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Judiciary Committee  
February 05, 2010

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[LB771 LB840 LB886 LB968 LB984]

The Committee on Judiciary met at 1:30 p.m. on Friday, February 5, 2010, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB840, LB771, LB886, LB984, and LB968. Senators present: Brad Ashford, Chairperson; Steve Lathrop, Vice Chairperson; Mark Christensen; Colby Coash; Scott Lautenbaugh; Amanda McGill; and Kent Rogert. Senators absent: Brenda Council. []

SENATOR ASHFORD: Everyone, welcome to the Judiciary Committee. My name is Brad Ashford. I'm joined today by, as I am most days, by Colby Coash from Lincoln; Steve Lathrop from Omaha; Amanda McGill from Lincoln; LaMont Rainey is legal counsel; and Christina Case is my committee clerk. So with that, we are going to have five bills today. The first one is LB840, and Senator Lautenbaugh has indicated that you would be introducing the bill so. []

BRENT SMOYER: I was going to say, he sent the B squad this time around; I apologize. Get the backup. Mr. Chairman, members of the committee, my name is Brent Smoyer, B-r-e-n-t S-m-o-y-e-r. I am legal counsel to Senator Scott Lautenbaugh. I'm here to introduce this bill on his behalf. It's really a very simple bill. LB840 just amends the criminal attempt statutes, Section 28-201 to include 1(c) and 1(d) felonies. This was brought to us by the County Attorneys Association which I believe there is someone here to explain this in more detail, but it's just a minor tweak really. The first class 1(c) and 1(d) felonies were created back in 1989. Unfortunately, the attempt statute was not amended to encompass these new crimes, and over the years, the number of these crimes has grown as far as, well, being enacted by the Legislature. And as the law stands right now, there are certain gun and drug charges which prosecutors can't file for. And so, basically, we're just fixing it so the prosecutors can properly attack these crimes, can properly prosecute these crimes and deal accordingly. And that makes a simple change and I guess if we have any questions I can try and answer them. Otherwise, I do believe we have somebody here from the county attorneys. [LB840]

SENATOR ASHFORD: So, Brent, I mean, so you can't file an attempt on a 1(c) and 1(d). [LB840]

BRENT SMOYER: Right now you cannot. It's just kind of a tweak we overlooked. [LB840]

SENATOR ASHFORD: That is something I did not know. All right, any questions of Brent? Seeing none, okay. Someone will be here from the County Attorneys Association? [LB840]

BRENT SMOYER: Thanks. We'll waive closing. [LB840]

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SENATOR ASHFORD: Good afternoon. [LB840]

SHAWN EATHERTON: Good afternoon. I'm Shawn Eatherton. I'm the president of the Nebraska County Attorneys Association, and my day job is actually the Buffalo County Attorney. We are in support of this particular bill because for the last couple of years we've kind of been sitting without the ability to prosecute these as attempts. Historically, old school, we always could say, well, an attempt basically knocked you down one level. That's the way we did our prosecutions. Well, the last few years, as the Legislature has evolved and added certain crimes, particularly in the 1(d) and (c) and the additional 1's, there is no longer an attempt to have that ability. So not only does it hamper us in our prosecutions, but it also, frankly,--I'm not speaking for defense attorneys, it certainly puts them at a disadvantage in trying to negotiate with us, so, frankly, we think it's a fix that needs to be done. [LB840]

SENATOR ASHFORD: So there's no crime for an attempt to deliver a firearm to a minor? [LB840]

SHAWN EATHERTON: I'd have to look specifically at the crime, but... [LB840]

SENATOR ASHFORD: Yeah, but theoretically, there wouldn't be. [LB840]

SHAWN EATHERTON: Exactly, exactly. It wouldn't be an attempt if you took a substantial, made a substantial step toward it. [LB840]

SENATOR ASHFORD: So even if it was interrupted in some way, that you couldn't charge it? Okay. That's good information. Thanks, Shawn. [LB840]

SHAWN EATHERTON: Thank you. [LB840]

SENATOR ASHFORD: Any questions of Shawn? I think you're in good shape. Thanks. [LB840]

SHAWN EATHERTON: Thank you. [LB840]

SENATOR ASHFORD: Any other testifiers on this bill? Seeing none, Brent. [LB840]

BRENT SMOYER: I'll waive. [LB840]

SENATOR ASHFORD: Okay. Speaker Flood, I believe you're next. You are next. LB771. [LB771]

SENATOR FLOOD: (Exhibit 1) Thank you, Senator Ashford. My name is Mike Flood, F-I-o-o-d. I represent District 19. This bill is very similar to the last one. It's made up of

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three parts: technical corrections suggested by Bill Drafters; number two, an amendment to the criminal attempts statute that is exactly the same as Senator Lautenbaugh's LB840; and finally, the provisions of a bill I introduced last year, LB38. Regarding the technical corrections suggested by Bill Drafters, these are in Sections 1 and 10 through 18 of the green copy. Most are grammatical changes; others update cross references or insert statutory references that were inadvertently left out. Regarding the attempted crimes, statute Section 28-201, the amendments that were brought to my attention in the interim were the same that Senator Lautenbaugh included in his LB840 which is also before you today. Since you just heard that testimony regarding those changes, I don't need to repeat how this amendment works. Senator Lautenbaugh's provisions are actually more accurate than mine, and I have an amendment that makes mine just like his if you choose to use this bill. The more substantive sections of this bill are in Sections 3 through 9 of the green copy. The changes here would add DHHS employees providing behavioral health services to a list of those folks who are protected by Nebraska's assault on officers statutes. Individuals who engage in criminal conduct prohibited by these sections would thus be subject to a felony charge. I've introduced similar bills in the past and in my prior introductory statement, I described an incident at the Norfolk Regional Center where one of the staff members was literally beaten within an inch of her life. She was bloodied, broken, and bruised and to this day still suffers from the attack. Now the issue that I think you have to wrestle with here is, can these patients of a regional center form the requisite intent under a M'Naghten standard to know what they're doing? Five years ago, when we were all behavioral health patients, I would say this is an inappropriate bill. Today, the Norfolk Regional Center, like the Lincoln Regional Center, has a high number of sex offenders who are not suffering from a bipolar disorder or schizophrenia. They know right from wrong and they have the ability to form the intent to strike a nurse or med aide or technician. So I would ask that you put this in place. What happened in that assault a couple of years ago in '06, the defendant was charged with assault in the third degree, a Class I misdemeanor, sentenced to a year which is the maximum, served five months and was back at the facility and compromised the safety of folks there. I do believe we owe these people who we put on the front lines to care for patients at a regional center this type of protection so that if somebody does assault a worker at a regional center, they suffer the consequences of a Class IV felony. It also has in here a provision that includes YRTC. Scot Adams, director of the Behavioral Health Division of DHHS testified last year in support of LB38 and I understand he has provided a letter of support for LB771 this year. I understand that Voices for Children objects to the inclusion of the YRTC facility in this bill and protecting those staff members. I would remind you that assault on an officer is assault on an officer if you're 17 and the prosecutor or the county attorney has the discretion to charge someone with assault on an officer, which is a Class IV felony, or not. And, obviously, the judge has the ability to determine whether or not this individual or the defendant should be tried in the juvenile court or in a criminal court. We have 17-year-olds in this state that can be violent. We have 16-year-olds in the state that can be violent. And in this situation, it is, while it's rehabilitation, it's a corrections

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atmosphere. I think we should extend the same protections to those frontline workers at YRTC. I understand the concerns that the Voices for Children may have, but I would remind you there's still a whole process of the county attorney making the judgment in their discretion. Also, the judge's discretion as to whether or not that case should go to juvenile court. So there are still protections built into the system; it's not an automatic charge. And if I were a defense attorney of a patient in a regional center or of a youth in a juvenile court situation at YRTC, I would certainly make, I think, arguments as to the intent formed by the individual and in the juvenile's case, whether or not that should be heard in the juvenile court or the adult court. And we should equip our county attorneys with the ability to use their own discretion in making those decisions. So I would hope that you really consider this bill. I am looking to some other members of the Legislature, maybe prioritize LB771 this session and, hopefully, you will look at it favorably. Thank you. [LB771]

SENATOR ASHFORD: Any questions of Speaker Flood? [LB771]

SENATOR LATHROP: Maybe just one. Mike, the youth still has to commit a serious bodily injury in order to make this a felony? [LB771]

SENATOR FLOOD: Well, it would be third-degree assault today without the use of a weapon or beating somebody within an inch of their life. I mean, if you're not using a weapon, I think more often than not it's third-degree assault, Class I misdemeanor, one year in jail, \$1,000 fine or both. So, you know, the assault could be as simple as one punch or one slap or it could be repeated brutal blows to the head. I mean, I think all of that probably fits within the third-degree assault. [LB771]

SENATOR LATHROP: So right now it's...right now what you're changing is if there's a kid in a youth detention center and he...how about if he spits on somebody? [LB771]

SENATOR FLOOD: I have been trying to get that included as a provision of an assault on an officer, but right now it is technically not an assault. [LB771]

SENATOR LATHROP: Okay. So then it slaps somebody at the youth detention center. Currently, it would be a Class I misdemeanor and you would make it a Class IV felony? [LB771]

SENATOR FLOOD: Right. [LB771]

SENATOR LATHROP: Okay. [LB771]

SENATOR FLOOD: And I will say if the committee has issues in the YRTC, I believe we should include that protection for them. My primary purpose are these regional center employees working with sex offenders that know the difference between right and

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wrong. That's my priority in terms of what brought the bill to my attention. I can see it both ways in YRTC, but I still think it makes sense policywise to have that in place for them. [LB771]

SENATOR LATHROP: And the other question from me is, your LB771 has everything Senator Lautenbaugh's LB840 has with a little bit more. [LB771]

SENATOR FLOOD: Yes. It has the... [LB771]

SENATOR LATHROP: Okay. [LB771]

SENATOR FLOOD: ...assault stuff and it cleans it up. I also have the amendment. [LB771]

SENATOR LATHROP: All the attempted stuff Lautenbaugh's bill covers. [LB771]

SENATOR FLOOD: And I have an amendment that I think would need to be considered by the committee to make mine as good as Senator Lautenbaugh's in his green copy. His green copy has the right language; mine needs a little... [LB771]

SENATOR LATHROP: Tweak. [LB771]

SENATOR FLOOD: ...a little extra tweak to make it as good as his. So I'd offer that to the committee if I could. [LB771]

SENATOR ASHFORD: Any other questions of...yes, Senator Coash. [LB771]

SENATOR COASH: Thank you, Chairman. Senator Flood, it looks like what you're after here is protection of workers through a deterrent... [LB771]

SENATOR FLOOD: Yes. [LB771]

SENATOR COASH: ...of enhancing the penalties. You obviously think that will work otherwise you wouldn't have brought the bill, but have you looked at whether or not, I mean, increased penalties? My concern is, these guys that will do these things, especially those with mental health, they're not really paying attention to the nature of penalty for committing these crimes. They're going to do that. And I'm just wondering if you've worked with people in the mental health field that have informed you about how they might...how people serving...I don't want to say serving time at the regional center because sometimes you're not serving time; sometimes you're there for treatment, but people who are at regional centers respond to increased punishment. And if it's healthy or how they see it from that perspective. [LB771]

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SENATOR FLOOD: Well, thank you, Senator Coash. I think the first thing I would say is our regional center system has made great strides in the last five years to reduce the use of restraints. We no longer restrain people to the extent that we used to. We have what's called the MAT training system where I think our use of restraints is almost nonexistent anymore because our staff is much better trained on how to diffuse a situation instead of resorting to simply restraining patients. I think the best case they can make for making a Class IV felony is if somebody is going to act out in that way and cause that type of harm or injury, removing them from the facility and placing them in a correctional facility is the right move so that the patients and the staff are protected at the regional center. The corrections system has a lot different method of ensuring good behavior and compliance that regional centers don't use right now. And your question about, is this an incentive to go back to prison instead of the regional center? Well, if that's their reason for going, they belong in a correctional situation. But like the Norfolk Regional Center, if we have a patient that acts out in this way or they see those types of behaviors, they can transfer the individual to the secured unit at LRC where they're placed in more of a secure special unit, and that has helped us greatly by transferring those patients down there. So I think staff are trained to see those kind of behaviors and hopefully, we get them to a secure unit before we have them up on a floor. And what concerns me is, you know, sometimes in a regional center system you've got somebody that's toward the end of their career; they're in their early sixties; they're looking forward to retirement; they've served the state very well, and they have somebody that becomes very aggressive. And there's got to be a cost or a penalty to help anybody that's assaulted. [LB771]

