided to run for the Legislature I knew that if I were elected I was going to introduce, because I have always been opposed to the death penalty. And if you were to ask a particular member of my family, there has been a heated debate on that issue as long as we have been adults, and I will maintain my moral position in opposition to the death penalty. And we've heard some rather compelling testimony today, but what stuck with me was the statement from a respected member, longstanding member of the judiciary in this state, former Judge Reagan, who characterized the death penalty as state sanctioned revenge. And if you look at that statement, it, in my opinion, clearly capsulizes the issue as a moral issue, one of whether the state should be engaged in revenge and sanctioning revenge, taking a human life. And I submit to the committee and to those who may be in opposition to LB306 that that's not where we want to be or should be, as citizens of the great state of Nebraska. And I urge you to advance LB306. [LB306]

SENATOR ASHFORD: Thank you, Senator Council. And thank you all for your attention and your contribution to this matter and these issues. [LB306]

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Disposition of Bills:

LB36 - Placed on General File with amendments.

LB306 - Placed on General File.

Chairperson

Committee Clerk