SENATOR COASH: It's dangerous there and I think I mentioned it last year when you brought LB36. We had right here in Lincoln a person at the regional center kill one of the doctors, and his stated motive was going back to corrections. And he's in corrections now because he's ended someone's life, so these are dangerous places to work. I can agree with that. [LB771]

SENATOR FLOOD: We had a psychiatrist killed in 1995 at the Norfolk Regional Center. I don't envision this being used on folks committed under LB1083 to a regional center. I don't...if you're seriously mentally ill, I think it's very questionable that you should be charged with assault on an officer or, you know, a Class IV felony. But I do think if you know the difference between right and wrong and you're a sex offender, you should have the penalty enforced, so. I see what you're saying. [LB771]

SENATOR ASHFORD: Your priority is on the adult side, not the juvenile side. [LB771]

SENATOR FLOOD: Right. I think the folks at YRTC who I've taken up their cause as well because of this bill would really appreciate that extra protection. Just because someone is 17 and not 20 doesn't mean they still don't have the intent to harm somebody and shouldn't be punished for that. And I think the county attorney knows

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where the line is, especially the county attorney that's in this room from Buffalo County. He would know exactly the kinds of situations that they have in Kearney. [LB771]

SENATOR ASHFORD: Okay. Any further questions? Thanks, Mike. [LB771]

SENATOR FLOOD: Thank you. [LB771]

SENATOR ASHFORD: Proponents. [LB771]

JERRY HOFFMAN: Chairman Ashford, committee members, my name is Jerry Hoffman, J-e-r-r-y H-o-f-f-m-a-n. I am with the Nebraska State Education Association. The association represents the teachers who are in the YRTC units that Senator Flood was mentioning in his opening remarks. We appreciate Senator Flood bringing forward this legislative bill as it does impact the teachers in the YRTC units probably more so than it does for the teachers that are in the Department of Correction units. SCATA, which is the State Code Agency Teachers Association, is the bargaining agent for 72 teachers that are in these facilities, the YRTC facilities. There is in the contract of SCATA, it's a contract between SCATA and the state of Nebraska, a safety provision. It's Article 14 in the contract. And it identifies steps taken by a staff member, in this case a teacher, in the event that an assault or physical restraint is required for a student. The teacher should notify their immediate supervisor or their designee who in turn notifies the appropriate authorities. In most cases it is the county attorney, and reporting of the assault will be in writing on the proper form. The employer, as may be appropriate, will provide legal advice to the teacher. That tends to come from the Nebraska State Education Association with our legal counsel as they are members. The teacher shall suffer no loss of wages, leaves, or benefits when involved in a school-related legal proceeding. Oftentimes what will happen in this situation is a teacher will be placed on administrative leave for a period of time with pay until an investigation is conducted, oftentimes by Child Protective Services, at least in the cases that we have dealt with. And the employer acknowledges that safety is of prime importance and will take reasonable measures necessary to provide a safe work environment. While that's in the contract, the coverage that's provided in LB771 provides more stringent punitive efforts toward the 17-, 18-year-old students who are in the YRTC facilities, and it is for that reason that we're rising in support of LB771. With that, I would be able to answer any questions you might have. [LB771]

SENATOR ASHFORD: Any questions? [LB771]

SENATOR LATHROP: Can I just ask one quick one? [LB771]

SENATOR ASHFORD: Yes. [LB771]

SENATOR LATHROP: Jerry, is this happening a lot? Are we fixing a problem that's

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widespread? [LB771]

JERRY HOFFMAN: It happens most frequently, Senator, in Kearney, probably because there are more teachers in the Kearney facility than at the... [LB771]

SENATOR LATHROP: Okay. And I don't want to take a lot of time with this question, Jerry. [LB771]

JERRY HOFFMAN: Yup. [LB771]

SENATOR LATHROP: Here's the second part of it then. If it's happening in Kearney, can you describe the extent of the assault? Is this just somebody slapping or do we have young people jumping up and repeatedly beating teachers or what's happening at the...? [LB771]

JERRY HOFFMAN: I would say that the offense is not a high frequency offense throughout a school year. For example, an industrial technology teacher at YRTC in Kearney has been assaulted in the last two years multiple times by one or more students. Oftentimes when you're industrial tech, you're holding a board, you're doing something with wood, you're doing...you have tools available to you that can be used as instruments to assault a teacher with and have been used in assaults. That's the student end where there have been assaults upon a teacher. There is also an issue raised here that is a little murkier, and that's what a teacher does to defend him or herself in the event that they're being approached by a student who is going...that is self-defense in the event that an assault occurs. And that's usually what happens when a teacher is placed on administrative leave for investigative purposes to ferret out whether or not this was an assault being brought upon that teacher or a teacher was acting... [LB771]

SENATOR LATHROP: This doesn't change any of that though, does it? [LB771]

JERRY HOFFMAN: It does not, although I think that it helps to address the issue that particularly with students who are repeat offenders, and there have been a few at Kearney that it at least heightens or elevates the result of...the consequence of that behavior. [LB771]

SENATOR LATHROP: Okay. Thank you. [LB771]

SENATOR ASHFORD: And we don't have a secure youth facility in the state. Many states do; we don't. [LB771]

JERRY HOFFMAN: I'm sorry, Senator? [LB771]



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SENATOR ASHFORD: We don't have a correctional facility for youth in the state. [LB771]

JERRY HOFFMAN: That's right. [LB771]

SENATOR ASHFORD: I would be interested in getting some information on the case you mentioned involving the shop teacher, and I don't need to know the names if they're sensitive, but I would like to get the... [LB771]

JERRY HOFFMAN: We can provide a general description of the circumstances. [LB771]

SENATOR ASHFORD: Or I'd like to get some reports... [LB771]

JERRY HOFFMAN: Sure. [LB771]

SENATOR ASHFORD: ...reports on that particular incident. [LB771]

JERRY HOFFMAN: Sure. [LB771]

SENATOR ASHFORD: Okay. Okay, thanks. [LB771]

JERRY HOFFMAN: Thank you. [LB771]

SENATOR ASHFORD: Hey, Todd. How are you? [LB771]

TODD RECKLING: (Exhibit 2) Good afternoon, Senator Ashford and members of the Judiciary Committee. My name is Todd Reckling, R-e-c-k-l-i-n-g, and I'm the director for the Division of Children and Family Services, and I'm here today to testify in support of LB771. This bill will amend the current Nebraska law regarding protection for employees of the state from assaults, terroristic threats, kidnapping, and false imprisonment. The proposed bill will add to the current law employees of the Department of Health and Human Services who you've heard work in the regional centers or the YRTCs. No such provision currently exists. This bill will establish parity for staff in the 24-hour facilities operated by DHHS with workers holding similar job classifications, duties, and functions as those in the State Department of Correctional Services. It will clarify for county attorneys the responsibility to file felony charges against an adult or juvenile who commits such an assault, makes such terroristic threats, or kidnaps or falsely imprisons DHHS staff during the course of performing their duties in our facilities. Many of these individuals being treated at the regional centers have been incarcerated in the correctional system, as you've heard. In 2008, there were three such individuals at the Tecumseh State Correctional Facility who were then held at the Lincoln Regional Center for restoration of their competency. Once competency was restored, they were

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returned back to the Tecumseh facility. These individuals were at the highest level of confinement at Tecumseh, yet at the Lincoln Regional Center, the employees that had direct contact with them in LRC, weren't afforded the same protection. The employees of the regional center were equally at risk for serious injury as those staff at the Tecumseh Correctional Facility. In 2009, there were 85 assaults at LRC and 2 assaults at the Norfolk Regional Center. Approximately 10 percent of those assaults resulted in serious injury to our staff. Since the protection of the current law does not include DHHS staff at the 24-hour facilities run for juvenile facilities as delinquents, we also have assaults that happen there and kids under the age of 16 do, at times, fall into that category of the assaults. If a juvenile commits an assault that currently can only be classified as Class III misdemeanor, as Senator Flood mentioned, this type of conduct creates a greater risk for our staff at the facilities as we're trying to lead a therapeutic environment. At YRTC-Geneva in 2008 and 2009, we had 57 staff who experienced serious physical assaults or other types of assaults or experienced threats of violence. And 2 percent of those actually ended in serious injury to staff. At YRTC in that same year, we had 84 incidents reported and, overall, there was 43 staff that actually were physically assaulted; 10 percent of those 43 sustained serious injury. So in closing, it's expected that by increasing the consequences for adults and juveniles who commit these identified crimes against our staff, we do believe that the numbers of these types of crimes will be reduced and we will be able to provide a safe environment both for the youth and the kids. So thank you. [LB771]

SENATOR ASHFORD: Todd, this is very...just a second...go ahead, Senator Coash, but I want to...this is very alarming information. I think that the concern that we've had on this committee is that we don't have a facility in our state to properly take care of these kids who...children, juveniles, I'm speaking primarily of juveniles now at YRTC, that if this kind of activity is going on at this level, I think we need to examine who's going in there and should there not be other types of facilities that are more correction-based. [LB771]

TODD RECKLING: Keep in mind, Senator, that the Omaha facility does take youth that are adjudicated and... [LB771]

SENATOR ASHFORD: But you get my point. [LB771]

TODD RECKLING: Absolutely. But for those kids that go through the adult prosecutorial side and are still juveniles,... [LB771]

SENATOR ASHFORD: Right. [LB771]

TODD RECKLING: ...they are housed and... [LB771]

SENATOR ASHFORD: I know that but you've... [LB771]

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TODD RECKLING: But, yes, it is of concern for us. [LB771]

SENATOR ASHFORD: This is a... [LB771]

TODD RECKLING: That's right. [LB771]

SENATOR ASHFORD: I'm not criticizing you. [LB771]

TODD RECKLING: No, no, no, but it is an issue for us, yes. Our staff are dealing with some of the toughest juveniles and when situations like this happen, under the current law, all we can do is a misdemeanor. [LB771]

SENATOR ASHFORD: Well, I think this is to me...and then, Senator Coash, I will certainly defer to you here and you know more about this than I do, but this is troublesome not because of anything you're doing or not doing, but it's troublesome that we don't have a...and I've thought this for quite a while, we don't have a facility for youth who are prone to take these kinds of measures against, you know, teachers or staff. So maybe over the interim we can take a look more in depth at the nature of these cases and these kids and find is there...are we...is this another great challenge we have in the corrections area and the treatment area to try to find other alternatives? [LB771]

TODD RECKLING: As you know from LB800, I'm more than happy to work with you and share information. [LB771]

SENATOR ASHFORD: Right. Right. And you've been very helpful and I know you will be, but I think this raises that issue. Yes, Senator Coash. [LB771]

SENATOR COASH: Thank you, Chairman. Thanks, Todd. I'm going to ask you a question as an expert on kids because that's what you do. [LB771]

TODD RECKLING: I don't know if I qualify as an expert but I'll answer your questions. (Laugh) [LB771]

SENATOR COASH: Okay. Well, you..do you think deterrence is a factor in decision making for kids? [LB771]

TODD RECKLING: You know, I think it depends on the child and it's probably not the answer you want but, absolutely, I do believe that the kids especially in a facility know what happens and what can happen to their peers. So if they see that one of their peers is repeatedly causing problems and if it doesn't rise to the level, like Senator Flood explained, where it can go to serious bodily injury and get charged as a felony, the most that can happen is a repeat misdemeanor. And the most that can happen in the juvenile

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justice system the way it is if they're not charged as an adult is a recommitment or a continued stay at Kearney, so there's no further incentive. What this allows is the county attorney to have another tool in their tool chest to go felony. And I understand and appreciate Senator Lathrop's comment. If we don't want to use this for minor situations, it's still to the discretion of the county attorney that if it doesn't rise to that egregiousness of a serious bodily injury but maybe multiple serious assaults, we can go the felony route. And, yes, I believe that kids will learn and understand what could happen to them in that situation if they did the same thing. [LB771]

SENATOR COASH: Okay. Because if this law were enacted and these kids who, as you've described, continue to get misdemeanor offenses, then all of a sudden they get a felony, they're probably going to be gone. So they don't have the opportunity to share with their peers, now I'm really in trouble. [LB771]

TODD RECKLING: The fact that they're gone is the message. [LB771]

SENATOR COASH: But if they're gone, the peers don't know if they went home or...you know. I would guess that 80 percent of the kids sitting at YRTC have an impulse control disorder or some type of...I mean, ADD, impulse control. And that in and of itself tells me that they're not thinking about consequences and because of their disorder that they're going to act out impulsively, and I am concerned that that impulse will lead to a felony that just makes their situation worse, not better. So I'll just leave it at that, but that's my concern with this, for kids. [LB771]

TODD RECKLING: Sure. And I do appreciate that side of it. And, again, we know that as we're trying to do rehabilitation, that we're going to have situations and it's not to further get them into the legal system and all those situations. I think that is what the committee and Senator Flood pointed out, too, is that this committee has to wrestle with is, you know, we know that people in treatment will have acting out behaviors. It's at the point where it crosses the line and it become injurious to us protecting our own staff or protecting other kids in the facility that we're trying to have those additional tools available. [LB771]

SENATOR COASH: Yeah, I appreciate you...I mean, and Senator Flood, he wants to protect the staff, too, and I support that concept. And I want to...we have a letter of opposition here and so I'm going to read a statement here because I don't know and I'll let you respond to it. And the statement is that YRTC staff are not all properly trained on dealing with youth with severe behavioral issues. And my experience tells me that there's plenty of training that goes on, but since we have this statement in the record, I want you to be able to respond about the training that YRTC staff do get to deal with these extreme behavioral problems on the front end so we don't end up with a potential felony on the back end. [LB771]

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TODD RECKLING: I appreciate the opportunity to respond. We absolutely believe that our staff are very well trained. We have a good training program in place. I'd be happy to share that information with you. And quite frankly, if it wasn't for the good training and the de-escalation techniques that our staff employ, I think you'd see further incidents. And so while that's one person's opinion, you know, I invite somebody to come and see the other side. [LB771]

SENATOR COASH: Fair enough. Thank you, Director. [LB771]

SENATOR ASHFORD: These people are here on...the juveniles, is what I'm primarily concerned with here; they're there on a treatment plan. They haven't been sentenced there. They're there on a treatment plan. [LB771]

TODD RECKLING: They have been committed to the YRTC facility for us to do rehabilitation treatment, you're correct. [LB771]

SENATOR ASHFORD: Under a treatment. So they have...many of them have some degree of behavioral mental health issues. [LB771]

TODD RECKLING: Absolutely. [LB771]

SENATOR ASHFORD: And I guess my concern is, is the same concern we've raised in LB800 over mixing populations of juveniles who have a propensity to be dangerous versus those that don't. And, I mean, do we have...we have teachers in there. Do we have adequate staff to...I mean, it seems to me like you've got an awful lot of assaults. You've got a number of assaults, over 80 assaults, 84 assaults at YRTC. That's a dangerous environment, aren't they, isn't it? (Laugh) [LB771]

TODD RECKLING: Well, again, we obviously are trying to protect the kids as well as our staff. If you look, just quantitywise, too, I think it's important to point out that Geneva's average daily population is about 70, 72, and Kearney's is more like 155 to 165. [LB771]

SENATOR ASHFORD: Right, and that will reflect the different numbers. [LB771]

TODD RECKLING: So volume makes a difference there. [LB771]

SENATOR ASHFORD: But still, that's 84 assaults and 2 percent of which resulted in serious injury. Well, actually, at YRTC it's 10 percent were seriously injured. [LB771]

TODD RECKLING: We definitely deal with some very tough boys and girls at our facilities. [LB771]

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SENATOR ASHFORD: I just...is there some...okay. Well, I think we have a conversation to...and it's the same thing that bothers me about the youth detention centers is we're dealing...we're putting juveniles under treatment plans in facilities with what I'm seeing now from the information and granted it's an aggregate number and it's not sliced and diced, but at least there's a suggestion here that these juveniles are quite disruptive and are assaulting teachers (laugh) and seriously assaulting some. I mean, that seems like a very bad... [LB771]

TODD RECKLING: And we also know...we also heard and we also know that some of the kids there are not...they don't fit in this category. [LB771]

SENATOR ASHFORD: Yeah. Right. [LB771]

TODD RECKLING: So we typically will see some repeat offenders. So if we could somehow deal with those so we can treat the rest of the kids, it would make a tremendous difference. [LB771]

SENATOR ASHFORD: Right, and this...I think what Senator Flood is asking for is not unreasonable under the circumstances here. My concern is, is that maybe we're creating, by not having some other alternatives, an environment that enables some of these activities to occur, and that would be my concern. But we can talk about that at another day. [LB771]

TODD RECKLING: I'll look forward to it. [LB771]

SENATOR ASHFORD: Thanks, Todd. [LB771]

TODD RECKLING: Thank you. [LB771]

SENATOR ASHFORD: Any other proponents? [LB771]

SHAWN EATHERTON: Thank you, again. Shawn Eatherton, E-a-t-h-e-r-t-o-n, County Attorneys Association as well as the Buffalo County Attorney. I mean, I get the opportunity to deal with the people from YRTC-Kearney really every day. And kind of as a side note, and don't hold this against the teachers, my wife is actually a speech pathologist out at the YRTC, so I understand the close proximity that we put our teachers and our staff in with these individuals. As a prosecutor, I see that there's really two levels of people that we have, at least in Kearney. We've got kids, and, of course, all of them, the umbrella is treatment, rehabilitating these people, trying to make these young men be productive members of our society. However, I kind of end up seeing two levels. We've got kids that are sent there that, you know, at least they're somewhat responsive, and we have some pretty hard-core criminals at the YRTC. And if you'd like to come out and see them, I can certainly arrange a tour. In the last 18 months, I've

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had...we've prosecuted somebody. We had some youth who put pool balls in socks and beat a staff member out there. We've had a situation where just...we have right now as a prosecution where we have a staff member with permanent eye damage from an assault. These are...I think they deserve our protections. And do I think it's a deterrent? Yes, I do. Those kids know what our rules are when it comes to escape and they know what the rules are when it comes to assault. And the other thing that this bill does, which I think is really important in helping to maintain the institution or maintain the facilities, are it makes if they assault each other a higher crime. And if you look at all correctional law and correctional facility management, I think you'll find that that's very important and they will know that. But if they kind of lose control and harm each other, they may find themselves no longer there and that's a huge factor in helping to maintain the control of these institutions. I'm in full support of this bill. I think it's been a long time coming. I appreciate the other sides of it, I really do, but I think they deserve it. [LB771]

SENATOR ASHFORD: I'm not sure about that there's another side. I think the...Senator Flood has requested...is responsible under the circumstances. It's the circumstances that are bothering me. We have...we are mixing populations of less severe cases with more severe cases. That's not good policy in a general sense. Now, maybe there's no other option and I have been there, but I...you know, I don't have it on the top of my head exactly how we segregate young people at Kearney or Geneva. But if what's happening is we're mixing serious offenders with...under the guise of treatment plans...and this has always bothered me. It's called...because it's a treatment plan and not a sentence there at Kearney, they're dangerous, they're assaulting teachers and assaulting other juveniles who don't have that propensity, that's a problem. What do you think about that, I mean? [LB771]

SHAWN EATHERTON: No, I agree. I mean, certainly you don't want to teach, you know, people who...you know, who are working toward rehabilitation, teach them bad habits or put them in harm's way either nor should the staff be put in that, so... [LB771]

SENATOR ASHFORD: Right. Right, and I think it was certainly one of the concerns we've had at the juvenile facility in Douglas County is not...no one is intending to make juveniles worse off by going into the youth center, but, in fact, that is what happens, and it's not the county attorney's fault and it's not the fault of the police officers who take them there. It's really the fact that we don't have the kinds of facilities that we need to deal with the different kinds...different levels of issue here. I mean, these juveniles have mental issues, mental behavioral issues, and they're going to strike out and lash out and I'm...anyway, that would be my...not that we're...I don't think one could be necessarily against what Speaker Flood is trying to do. I mean, he's trying to protect citizens and that's a laudable goal. I just wonder if we're not creating an environment where there can be no other outcome. I don't know if it's...may or may not be a deterrence, Shawn. I don't know, but if these young people are in the kind of condition that they're in, some of them, I don't think they're going to be deterred from anything generally. But I don't think

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that's necessarily the reason to do this. You're trying to protect the citizens who work there and put their physical safety on the line to help kids. I get that. But I'm wondering about whether we've got the alternatives in place that we need to deal with kids. But anyway, thanks. [LB771]

SHAWN EATHERTON: Thanks, Senator. [LB771]

SENATOR ASHFORD: Maybe you can help me with this, Senator Coash (laugh). [LB771]

SENATOR COASH: I'll try, I'll try. And I'll ask you this question maybe. I would have asked it...I didn't think about it until after Todd left. What's the age range of kids at YRTC? I mean, what's... [LB771]

SHAWN EATHERTON: Twelve to nineteen. [LB771]

SENATOR COASH: Twelve to nineteen. [LB771]

SHAWN EATHERTON: Yeah, very few...I mean, that's the statutory range. [LB771]

SENATOR COASH: That's the ability... [LB771]

SHAWN EATHERTON: Very, very few. Yeah, most kids you're going to have a 15 to 18. I bet if you took the bulk of the kids, that's what we're talking about 16 to 18, right in that range. [LB771]

SENATOR COASH: The bulk...your experience is the bulk of those is on the higher end. [LB771]

SHAWN EATHERTON: Yes. [LB771]

SENATOR COASH: Okay. Because with the ability...I mean, 12-year-old...I mean, I worked with 12-year-olds who can get pretty violent as well and they can put a...poke you a sock just as much...they have the ability to. Do you see any value in looking at this and even piecing out a little bit of a different way of dealing with the 12-, 13-year-old than we...that might do something that's dangerous compared to an 18-, 19-year-old because, you know, Speaker Flood made a good point. People know right from wrong but a 12-year-old has got a different brain than a 19-year-old and the way they look at things is a lot different too. Do you see any value in that? I mean, if your office got a case of a 13-year-old, would you like some different guidelines than the same case for an 18-year-old? [LB771]

SHAWN EATHERTON: Well, if my office got a 13-year-old, we would...even if it's for



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that very violent assault, that juvenile would be prosecuted in the juvenile court. I mean, we're not going to... [LB771]

SENATOR COASH: Can you still get a felony in juvenile court? [LB771]

SHAWN EATHERTON: No, no, no. I mean, it's listed as a felony but it's an adjudication, it's not a conviction. [LB771]

SENATOR COASH: Okay. [LB771]

SHAWN EATHERTON: As a matter of fact, most of the...many of the youth that are already at the YRTC have that type of an adjudication already in their history and that's why they are there. So then that youth would be basically you're readjudicating them for a felony, you know, putting them back more than likely at the YRTC under those circumstances. But age is a huge factor. [LB771]

SENATOR COASH: So age is a factor. [LB771]

SHAWN EATHERTON: It's a factor when considering what to charge or whether to keep an adult court or go to juvenile court at any time. [LB771]

SENATOR COASH: Okay. [LB771]

SENATOR ASHFORD: Shawn, have you had occasion to prosecute a juvenile as an adult, in adult court in Kearney, that would have assaulted a younger juvenile? [LB771]

SHAWN EATHERTON: Oh, certainly, certainly. [LB771]

SENATOR ASHFORD: And how often does that happen? [LB771]

SHAWN EATHERTON: Well, not very often, thank goodness, because when they assault each other, unless you have serious bodily injury or they use a weapon, it's not going to be a felony, so we would bring them back as a misdemeanor assault back into juvenile court. But I would...routinely, I mean, it's, you know,...those kids, they'll get into it. And we have a good relationship with the YRTC. They don't send everything that happens as a crime. [LB771]

SENATOR ASHFORD: Right. I'm sure they try to handle things internally, but are there young juveniles that are assaulted by older juveniles on a regular basis at YRTC? [LB771]

SHAWN EATHERTON: I can't...I don't say on a regular basis,... [LB771]

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SENATOR ASHFORD: Once in a while or... [LB771]

SHAWN EATHERTON: ...but we'll have a few a year. [LB771]

SENATOR ASHFORD: Okay. [LB771]

SENATOR LATHROP: These kids are going...are they just going to go back to juvenile court to have these charges...whether it's a misdemeanor or a felony, are most of them going to go back to juvenile court? [LB771]

SHAWN EATHERTON: It would certainly...it would depend on their age and what the actual offense was. If you're talking about somebody who commits a serious assault, no, that's more than likely. And depending on their age, if they're maybe, you know, 17, 18, in that ballpark, they could very well be prosecuted in adult court. That gets us back to the same factors. [LB771]

SENATOR LATHROP: So in the serious bodily injuries, we can see somebody...I'm just wondering if they're going to go back to juvenile court anyway and now we're talking about somebody who might let's say punch a teacher, slap a teacher, and we're taking it from, not with serious bodily injury, but we're making that...taking that from a misdemeanor to a felony now... [LB771]

SHAWN EATHERTON: Um-hum. [LB771]

SENATOR LATHROP: ...is that person who let's say is 16 and he slaps a teacher or one of the workers there, is he going to go back to juvenile court? [LB771]

SHAWN EATHERTON: The answer is maybe, but it would depend on age, prior history, of course, that would depend on where the county attorney would choose to file it originally, and then whether or not a court would choose to transfer it to juvenile court if it was originally filed in adult court. And then there's the whole list of factors for the court to consider, yeah. [LB771]

SENATOR LATHROP: Right. And we're familiar with those or at least I am. I'm just wondering if by increasing the penalty, if we're doing anything, if they're all going to end up in juvenile court anyway. [LB771]

SHAWN EATHERTON: Well, the more serious, the older ones, from my vantage point as the prosecutor in Buffalo County, they may very well end up in adult court and stay there because I don't... [LB771]

SENATOR LATHROP: Okay. Now I've got another question that maybe I'm going to ask you in your experience as the county attorney or your wife's experience if you can give it

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to us secondhand, are a lot of these assaults or are some of them a function of not having enough staff? And I'm familiar with developmental disabilities and some of the youth behavioral issues, and a lot of them can be traced to staffing issues, too, whether people are properly trained, whether they're engaging in active treatment and things like that. [LB771]

SHAWN EATHERTON: And I think that it's...I mean, we all think that we could have more staff. I mean, I'd love a couple more in my office as well. I mean, so I don't...the staffing issue is hard. I know schoolwise, I only can speak for my wife in school, I think that they feel that they are meeting the needs as far as educating the children, the youth. As far as the actual staffing of the facility, that's outside my scope. I do know they go through a lot of training and I have met with them... [LB771]

SENATOR LATHROP: Maybe this is my point. Are we...as we try to tighten our belt statewide, our budget issues, we cut back on staff to the point where we necessarily have more assaults because we don't have as many people per persons in the youth center, and now we're going to try to fix the problem by elevating the level of crime. [LB771]

SHAWN EATHERTON: I would say that that...as far as the...if you reduce staff, could that potentially have more problems there? Certainly. I think that...I'm only speaking from how it looks from the outside, but that would concern me. I guess one of the major things I'd like to return to just real quick is the idea that if they assault each other, that it is a higher level of crime because that is a deterrent. [LB771]

SENATOR LATHROP: It's what? [LB771]

SHAWN EATHERTON: It's a higher...under this bill if they assault each other it would be a felony as opposed to just a misdemeanor and that is...I do believe that that would have a controlling...way to control... [LB771]

SENATOR LATHROP: Do you think...just as a matter of policy, help us out, do you think that we ought to make these felonies if it doesn't involve a serious crime or a serious injury? So somebody...and let's just take a slap which is...and believe me, I'm not condoning any of this, but it's already a crime to do it, so the question is, is it good to make these people face a felony that are juveniles if they haven't caused a serious bodily injury? [LB771]

SHAWN EATHERTON: Yes, because I think if you're going to use the deterrent, you don't want to encourage people to do just enough to not seriously harm somebody, to do just enough not to use a weapon. Now, that doesn't mean we can't still back it off to a third-degree assault which happens every day in every jail, you know, because that's the similar law there. It happens every day in our jails. I mean, there are some...there's

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certainly a difference between a punch where you knock out somebody's teeth and a push or a slap and have to recognize that. But it's very hard to start drawing that line as you broaden it. [LB771]

SENATOR LATHROP: This bill would kind of put all of those people into the felony pile, and then we rely on prosecutorial discretion to knock it down, right? [LB771]

SHAWN EATHERTON: Yes. [LB771]

SENATOR LATHROP: Okay. [LB771]

SENATOR ASHFORD: I mean, to me, Shawn, it seems like there are issues there that are coming...that instead of...because the nature of the individuals we have there that you're getting a lot of the problems that exist at the facility in your office. Wouldn't that be fair? [LB771]

SHAWN EATHERTON: Certainly. Yes. [LB771]

SENATOR ASHFORD: I mean, if you have two juveniles fighting on the street, they would not necessarily be guilty of or charged with felonies. [LB771]

SHAWN EATHERTON: Oh, absolutely not, absolutely not. [LB771]

SENATOR ASHFORD: But if they're in this facility and they fight each other, they could be charged with a felony. [LB771]

SHAWN EATHERTON: Correct. [LB771]

SENATOR ASHFORD: And the difference would be because they're in the facility that they could cause greater harm or... [LB771]

SHAWN EATHERTON: Exactly, and there's...I mean, even and whether you're in correctional facilities or like the YRTC which is rehabilitation treatment, the close...just the close nature of it, any type of violence is...can cause problems... [LB771]

SENATOR ASHFORD: Spills over beyond that violence. Okay. So what about the gang activity? Do you perceive that going on? [LB771]

SHAWN EATHERTON: Yes. [LB771]

SENATOR ASHFORD: Is that greater now than it was? Does it continue to be a problem at a greater... [LB771]

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SHAWN EATHERTON: It's certainly greater now than it was ten years ago when I started. [LB771]

SENATOR ASHFORD: Is there recruitment of younger juveniles by gang members at YRTC? [LB771]

SHAWN EATHERTON: I have not had any reports of that. I think that's something that would have been brought to my attention. I'm certainly not going to sit here and say it hasn't happened. [LB771]

SENATOR ASHFORD: That's...thanks, Shawn. [LB771]

SENATOR LATHROP: Thanks. [LB771]

SHAWN EATHERTON: Thank you. [LB771]

SENATOR ASHFORD: Any other proponents? Opponents? [LB771]

BRAD MEURRENS: (Exhibits 3, 4, 5) Good afternoon, Chairman Ashford and members of the Judiciary Committee. For the record, my name is Brad, B-r-a-d, Meurrens, M-e-u-r-r-e-n-s, and I am the public policy specialist and registered lobbyist for Nebraska Advocacy Services, the center for disability rights, law, and advocacy. We are opposed to LB771 as currently written. Our objection to LB771 pertains to the increased penalty for assaults that occur to departmental staff in treatment facilities by persons with mental illness receiving treatment. We do not deny or intend to trivialize the injuries that do happen to departmental staff in these facilities. While the intent of the language in Sections 3 through 9 is laudable, to decrease assaults on staff, LB771's prescription to achieve this goal, making assaults on staff a felony, is misguided. Rather, LB771 is a smokescreen that portrays increased safety for departmental staff but, in effect, simply masks the underlying problems giving rise to assaults and presents an ineffective and unworkable solution. The academic literature on the topic indicates that explaining why these assaults occur is complex, often not simply because an individual is intrinsically bad; that there are also systemic and institutional factors in play that can exacerbate or diffuse situations leading to violence; that there are often discernible precursors to these incidents of violence; and that there are available prevention measures and techniques that can and should be utilized in lieu of or prior to action as proposed in this bill. It is only prudent to examine and understand fully why assaults are occurring in the first place and what mechanisms can be developed to address the root cause of the issue before simply imposing tougher criminal sanctions. It is questionable whether assaults on departmental staff will be prosecuted even if LB771, as currently written, were to pass. In conversations with county attorneys in Norfolk, Omaha, and Lincoln during the previous legislative session, I was told that even with a felony classification, the difficulty in proving competency would remain a primary disincentive to prosecute assaults by

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persons in these facilities. Second, the deterrent effect, which is precisely what LB771's solution is premised on, is dubious. The current assault statutes have not prevented or deterred assaults from occurring, and we are not convinced that increasing the penalty will enhance prevention. Often assaultive behavior is a manifestation of the very mental illness or disorder for which the person is being treated if not a response to external conditions such as being placed in restraints. To punish individuals for behavior arising out of their psychiatric condition contradicts the premise of treatment and is especially harsh for those individuals who, by the nature of their condition, have diminished control over their actions. That concludes my testimony this afternoon. I'd be happy to answer any questions the committee may have. [LB771]

SENATOR ASHFORD: Any questions of Brad? Yes, Senator Christensen. [LB771]

SENATOR CHRISTENSEN: Thank you, Chairman. Thank you, Brad. Do you have suggestions for helping to...? [LB771]

BRAD MEURENS: Well, I think the literature as I've handed out a couple of handouts to you, the dissertation and a letter to the editor by Susan Stefan who's a nationally renowned researcher in this area, you know, indicate things like de-escalation techniques would work, techniques to, you know, try to figure out what is causing these problems. Is it the staff being...using commands that are in a tone of voice that, you know, is aversive to the individual? Is the individual not being...you know, is there inadequate...you know, watching and camera usage or things like that? Our position is that it's not...that these assaults often do not arise out of someone's just intrinsic badness, but actually, there are other factors, right, such as staffing issues, such as training issues, right, such as inappropriate placements that are more often the precursors to this violence than it is just a person just deciding to all of a sudden start throwing elbows. [LB771]

SENATOR CHRISTENSEN: Thank you. [LB771]

SENATOR LATHROP: Brad, you mostly have the...you're with NAS... [LB771]

BRAD MEURENS: Yeah. [LB771]

SENATOR LATHROP: ...so you're mostly dealing with the developmentally disabled? [LB771]

BRAD MEURENS: Well, we cover all disabilities: developmental, psychological, physical. [LB771]

SENATOR LATHROP: Certainly somebody who's in, for example, the Norfolk Regional Center who has...who's there because of their sexual deviancy,... [LB771]

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BRAD MEURRENS: Um-hum. [LB771]

SENATOR LATHROP: ...that person...the arguments you just made really don't ring true with that group of people. Would you agree with that? [LB771]

BRAD MEURRENS: That's true. Our position is... [LB771]

SENATOR LATHROP: Then hitting...that's not a group whose competency is an issue. [LB771]

BRAD MEURRENS: Yeah, and that's not an issue that we've taken a position on. [LB771]

SENATOR LATHROP: And your concern is whether it is mental illness or whether it is a developmental disability if they're not competent. That's an issue for you,... [LB771]

BRAD MEURRENS: Right. [LB771]

SENATOR LATHROP: And that really is...the law pretty much takes care of that. If you're not competent, then you haven't...you don't have the mental capacity to commit a crime. [LB771]

BRAD MEURRENS: Right, which is my understanding is the main reason these assault cases are not being prosecuted in status quo under the existing statutes. [LB771]

SENATOR LATHROP: But you don't have a problem with prosecuting somebody who's at the Norfolk Regional Center and their...I don't know what the unit is called, the sexual... [LB771]

SENATOR ASHFORD: They're all juveniles. [LB771]

SENATOR LATHROP: ...deviant unit. [LB771]

BRAD MEURRENS: Well, yeah. We haven't taken a position on sex offenders and I think our main point is that persons who don't have the requisite mens rea to determine intent and all that according...you know, especially if it...around their mental illness should not be prosecuted as such. [LB771]

SENATOR LATHROP: Okay. Thanks, Brad. [LB771]

SENATOR ASHFORD: Thank you. Thanks, Brad. Next opponent. [LB771]

MARLA FISCHER-LEMPKE: (Exhibit 6) Chairman Ashford and members of the committee, my name is Marla, M-a-r-l-a, Fischer-Lempke, F-i-s-c-h-e-r-L-e-m-p-k-e. I'm the executive director for the Arc of Nebraska. The Arc is a support and advocacy organization working with and for people with intellectual and developmental disabilities. We're opposed to LB771 in regard to the expansion of felony classifications. We're concerned about the inclusion of persons confined in youth rehabilitation and treatment centers as well as people who have been committed under the Nebraska Mental Health Commitment Act. Broadening assaults and other felony offenses to include groups as those just mentioned creates problems on several levels. First, people who are seeking treatment are there because of a mental illness for which they need acute intervention. Secondly, some of the actions people seeking treatment may engage in are beyond their control. This is particularly true in individuals with mental illness and co-occurring intellectual and developmental disabilities. Often people with such disabilities have barriers expressing themselves through verbal language skills that others without these disabilities don't have. Instead, expression of frustration or dissatisfaction with a situation, person, or oneself is expressed through physical actions or behaviors. Potentially, some of the behaviors used to communicate can be misconstrued. While they may result in harm to others, it's the responsibility of staff to understand this communication and ensure that situations don't present themselves in which those kinds of actions can occur. If staff in a treatment facility know what events are likely to trigger these violent responses from a person, it's up to them to assist them in preventing those from happening; it's part of effective treatment. Statistics show that people with intellectual and developmental disabilities are already overrepresented in the criminal justice system. Research shows that people with intellectual and developmental disabilities involved in the criminal justice system are extremely disadvantaged when it comes to due process. Often, evaluations to investigate competency are not done by qualified professionals who are experienced in evaluating people with both intellectual disabilities. Usually they're just...they know about mental illness. Further, people with intellectual disabilities and family members might not understand the rights of the person. And then finally, attorneys may also not be familiar with how to communicate with people with intellectual or developmental disabilities. These raise the question about whether the rights of some are more important than the rights of others and who will become victimized if this legislation is passed. While employees may be better protected, it's those who are already vulnerable who bear the greatest risk. And I'd be glad to answer questions. [LB771]

SENATOR ASHFORD: Any questions? Seeing none, thanks. Yes, Senator Coash. [LB771]

SENATOR COASH: Thank you, Chairman. Thank you, Marla. I am struggling a little bit with this, but would you agree we have to be careful when we're working with folks with disabilities that we don't want the disability to be a mask for inappropriate behavior? I'm concerned that...I just think we have to be careful, that we can't let behavior hide behind



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someone with disability and then say, well, you have a disability so whatever you do, there's no consequences for it. [LB771]

MARLA FISCHER-LEMPKE: No, I agree with that. [LB771]

SENATOR COASH: I mean, I'm afraid about shifting that way... [LB771]

MARLA FISCHER-LEMPKE: Um-hum. [LB771]

SENATOR COASH: ...as much as I am concerned about protecting people. You made a good point about folks who don't communicate verbally. But I don't...I'm concerned about that being an excuse in some cases. [LB771]

MARLA FISCHER-LEMPKE: Right. I understand that. Yeah. [LB771]

SENATOR COASH: I don't know if there's a way to address that in this bill. We ought to. But can you respond to that what you, as an advocate? [LB771]

MARLA FISCHER-LEMPKE: Yeah. I understand what you're saying and certainly we wouldn't want it to just be an excuse because someone has a disability. I mean, if they do know what they're doing, that's another issue. But on the other hand, I think that for the reasons I just mentioned, a lack of knowing how to communicate, first of all, their needs and then, secondly, those involved in the process such as attorneys and so on being able to really get at what was behind the action. Whether it was truly disability related or not can be a difficult process. [LB771]

SENATOR COASH: Okay. Thanks. [LB771]

MARLA FISCHER-LEMPKE: Um-hum. [LB771]

SENATOR ASHFORD: Thank you, Marla. [LB771]

MARLA FISCHER-LEMPKE: Thanks. [LB771]

SENATOR ASHFORD: Next opponent. [LB771]

SARAH NEWELL: Hello, Chairman Ashford, members of the committee. My name is Sarah Newell, S-a-r-a-h N-e-w-e-l-l. I'm speaking on behalf of the Lancaster County Public Defenders Office and also the Nebraska Criminal Defense Attorneys Association. My cohort, Mr. Jorgensen, will be up here as well. We're going to split up our testimony so you don't have to listen to me ramble quite as long. [LB771]

SENATOR ASHFORD: We don't mind. [LB771]

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SARAH NEWELL: (Laugh) Well, you say that now, just wait. (laughter) [LB771]

SENATOR ASHFORD: I mean, you do a great job... [LB771]

SARAH NEWELL: I may make you take that back. [LB771]

SENATOR ASHFORD: Ramble on. I mean, it's... [LB771]

SARAH NEWELL: I'm primarily going to address the issue that seems to be the biggest concern for the committee here which is broadening the definition of assault by a confined person to incorporate juveniles both within the YRTC, and I also have specific concerns about using the definition under Section 71-914 which is technically a definition under the mental health statutes. It's a very broad definition that basically says "a facility licensed to provide services for persons with mental illness or substance dependence," and that definition is also linked to the juvenile code. The problem with using such a broad definition is that there's no real specificity for what kind of populations we're talking about. We're not defining what kind of facilities, so this could range as far as could be the youth rehabilitation treatment center on its own because it does on occasion or to a certain degree address substance abuse and dependency issues and mental illness, and it can also go maybe as low as group homes or other facilities that a lot of youth are in. That is particularly problematic because if you have youth in group homes, not all youth who are in group homes or treatment facilities are there for law violations. A lot of them are there on dependency cases where their parents...they were taken out of their parent's home for their own safety. And these youth are in these facilities and if they were to assault another youth there, that can be a situation where those folks are going to be getting felonies now. So we took a kid who we were...was in the state's custody for their own protection and just made them a felon. And granted, they're doing that by their own conduct by engaging in assaultive behavior, but I think that the committee is on the right step here, on the right path considering whether or not as a policy standpoint we really want to go that far. There's also going to be additional costs with that. The more youth are charged, the more attorneys are going to get appointed, the more we're going to file or the more we're going to be pursuing that. And there's much more of an incentive to fight a felony versus a, you know, misdemeanor, adjudication, so there's going to be broadened costs in that way. Also, I think the other opponent so far made an interesting point about the differing degrees of training. You know, when we're normally talking about assault by a confined person, we're talking about prison staff or police officers, people that are trained on a regular basis in-depth to deal with people with these kind of issues. And when we're getting into these group home facilities and the variety of different continuum of care options, you're going to be having some people that are in group homes where you just have college kids who had very little training, and those are the folks who are going to be responding. And I personally have worked in a treatment facility like that as a college kid and I saw

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that there were some staff that handled kids with outbursts very well and there were others who tended to escalate the situation more because they didn't know when to back off and when to let the kid, you know, go settle down. And so those are concerns that we would have if those are going to continue to be ongoing problems. I'd be happy to answer any further questions that the committee has. [LB771]

SENATOR ASHFORD: Senator Lathrop. [LB771]

SENATOR LATHROP: The use of the definition by reference to Chapter 71, and I don't remember the exact statute you quoted, would that be true in a doctor's office? I mean, is it broad enough to include a doctor's office? [LB771]

SARAH NEWELL: Well, it could. I mean the concern, I guess you could argue that it's limited to the mental health statutes because that's where it's originally limited and then incorporated into the juvenile statutes, but it's a really broad, broad term. And I don't think that it would be beyond, you know, certain prosecutors to think that maybe it should be broadened, which raises another issue that I wanted to address. I know that the folks from Kearney have indicated that they are not currently using this language or using the definition of confine broadly to charge youth as felonies, but in Lancaster County we are having some youth who have assaulted people at the detention centers charged with...under the felony language. Now, normally those are reduced as part of a plea agreement to a straight third-degree assault, and so we're not in a position to have challenged the legality of that and have it go up through the chain. But I can tell you that there are...there is at least one prosecutorial office that I'm aware of that reads it that way and is using that language to charge a felony. So I guess to a certain extent, you know, it's arguably...I mean, if you read it as broadly as the county attorney's office is here, you could theoretically charge it currently even at the Kearney facility and things like that, so this may be a situation where we don't even need to go this far. But I would urge that if we are going to, that we need to be very cautious about the way we phrase the language and really try to think about the unintended consequences because I think there will be quite a few. [LB771]

SENATOR LATHROP: Thanks. [LB771]

SARAH NEWELL: Thank you. [LB771]

SENATOR ASHFORD: Just one, Sarah, one question. The system on the juvenile side does seem to be...have some parts to it that enable further problems to happen. And one of the...trying juveniles or filing in adult court, waiving down to juvenile court, especially younger violent offenders, 15-, 16-year-old offenders, in many, many cases they're waived down. Wouldn't that be a fair comment? You don't have too many 14-, 15-, 16-year-old juveniles in adult incarceration. Some, but... [LB771]

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SARAH NEWELL: Probably not many, but it is going to depend on a variety of different factors and it's going to depend on the... [LB771]

SENATOR ASHFORD: Sure, but I mean their...but the problem is that they're violent offenders and they've committed some sort of act of violence and it could be assault, it could be a myriad of things and often they're charged...they're waived down. I mean, that happens all the time, doesn't it, I mean, generally or...? [LB771]

SARAH NEWELL: I think it's going to depend on different counties. Different counties handle things differently. [LB771]

SENATOR ASHFORD: Sure, but I mean we have a facility full of juvenile offenders who have committed assaults or... [LB771]

SARAH NEWELL: Yeah. Well, and our impression would be in...that the Lancaster County Attorney's Office tends to be a little bit more conservative in terms of what they choose to file, and by conservative I mean filing more than maybe other counties might. And... [LB771]

SENATOR ASHFORD: As adults. [LB771]

SARAH NEWELL: Yes. And being less inclined to waive things down. [LB771]

SENATOR ASHFORD: And then they get waived down or not, but I mean...but maybe that's the point is that Lancaster County may file them as adults and more adults than juveniles but it may be different in Douglas County. But the result of all those differences is that we have different standards and then we have these young people, these juveniles through the juvenile system, treatment plan, Kearney, and they've committed violent acts. [LB771]

SARAH NEWELL: One thing to remember, too, about Kearney is that you're not...I mean, sometimes youth are sent to Kearney because they've committed a particularly egregious law violation and sometimes they're sent there because they've... [LB771]

SENATOR ASHFORD: They violated court orders. [LB771]

SARAH NEWELL: Yeah, and they're not getting with the program when they're sent to treatment facilities, and so a lot of times they use Kearney as a...I don't want to say a last ditch effort but saying, well, you're not complying with our treatment efforts so you need to get your behaviors under control. So they say those youth are at Kearney because they need to focus on their behaviors before they can get to their treatment issues. [LB771]

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SENATOR ASHFORD: And there are many, many different kinds of cases, but there are young juveniles who have committed violent acts and they're sentenced to Kearney or treatment...they're not sentenced, whatever they've done, whatever is done, they go there, they go there. And then there are others who have behavioral issues, treatment plans, failure to appear, violating court orders, over and over again and they go. [LB771]

SARAH NEWELL: Yeah, you have a wide range of folks at Kearney. [LB771]

SENATOR ASHFORD: Very wide, and I guess I think that's a significant issue with our juvenile system. [LB771]

SARAH NEWELL: That is certainly a problem and I think the difficulty with this bill is, at this point, there's no...I think we probably are going to want to separate out factors and say...maybe limit some of the discretion because you're going to want to say there's certain kids that need this kind of attention and certain kids that don't. And sometimes when you leave it up to discretion, then you end up getting results that you wish you didn't get. [LB771]

SENATOR ASHFORD: Okay. Thanks for your testimony. [LB771]

SARAH NEWELL: Thank you. [LB771]

SENATOR ASHFORD: Next opponent. [LB771]

JOHN JORGENSEN: My name is John Jorgensen, J-o-h-n J-o-r-g-e-n-s-e-n. I am a licensed and practicing attorney in Lincoln, Lancaster County, member of the Nebraska State Bar Association, Lincoln Bar Association, National Criminal Defense Attorneys Association, currently employed at the Lancaster County Public Defenders Office. I'm also, more importantly, in my perspective here today as a property owner in Lincoln, Lancaster County who views this particular legislation to be an opportunity to pass on additional costs to the local taxpayers. There are several aspects to this particular bill which are troubling, but the costs are primary. We're not talking about a simple increase in costs. I think this bill would lead more towards it's safe to say a skyrocket increase in cost. There was noted in a fiscal note connected with LB38 which incorporated some of the language that was ultimately utilized in this bill to reflect the average costs on a yearly per diem basis, how much it costs to incarcerate an individual. But the costs associated with this particular act are not just incarcerating those who have been found guilty of a particular offense. We're talking about if someone is out at a regional center and they commit this particular offense, I don't think any criminal defense attorney would proceed on that particular case without having that person evaluated for competency. And if there was an evaluation for competency for when an individual was held at a regional center, that means that that person needs to be held at another facility until that competency evaluation can be held. That means we have an increase in additional

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experts, separate experts from those who might have been available at the other facility. We're talking about increased housing and travel costs, attorney time, both prosecutors, defenders, court time, transport staff, and then, of course, the greater part of these costs are left to be borne by the individual counties where these particular agencies may be housed. I think it's also problematic in regards to the particular elements of these particular offenses as outlined in here. If we are going to make the policy decision to include juveniles or those who are currently being held in a mental health-type facility, I think that then they should mirror the respective assault statutes and there should be a comparison between 28-309 and 28-930, so that way an assault on an officer first degree would have a requirement of an intentional, knowingly causing serious bodily injury, assault on an officer in the second degree should be intentionally knowingly causing injury with a dangerous instrument, or recklessly causing serious bodily injury, or count...assault to officer in the third degree should reference back to intentionally or knowingly or recklessly causing injury. You should not have a particular occasion where a child sitting in a...being housed in a detention center is then subject to the potentiality of a 1 to 50 potential...your sentence for argument between himself and a peer that when he pushed a chair into his peer and the peer said, ow. That brings another point...and I see my time is up here, so. [LB771]

SENATOR ASHFORD: Just go ahead and sum up. We may get some questions. Go ahead and finish your point. [LB771]

JOHN JORGENSEN: The remark was, and simply that I don't think there's a necessary connection towards what we're looking at for the potential penalty ranges when we're talking about 1 to 50, 1 to 20, and 0 to 5 for things that occur on playgrounds. [LB771]

SENATOR ASHFORD: Okay. Any questions? Seeing none, thank you. [LB771]

JOHN JORGENSEN: Thank you. [LB771]

SENATOR ASHFORD: Other opponents? How many other opponents do we have? Do we have any neutral testifiers? Okay. You're the last testifier. [LB771]

MARY ANGUS: (Laugh) I can barely see over the table. (Laughter) Hi, Senator Ashford and members of the committee. I'm here testifying on my own behalf as a person who experiences a mental illness who has also been placed as an inpatient not at the regional centers per se but in other hospital settings, sometimes for a couple of months or more. I am in opposition to LB771. You don't need to hear what everybody else has already said, so I'm not going to repeat all of that. It's just simply an unnecessary bill and I think you really have heard that. Even Senator Flood said that LB840 says what he is saying better and I would suggest that would be the better course of event. Since the section... [LB771]

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SENATOR ASHFORD: Before we go any further,... [LB771]

MARY ANGUS: Yes. [LB771]

SENATOR ASHFORD: Could you give us your name? [LB771]

MARY ANGUS: Oh, I'm very sorry. I'm Mary Angus, A-n-g-u-s, which anybody in Nebraska ought to be able to spell (laughter). [LB771]

SENATOR ASHFORD: Mary or...? [LB771]

MARY ANGUS: Mary. Neither one. (Laughter) You know, you go to McDonalds and they want you to eat an Angus burger and I have a problem (laugh). [LB771]

SENATOR ASHFORD: Thank you. [LB771]

MARY ANGUS: And just kind of...rather than restate anything else, I just think that we're talking about too broad of a group of people in the first place, but we're talking about people who are already confined, many of them for a mental illness. Some of the kids in the rehabilitation treatment facilities are there because they have some form of mental illness which would make that a developmental disability. We're talking about people who are confined. We're talking about people who don't have the key. We're talking about people who are subjected to orders right and left, who are told you have to do this at this time; you have to do that at that time. Frustrations are increased in those situations for anybody. Senator Lathrop, I think you asked about the staffing levels. I believe that if we look into it, there are staffing problems in all of our 24/7 facilities. In fact, in the most recent newsletter from the Lincoln Regional Center, they talked about people taking overtime so that other people couldn't have to have to take mandatory overtime. So we're talking about a whole variety of factors. And rather than go to the red light, I will close and answer any questions that you might have. [LB771]

SENATOR ASHFORD: Any questions of Mary? Yes, Senator Coash. [LB771]

MARY ANGUS: Yes, Senator. [LB771]

SENATOR COASH: Thank you, Chairman. Thanks for being here today, Mary, and as an advocate for people with mental illness. Do you think sometimes we have people who use mental illness or their developmental disability as a way to excuse behavior, and do we need to address that so that people who can be...who are accountable should be held accountable for their behavior? Is that something we need to address? [LB771]

MARY ANGUS: I believe that the current statute on intent covers that. [LB771]

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SENATOR COASH: Okay. [LB771]

MARY ANGUS: And when we include the Class I(c) and (d) under that status with the intent, that that would be more than adequate. In that statute, in that particular bill it said, basically that if a person is doing something...if that would be a crime if the circumstances were as that person believed them to be, then it would be a crime. So if I believe that you are the devil and that you're coming at me and you're going to hit me and then I commit something that would be a crime, if that weren't the case...gosh, this is hard to...(laugh) the intent stuff is really difficult. So if it...under that statute, if what I was doing was a crime, if what I believed was happening was true, then it would be a crime. I've got that backwards. If it weren't... [LB771]

SENATOR COASH: I get you. [LB771]

MARY ANGUS: Okay. So if I'm doing...if I'm attacking you because I believe you're the devil and that under that statute would not be forming intent, if I do that, telling people that I believe you're the devil, and that's...no, if I do that because I don't like you and I want to hit you, then that's a crime. It doesn't matter so much of the other...I'm not explaining it very well. [LB771]

SENATOR COASH: I think we get you. [LB771]

MARY ANGUS: But I think that the current statute and then extending to it to 181(b), (c), and (d) covers it. [LB771]

SENATOR COASH: So you're okay with that part of Senator Flood's bill that includes that intent. [LB771]

MARY ANGUS: Well, I would say that it's much better done in LB840 and the other pieces of it I'm very, very, very uncomfortable with... [LB771]

SENATOR COASH: Okay. Thanks, Mary. [LB771]

MARY ANGUS: ...to put it lightly (laugh). [LB771]

SENATOR ASHFORD: Thank you, Mary. [LB771]

MARY ANGUS: Thank you. [LB771]

SENATOR ASHFORD: Thanks for your testimony. [LB771]

MARY ANGUS: Thank you. [LB771]



SENATOR ASHFORD: Speaker Flood. [LB771]

SENATOR FLOOD: Thank you, members of the committee. This is one of the only bills I've ever had where I think my intent is with this...I have the same intent as many of the opponents, and that is, I don't want to prosecute or make felons out of people who can't form the requisite mens rea or intent to commit the crime. That's not what the bill is for, and if the committee feels extra protections need to be added, I'd be happy to work with you on that. This is not intended to punish the disabled or the folks that don't know what they're doing. But the fact is in these facilities, we do have people that understand right from wrong and there has to be a consequence and it should be a serious consequence because some of them do know what they're doing, and I'm specifically referring to folks that are committed under the Sex Offender Registry Act. If you were there under a mental health commitment, I would have to think there are very rare circumstances where the individual knows right from wrong. And if you want to exclude those folks, I think we have to be careful there, but it's something you can certainly consider. That was never my intent. My other intent was to limit this to Norfolk Regional Center, Hastings Regional Center, Lincoln Regional Center, YRTC. I wasn't intending to extend it to group homes and I haven't had a chance to cross reference the statute that was raised, but if that's the case, you know, I don't want this extended to those areas because I haven't been advised that that's an issue. No one that spoke in opposition, you know, really recognized the fact that under the M'Naghten case, there is a clear standard of what's right and what's wrong in terms of intent, and I think that is a barrier. And whether you're charging somebody with a Class I misdemeanor or a Class IV felony...you know, I might also add if you're putting pool balls in a sock, that could be considered a deadly weapon and you could be eligible for second-degree assault. That's already there, I understand that. You know, what I do resent, though, is the assertion that this is somehow an alleged smokescreen. As much as we care for the patients and the folks that are getting rehabilitated at YRTC, we also expect citizens in our communities to walk into these facilities everyday, and I guarantee you they're there for the right reasons. If somebody pushes a chair into them, I highly doubt that's going to become an actionable offense. We're talking about people who go to work and get beaten within an inch of their life by somebody that knows right or wrong, by somebody that loses their eyesight or has a gash down the side of their neck with 25 stitches. These people aren't there to punish people. People in the regional centers that work there are there to help people. And we should be there for them, supporting them as they take care of folks that otherwise quite often aren't welcome in the community setting and I'm speaking solely about sex offenders. I'm not meaning to cast any kind of a scourge on any other patient in our regional center system. I care for those folks as much as anybody in this room. With that, I'm happy to work with you. I think this is the right thing to do. I appreciate the opponents, especially Ms. Angus at the end providing her perspective. That is certainly not what I'm after. I do not want people in a condition that can't know right from wrong...that don't know right from wrong to be punished.

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Thank you. [LB771]

SENATOR ASHFORD: (See also Exhibits 13, 14) Thank you, Mike. Seeing no questions, thank you. [LB771]

SENATOR FLOOD: Thank you. [LB771]

SENATOR ASHFORD: Let's go to the next...what's our next bill here? Senator Stuthman, LB886. Senator Lautenbaugh has joined us. Welcome. Good afternoon, Arnie. [LB771]

SENATOR STUTHMAN: (Exhibits 7, 8, 9) Good afternoon. Chairman Ashford and members of the Judiciary Committee, for the record, my name is Arnie Stuthman, A-r-n-i-e S-t-u-t-h-m-a-n, and I represent the 22nd Legislative District. I'm here today to introduce LB886. LB886 changes provisions in law relating to minors and tobacco use and possession. It amends Section 28-1427 so that anyone under the age of 18 who purchases or attempts to purchase any kind of tobacco shall be guilty of a Class V misdemeanor. The new language in LB886 provides that any person under the age of 18 who uses or possesses any tobacco products or materials shall be guilty of an infraction. I have presented to the committee an amendment that makes a couple of changes to LB886. The first change is in Section 2 of the bill. This language protects minors who participate in compliance checks. The language is similar to the current law that allows the compliance checks of establishments that sell liquor. The second change in the amendment will make sure that an infraction shall not be included in the person's criminal record. I do have some information...I would also like to mention the fact that there are 36 states at the present time that prohibit minors from possession of tobacco, and every state that borders Nebraska does have that in law that prohibits minors from possessing tobacco. They are Colorado, Kansas, Wyoming, South Dakota, Missouri, and Iowa. I also have letters of support from the American Cancer Society which I would like to have the page pass out and entered into the record of support; also from the Nebraska Grocery Industry Association of letters of support also. So with that, I would be happy to attempt to answer any questions. [LB886]

SENATOR ASHFORD: Thank you, Arnie. Any questions of Arnie? Yes, Senator Lautenbaugh. [LB886]

SENATOR LAUTENBAUGH: Thank you, Chairman Ashford. Thank you for bringing this, Senator Stuthman. Is there a group that would be set up to do these compliance checks? [LB886]

SENATOR STUTHMAN: These compliance checks, I think it would be...it would be the same type of a group that would be doing the alcohol test, the checks on alcohol because it would be...it would be people that would be going into the retail outlets and

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checking as to whether liquor is sold to minors or tobacco products are sold to minors also. [LB886]

SENATOR LAUTENBAUGH: And currently in Nebraska there's no prohibition against selling tobacco to minors? [LB886]

SENATOR STUTHMAN: Yes, there is, um-hum. [LB886]

SENATOR LAUTENBAUGH: Okay. What does this add to that for clarity sake? [LB886]

SENATOR STUTHMAN: What this adds to it is the fact that the Class V misdemeanor is in there if they attempt or purchase the tobacco products, but what this bill does, it adds that if someone is in possession, say a 15- or 16-year-old is in possession of a tobacco product, they can...they're found guilty of an infraction. And that's what is in addition to what is currently. [LB886]

SENATOR LAUTENBAUGH: Thank you. [LB886]

SENATOR ASHFORD: Senator Coash. [LB886]

SENATOR COASH: Thank you, Chairman. Where it says guilty of an infraction, do you mean guilty of the same infraction as if you purchased it, so you have it, you're going to get a Class V misdemeanor as well? [LB886]

SENATOR STUTHMAN: If you attempt to purchase or purchase it,... [LB886]

SENATOR COASH: Yeah. [LB886]

SENATOR STUTHMAN: Then it is a Class V misdemeanor. [LB886]

SENATOR COASH: Got that. [LB886]

SENATOR STUTHMAN: Okay. And then if you didn't purchase it, but the law enforcement picks you up and you're driving in a car, and you're smoking and you're 17 years old, and you got the tobacco can in your back pocket, then it is an infraction. [LB886]

SENATOR COASH: Well, it says infraction, but is that the same as...? [LB886]

SENATOR STUTHMAN: The same as penalty wise? [LB886]

SENATOR COASH: Yeah, is it...? [LB886]

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SENATOR STUTHMAN: No, it's lower. [LB886]

SENATOR COASH: Okay. So it's not a misdemeanor to... [LB886]

SENATOR STUTHMAN: It's an infraction. It's...it's... [LB886]

SENATOR COASH: It's an infraction which is lower than a... [LB886]

SENATOR STUTHMAN: ...and it's something that we also have in there with the amendment that, you know, that it's not on the person's criminal record, the infraction part of it. [LB886]

SENATOR COASH: Okay, got it. Thank you. [LB886]

SENATOR ASHFORD: Thank you. Are there any other questions? Arnie, thanks. Are you going to stick around and close? [LB886]

SENATOR STUTHMAN: I'll stick around a little while. [LB886]

SENATOR ASHFORD: A little while. All right. Proponents. Jim. [LB886]

JIM MOYLAN: (Exhibits 10, 11) Mr. Chairman and members of the committee, I'm Jim Moylan, J-i-m M-o-y-l-a-n, representing Reynolds American which formerly was R.J. Reynolds Tobacco Company. We're in support of the legislative bills, and I've got a couple of handouts here, mostly for bedtime reading. One of them is the state's type of tobacco products with respect to minors that they have in all those states, and it shows the 15, I think, that does not have this. Now, we're listed in there as having a statute already, but that's the snitch statute which we'll go over. When I talked to different people around, they decided that it would be a good idea to make sure that the offense under this statute would not be on the record. The second handouts here are the statutes with respect to infractions. There's one with respect to minors driving with .02 or more within their system. Goes through the system, the same type system as an adult with respect to testing and the like. But that's an infraction, but it's a little different. It's called a traffic infraction, and there's a definition of traffic infraction I think on the third page in here. So...but it also includes suspension of drivers' licenses which the ordinary infraction statute does not. The ordinary infraction statute which this would come under is 29-436, and the first offense be fined not more than \$100; second within a two-year period, not more than \$200, and the third within a two-year period, not more than \$300, so that's the penalty section that it would come under. None of those other infractions...and then we have the marijuana infraction law too which is listed in here, and, of course, that has various aspects of it. It also includes fines, but the fines start at \$300, and that it requires a certain amount of counseling and instructions over the period of time that...if you get caught with that. So we'd recommend that you advance

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the bill to the floor and support it. If you have any questions, I'd be happy to try to answer them. [LB886]

SENATOR ASHFORD: Any questions of Jim? Seeing none, thanks, Jim. We have the amendment. [LB886]

JIM MOYLAN: Yeah, you have the amendment. [LB886]

SENATOR ASHFORD: Okay. Any other proponents? Opponents? Neutral? Mark. You can give it to Sarah over here. She will... [LB886]

MARK WELSCH: Thank you. Thank you, Senator Ashford, for having this meeting today. This is an important issue that's trying to address a major problem in our state... [LB886]

SENATOR ASHFORD: Give us your name just for the record. [LB886]

MARK WELSCH: Oh, I'm sorry. Yes, I know this routine. Mark Welsch...I'm the president...and it's spelled W-e-l-s-c-h. Mark is with a k on the end. I'm the president of GASP of Nebraska, the Group to Alleviate Smoking Pollution. I live at 5611 Howard Street in Omaha, Nebraska. As I was saying, this is an important issue for Nebraskans, especially our children who are victimized, I believe, by many store owners who do not train their employees to properly check ID and to tell them how important it is for those clerks to not sell tobacco to minors. Many children just go into a store, slap their five bucks on the counter, and get tobacco. So what I would like you to consider, although I'm not opposed to this bill, I think it could be improved drastically if it would be amended to hold the tobacco license holders, not just the clerks, to be accountable for illegal sales on their property of tobacco to minors just like alcohol retailers and license holders are held accountable for actions of their clerks. Tobacco kills approximately one-half of its users. Alcohol kills far fewer, although it's also a very major public health issue in our state. Tobacco killing so many more people I think needs stronger restrictions on the license holders to stop children from becoming addicted to tobacco because it is so easy for them to buy throughout this state. Even when we have compliance checks that drive down the failure rate to 5 or 6 percent as they've been done in Omaha for quite a few years now, kids know where to find those 5 percent of the retailers that will sell to them because they do it over and over again. Walgreens is one bad example of that. Also I think that the compliance checks amendment that you apparently have in your hand...not seen it yet, but hopefully, that language could be modified to also allow nonprofit groups like GASP to do compliance checks because we have done them before to the benefit of our state. Years ago, probably over ten years ago, I took two 7-year-old boys and a 4-year-old girl throughout Omaha to see if they could buy cigarettes in a vending machine. They succeeded at every location they went to. Those vending machines just couldn't tell that they were 7-year-olds or a 4-year-old little girl

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which I actually had to help hold up, so she could reach the place to put the quarters in. At one location, a waitress actually helped the young boys buy cigarettes from a vending machine, so I think these compliance checks are important and need to be available to all people in the state, not just those being run by law enforcement agencies. Thank you. [LB886]

SENATOR ASHFORD: Thanks, Mark. Any questions of Mark? Seeing none, thank you. Senator Stuthman, do you want to close? [LB886]

SENATOR STUTHMAN: Thank you, Senator Ashford. Just a couple of comments in closing. And as far as the concerns that Mr. Welsch had is...I think there are in statute already things to deal with the people selling...organizations, retailers that sell tobacco to minors. I think there is a problem...I mean, there is something in statute already on that. So...so with that, I would like to ask, you know, that the committee look favorably on this and pass it out, if possible. [LB886]

SENATOR ASHFORD: Thank you, Arnie. [LB886]

SENATOR STUTHMAN: (See also Exhibit 15) Thank you. Have a nice weekend. [LB886]

SENATOR ASHFORD: Have a good week...good weekend to you too. Senator Howard. LB984. Hi, Gwen. [LB886]

SENATOR HOWARD: We were knee-deep in Medicaid issues, so hard to tear yourself away from that (laugh). [LB886]

SENATOR ASHFORD: Well, if you want to go back soon after you... [LB886]

SENATOR HOWARD: I will in awhile. How's that? [LB886]

SENATOR ASHFORD: Okay. Go ahead, yes, ma'am. [LB886]

SENATOR HOWARD: Good afternoon, Senator Ashford and members of the committee. For the record, I am Senator Gwen Howard, and I represent District 9. Thank you for the opportunity to present LB984 for your consideration. LB984 would establish child abuse resulting in serious bodily injury as a Class II felony. Moving child abuse from a Class III to a Class II felony will increase the maximum penalty available from 20 to 50 years. This will allow more discretion in sentencing individuals who are targeting our most vulnerable population. The impetus for this bill was a letter that many of us received from a citizen concerned about shaken baby syndrome. Although this bill does not specifically target shaken baby syndrome, I would like to take some time to share some information about shaken baby syndrome. Shaken baby syndrome is a

method of describing abusive head trauma that babies and infants suffer when they are violently shaken. This happens because babies' heads are disproportionate to their bodies and babies' brains and surrounding blood vessels are immature. Babies' brains are more susceptible to the trauma of shaking and babies' blood vessels are more likely to tear. When a baby is shaken, the brain will rotate inside the skull and will damage or destroy brain tissue. The blood vessels will tear and blood can pool in a baby's skull, causing pressure and even more brain damage. This can cause the baby's breathing to be impaired, seizures, heart stoppage, vomiting, and inability to feed, suck, or swallow. These are just the immediate consequences. In the long term, babies with shaken baby syndrome can suffer from a lifetime of cognitive impairment, behavioral disabilities, learning problems, physical disabilities, speech, visual, and hearing impairments, cerebral palsy, and seizures. All of this is only true if they live. Many of these babies don't. Babies are most often shaken by parents or caregivers. The number one trigger of shaking is crying. However, some individuals shake infants because of problems with bowel movements or feeding. The facts of shaken baby syndrome are gruesome enough, but the reality is devastating for babies and their families. In one publicized Nebraska case, a child who was shaken when he was only a few days old will be six years old this month. He remains in a vegetative state, dependent on feeding and trach tubes. He will never walk out of the hospital, but his abuser walked out of prison in November. The abuser, who was also the child's father, was charged with first degree assault which is a Class II felony. Although this abuser will have a criminal record, his record will not truly reflect his crime. He was and he is a child abuser. If passed, LB984 would also make child abuse resulting from serious bodily harm a Class II felony. It would allow the same penalties as much as 50 years in prison and would name these perpetrators what they are--child abusers. Again, LB984 does not only address shaken baby syndrome, but it provides more discretion in sentencing all abusers. It will allow courts to properly punish the 3,000 offenders who abuse children each year. In 2008, over 2,000 of nearly 5,000 victims of child abuse were under the age of four. Nearly 4,000 victims of child abuse were abused by their parent. Proper sentencing options are only one tool for dealing with child abuse and should not overshadow the importance of preventing abuse before it happens. But when it does, LB984 will mean that we can put child abusers away for a very long time. Thank you for your time and attention to LB984. [LB984]

SENATOR ASHFORD: Thank you, Gwen. Any questions of Gwen? Seeing none, thanks. [LB984]

SENATOR HOWARD: Thank you. [LB984]

SENATOR ASHFORD: Proponent...proponents? Testimony on LB984? Opponents? Neutral? You have to go back to Medicaid. [LB984]

SENATOR HOWARD: No, I think I'll close before I do that (laughter). Pretty self

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explanatory. LB984 provides for increased penalties for individuals who abuse children. It makes child abuse resulting in serious bodily injury a Class II felony which carries a maximum penalty of 50 years. LB984 provides for the discretion to properly punish those who target members of our society who are least able to protect themselves. It allows us to call these despicable criminals what they are--child abusers. And it just happened today. I pulled a story off the Internet from the World-Herald. Nebraska man accused of abusing baby. An Osceola, Nebraska, man has been arrested on suspicion of child abuse, accused of injuring his baby boy. The Polk County sheriffs office says that 30-year-old Joshua Bondegard was arrested Wednesday at Children's Hospital and Medical Center in Omaha. The sheriffs office had been in contact with Omaha authorities after the baby was admitted to the hospital with injuries consistent with child abuse. Omaha police say the child was in a coma on Tuesday. No further information on the baby's condition was available Friday. Sheriffs office says the baby's mother is not a suspect in the abuse case. All right. Thank you. No questions? All right. [LB984]

SENATOR ASHFORD: (See also Exhibit 16) Thanks, Gwen, very much.  
Amanda...Senator McGill, LB968. [LB984]

SENATOR MCGILL: I am Senator Amanda McGill, A-m-a-n-d-a M-c-G-i-l-l, and I represent the 26th District. I'm here today to introduce LB968. I don't need to tell anyone here that domestic violence is a huge problem that's committed by both men and women. No one is immune from it, and it is often a repeated offense. The Nebraska Legislature in 1978 found that there was a present and growing need to develop services to lessen and reduce the trauma of domestic abuse. Nebraska statute specifically states that the Protection of Domestic Abuse Act is to provide abused families and household members necessary services including shelter, counseling, social services, and limited medical care and legal assistance. It was at that time that the Legislature defined domestic abuse and created the Domestic Abuse Protection Order which is one of the few options a victim of domestic abuse has within the legal system. The definition created in 1978 has remained unchanged even though our philosophical understanding of abuse has evolved. Part of the statute defines abuse as "placing by physical menace another person in fear of imminent bodily injury." Since the time this definition was created, courts have routinely interpreted this part of the definition to include threats by an abuser to harm his or her intimate partner. Courts could consider the credibility of the threat and the immediate needs of the petitioner. A recent Court of Appeals' opinion, which you'll hear more about through testimony from others behind me severely limited the trial courts' ability to do this. The purpose of this bill is to restore the definition of domestic abuse to its original intent. It removes the words "physical menace" and "imminent" and allows the court to consider a credible threat of bodily injury. This change will allow a victim to once again apply for a protection order when there is a threat of bodily injury, and if granted, the protection order limits contact between the petitioner and the respondent, reducing the chance that bodily injury will, in fact, occur. This restores the definition of abuse to the original intent



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of the Legislature when it passed the Protection of Domestic Abuse Act. I'd be happy to answer questions and would encourage you to ask the people following me about the practical impact that this court decision has had on the number of orders that have been filed for. [LB968]

SENATOR ASHFORD: Any questions of Amanda--Senator McGill? Seeing none, we have some testifiers behind you, I think. Proponents of LB968. [LB968]

ROBERT SANFORD: (Exhibit 12) Good afternoon, Senator Ashford, committee members. My name is Robert Sanford, R-o-b-e-r-t S-a-n-f-o-r-d, and I'm the legal director for the Nebraska Domestic Violence Sexual Assault Coalition. The coalition is a membership organization consisting of 22 local programs that provide services to victims of domestic violence, sexual assault, and stalking across the state of Nebraska. I'm here today to express support for LB968 and ask that you advance this bill out of committee. In 1978, as Senator McGill indicated, senators considered and passed LB628 creating a process that allowed victims of domestic abuse to seek a protection order against a batterer. At that time, the Legislature indicated that there is a present and growing need to develop services which will lessen and reduce the trauma of domestic abuse. On June 30, 2009, the Court of Appeals released its opinion in the case of Cloeter v. Cloeter which has the effect of putting victims of domestic abuse at greater risk of physical harm and which ignores the legislative intent behind the Protection from Domestic Abuse Act. In Cloeter, the court looked at 42-903(1)(b) and considered the terms "physical menace" and "imminent" when it overturned the domestic abuse protection order. The Court of Appeals stated that words alone are not a physical threat or act within the purview of the statute. The court also concluded that the imminent bodily injury within the context of 42-903(1)(b) means a certain, immediate, and real threat to one's safety which places one in immediate danger of bodily injury, that is, bodily injury is likely to occur at any moment. While the language used by the Court of Appeals to define these terms appears to be the plain meaning of the language, I believe the impact of this case directly contradicts the legislative intent. If the intent of the statute is, in fact, to reduce the trauma of domestic abuse, an individual who has, in fact, not previously been physically harmed by an abuser cannot seek the protections offered by the Protection from Domestic Abuse Act even though the threats of abuse may be such to put the average person in fear of his or her safety. This bill seeks to remove the two terms defined by the Court of Appeals and provide a definition of domestic abuse that includes a credible threat of bodily injury to the applicant. While this is a change in language, it is actually codifying the common practice found in many trial courts across the state, a practice which ended on June 30, 2009, with the release of the Cloeter decision. This change will restore the purpose of the Protection from Domestic Abuse Act to its original legislative intent and will help restore the confidence of victims seeking help through this process in the courts. We are asking you today to consider this bill, to consider the impact the Cloeter decision has had on the Protection from Domestic Abuse Act, and to advance this bill to the full

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floor of the Legislature. Thank you. [LB968]

SENATOR ASHFORD: Thanks, Robert. Any questions for Robert? Yes, Senator Coash. [LB968]

SENATOR COASH: Thank you, Chairman. Thank you, Mr. Sanford, for being here. I spoke with you several times about this particular issue. Can you give the committee an idea of the...maybe just an example of where because of the current statute, someone wasn't able to get a protection order? I think it would be...when you did that for me, it was very helpful for me to understand why this change in legislation was needed. [LB968]

ROBERT SANFORD: I think one of the things that this particular decision that came out of the Court of Appeals, the result of that, I think, is someone who, for example, their abuser is at another location, makes a phone call, says I'm going to come kill you. It's going to be more than that, obviously. Because the court is requiring this definition of imminent now, there could be an intervening act. She, basically, in order to qualify for a protection order, she is going to have to...he or she...the applicant is going to have to be subjected to abuse before they can qualify now. And so what we're asking is that this bill actually would go back to looking at the threats. [LB968]

SENATOR COASH: Okay. Thank you. [LB968]

SENATOR ASHFORD: Okay. Thanks, Robert. [LB968]

ROBERT SANFORD: Um-hum. [LB968]

PATRICK RUNGE: Good afternoon, Senator Ashford, members of the committee. My name is Patrick Runge, P-a-t-r-i-c-k R-u-n-g-e. I'm a private attorney based in Omaha. I do work assisting victims of domestic violence. I also do some work in my private practice as criminal defense attorney. I'm here in support of LB968. I think the committee, if in looking at the underlying facts in the Cloeter decision, I think you could see that the factual scenario in that case clearly fits a pattern of behavior where the Legislature intended to offer protection to the victim in that circumstance as has been indicated previously. When you look at the practical upshot of the result of the Cloeter decision, you're in a circumstance where the domestic violence victim has to be subjected to an imminent attack...in other words, be in imminent danger of being attacked, hopefully survive that circumstance before they're able to actually come to court and ask for relief. That is clearly not the type of policy that was intended when the domestic abuse protection order statutes were initially drafted and passed and something that needs to be remedied by this court. Abusers tend to be very well informed with regards to how the system works and the maximum amount of fear and intimidation that they are able to inflict upon their victims under the current set of rules.

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LB968 restores the law to where the Legislature intended, offering victims of domestic violence protection from fear and intimidation while ensuring that the procedural and legal safeguards are afforded to those who are accused of such abuse. I would urge the committee to approve LB968 and move it forward. I would yield any further time and take any questions that the committee might have. [LB968]

SENATOR ASHFORD: Any questions? Let me understand where we're...how does this fit into the protection orders? Just give me some...what's the context here? This is a separate violation... [LB968]

PATRICK RUNGE: I'm sorry, I'm not... [LB968]

SENATOR ASHFORD: ...you're...this is a separate violation of the...you're increasing the penalty, is that what you're doing here? [LB968]

PATRICK RUNGE: Are you talking about the...there's a couple of different... [LB968]

SENATOR ASHFORD: Well, you're increasing the penalty for the act. [LB968]

PATRICK RUNGE: Correct. [LB968]

SENATOR ASHFORD: And so if there is this threat, what happens? You...you...or what here...let me just tell you. I mean, there's a threat. You...then the victim would call the police, and that's what should trigger the event. That's what you're talking about here. How does this happen in real life? [LB968]

PATRICK RUNGE: Well, the...um-hum. What I'm...well, what's happening now...what appears to be happening now, it's anecdotal at this point. What appears to be happening now is that when victims are coming forward and having a circumstance where somebody called and threatened me or something along those lines, but there wasn't an actual physical intimidation--nobody's pointing a gun at anybody or threatening to swing a bat at anybody. What anecdotally is...we're finding, is that they're either not filing those because the result of the decision...the Cloeter decision says, we can't unless there's an imminent threat, you can't issue a protection order. So that's really the concern that... [LB968]

SENATOR ASHFORD: Okay. There's a protection order, but you're also...this is also a separate offense that would... [LB968]

PATRICK RUNGE: There is...there is language that is talking about amending Section 28, talking about domestic assault in the third degree to remove the imminent language, and I think it's to address the same issues as... [LB968]

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SENATOR ASHFORD: Okay, but what I'm saying is there's...you don't need a...it may not be a protective order case. You could be in...you may...you may feel threatened to the point where you call the police under this act. The police come in and arrest that person. The protective order doesn't even enter into it. [LB968]

PATRICK RUNGE: Correct, although it may be a circumstance where the two aren't mutually exclusive. It may be that they do both... [LB968]

SENATOR ASHFORD: Right, right. I understand that but... [LB968]

PATRICK RUNGE: ...although the concern in...at this point would be is if, again, if the imminent part is removed, if you've got someone that's made that threat, that's not the direct imminent threat. If the Cloeter definition of imminent remains in place, the question then becomes if someone makes that threat to somebody else, but it's not the point in...right there, pointing the gun at someone, is that...fall under that Section 28 definition that it is a crime. Do they get arrested in the first place? [LB968]

SENATOR ASHFORD: Actionable. Right. Anecdotally, my brother who's now a judge, but he tried when he was working as a county attorney, had the case where the...the Air Force colonel drove across the country and killed Jill Garlock, and who was a coach at Burke...I think Burke High School. And that's quite a few years ago, but that...there were many, many threats along the way, and then finally, Jill was killed. But that's an extreme case, but it's...it was a...certainly, there was no imminent threat, but there was a threat that that was carried out. So I assume that you've seen cases in a similar vein. [LB968]

PATRICK RUNGE: Yeah, and obviously, that's the worst case scenario, the...the... [LB968]

SENATOR ASHFORD: But it could happen. It's... [LB968]

PATRICK RUNGE: Absolutely. [LB968]

SENATOR ASHFORD: Right. [LB968]

PATRICK RUNGE: And the idea behind the changes in this particular legislation is to make sure that action can be taken before you get to that imminent...you know, you get to the stage where you have to wait until you're about to be killed in order to request relief from the court, whether it be criminal relief or relief from a protection order. [LB968]

SENATOR ASHFORD: Yes, Senator Lautenbaugh. [LB968]

SENATOR LAUTENBAUGH: Thank you, Mr. Chairman. I have to ask you if you agree

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with this because I don't read this as creating any new offenses or even changing any penalties. I just see this as clarifying the elements of a possible action. [LB968]

PATRICK RUNGE: That's my understanding too, and I think I may have agreed to something without really thinking my way through it. I don't... [LB968]

SENATOR ASHFORD: Oh, so the (inaudible) still in there. Okay. [LB968]

PATRICK RUNGE: Yeah. I don't think...I think you're correct, Senator, and I appreciate you pointing that out. [LB968]

SENATOR ASHFORD: So it's just removing imminent? [LB968]

PATRICK RUNGE: It's just changing language and making things clear. I apologize if I misstated what's being presented. [LB968]

SENATOR ASHFORD: Right. No, I...I'm the one that presumed there was an enhanced penalty so. [LB968]

PATRICK RUNGE: This is my first testimony before the Legislature. I'm a little nervous (laughter). [LB968]

SENATOR ASHFORD: Well, this isn't my first and I make mistakes all the time, so that was not a mistake on your part. Thank you. Thanks for your testimony. [LB968]

PATRICK RUNGE: Thank you. [LB968]

SENATOR ASHFORD: Any other proponents? Opponents? Neutral? Sally? ..no (laughter). That would be a first...you've never (laughter)...you've never...you've never opposed anything (laughter). [LB968]

SENATOR LATHROP: I've never had Sally testify (laughter). Come on, Sally. Oh, that's hilarious. She stood up on cue (laughter). [LB968]

SENATOR MCGILL: I will just throw in real quick, we were talking about the practical impact it's had on the ground and during the first six months after that court decision, there was an 11 percent decrease in filings likely because they're being told that, you know, you're not going to get this protection order with this change since the court decision. And in Douglas County alone, it's 20...almost 23 percent down, so it's had an impact on the filings. [LB968]

SENATOR ASHFORD: It seems like a major...a major issue. Seems like a major issue to me so. [LB968]

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SENATOR MCGILL: Yeah. [LB968]

SENATOR ASHFORD: Thank you for bringing it to our attention. [LB968]

SENATOR MCGILL: All right. [LB968]

SENATOR ASHFORD: All right. That closes the hearings and...I wasn't going to say  
exec session, but in case I did, (laughter)... [LB968]