[LB244 LB245 LB299 LB434]

The Committee on Judiciary met at 1:30 p.m. on Friday, January 30, 2015, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB299, LB434, LB244, and LB245. Senators present: Les Seiler, Chairperson; Ernie Chambers; Laura Ebke; Bob Krist; Adam Morfeld; Patty Pansing Brooks; and Matt Williams. Senators absent: Colby Coash, Vice Chairperson.

SENATOR SEILER: We don't have a quorum yet, but I'll go over some of the preliminaries. We will be discussing the bills in the order in which they were published. And, testifiers, if you're going to testify, sign the testifying sheet and get it filled out. And when you come up to the desk to testify, hand it to one of the clerks and they'll get it to the main...or a page and they'll get it to the clerk. We need that information. If any of you are in a position where you want to voice your opinion but you do not want to testify, there is a sign-up sheet and that will at the end of the hearing be made part of the record, and so your name will appear in the record as being for or against or in the neutral of a bill. We will be operating a clock. When you see the red light go on, stop. I don't mean to be imprudent (sic) to you, but I will ask you to stop when the red light goes on. If you've got something really important to...that you're going to cover, one of the senators can ask you if you have anything yet to add to your testimony and, if you do, you'll get an opportunity to finish your testimony that way. If you have handouts, we need 15 copies to be handed out. We want you to speak very clearly into the microphone that's in front of you. The purpose of that is not for amplification but to make sure the record picks up your recorded testimony so we know exactly who is testifying and what you said. The...if you and one of the members of the committee get into a little debate, let one talk and then the other so that we don't talk over each other and the record is blurred and we don't get either side's testimony. Put your cell phones on silent. I think most of us will do that right now. The reason we're waiting is we've got one senator that's due in another committee and if he leaves we don't have a quorum, so we're going to wait for one more. There she is. We now have a quorum, so we'll start the hearing with LB299. Senator Schumacher, please come. And while you're coming up, I'll introduce the group. On the right is Matt Williams from Gothenburg, Senator. You can see the nameplates so I won't...Senator Morfeld from Lincoln just came in on the right, Diane Amdor is our legal counsel, our clerk is Oliver VanDervoort, and Senator Patty Pansing Brooks there. And last but not least is Senator Ebkuh (phonetically)? Ebke. [LB299]

SENATOR EBKE: Key (phonetically). [LB299]

SENATOR SEILER: Ebke,... [LB299]

SENATOR EBKE: Key (phonetically). [LB299]

SENATOR SEILER: ...from...what do you claim, Wilber? Crete? [LB299]

SENATOR EBKE: Crete. [LB299]

SENATOR SEILER: Crete? Okay. And I'm Les Seiler and I'm from Hastings. Okay, Paul, take off. [LB299]

SENATOR SCHUMACHER: Thank you, Senator Seiler. Members of the Judiciary Committee, my name is Paul Schumacher, S-c-h-u-m-a-c-h-e-r, representing District 22 in the Legislature. Today's bill was brought to me by the County Attorneys Association. It is essentially a parallel document to what appears in the federal law regarding the issue of alibis. An alibi is when the accused says, I wasn't there, I was with somebody else, I was in the other part of the country, therefore, I'm not guilty. Well, currently, under Nebraska law all that has to be done is that the accused has got to serve a notice on the state that says, I intend to rely on an alibi defense. And that's all they got to tell you unless you go through a bunch of depositions and other processes to try to get that information out of the state. This particular bill sets out that when people intend to have witnesses as alibi witnesses, intend to rely upon alibi as a source of defense--and it's mirror imaged if the government intends to impeach those witnesses--that you got to tell people ahead of time who those witnesses are and what your alibi is so that, fully and fairly, you will be able to have a fair trial with all the facts on board. The language of the bill, perhaps a bit of a drafting anomaly, talks about the government and the government here is the state of Nebraska, the prosecutor, county attorney or, I suspect, as the case might be in some cases, a city attorney. But it is the prosecution, and in the federal law the government is referred to as the government. But here at the state level, we all like our county attorneys so we'd never call them the government. Any rate, that's the gist of it. The folks with the County Attorneys Association probably will have a better understanding of what's been recently going on with alibi defenses, why this will be resulting in a fairer and better system, and a way that we hopefully can get to the truth of the matter in criminal cases without as much commotion as we would have otherwise and hopefully will be justice for all. I'll be happy to take any questions. [LB299]

SENATOR SEILER: Any questions? Paul, you and I talked about...oh, excuse me, go ahead. [LB299]

SENATOR WILLIAMS: Go ahead. [LB299]

SENATOR SEILER: Paul, you and I talked about changing that "government." Are you going to do that to make it conform with all the other statutes? [LB299]

SENATOR SCHUMACHER: If the committee is inclined to advance it with an amended version of the bill that would change that word so that it conforms, either that or define "government" in the context of the other statutes. [LB299]

SENATOR SEILER: I think, to be consistent, we ought to probably change that to "state." [LB299]

SENATOR SCHUMACHER: But to be interesting, we could keep it different. [LB299]

SENATOR SEILER: Pardon? [LB299]

SENATOR SCHUMACHER: To be interesting, we could keep it different. [LB299]

SENATOR SEILER: Some...I'm not going to go to that line. Senator Williams. [LB299]

SENATOR MORFELD: Diane is shaking her head. [LB299]

SENATOR WILLIAMS: That was my question, Chairman Seiler. [LB299]

SENATOR SEILER: Okay. There may be a friendly county attorney out there that I don't want to...(laugh) nevermind. [LB299]

SENATOR SCHUMACHER: (Laugh) Okay, thank you. I'll...I've got some things in Revenue Committee. I would waive closing. [LB299]

SENATOR SEILER: Okay. [LB299]

SENATOR SCHUMACHER: Thank you. [LB299]

SENATOR SEILER: First proponent witness. Will you proceed and state your name and spell it for the record. [LB299]

NATHAN COX: I will, thank you, Mr. Chairman. My name is Nathan Cox, C-o-x. I am the county attorney in Cass County and I am here representing the County Attorneys Association in support of this particular bill. Currently, the statute that we have doesn't really serve either the defendant or the prosecution very well at all. The burden is on the defendant to make sure that

they file that alibi notice. If they don't, and we've had cases like this, you get into trial and an alibi is brought up, the state can, and we have had success in doing this, make an objection. That witness cannot testify. The statute is written in such a way that it specifically says "shall not." So these...this has the potential of being fairly draconian with regard to defendants. Also, it doesn't really serve the prosecution very well because the prosecution doesn't know what the alibi is. When you're trying to figure out if the case really should go forward, it's beneficial to know that your defendant is entirely elsewhere and could not possibly be the defendant or the perpetrator of the crime that you have alleged. And so the legislation mirrors, as Senator Schumacher pointed out, mirrors that of the federal system. It's been around for several decades. It was bandied around pretty hard as to how it should be drafted. And with this legislation, then the burden would be on the state initially with the alibi. The state would have to contact the...or file with the court a document asking if there was any alibi being offered by the defendant. Then the defendant would have a period of 14 days to indicate that there was, give that information to the state. Then the state is under a requirement to then turn over their rebuttal witnesses which, as those of you who are trial attorneys know, you don't necessarily have to turn over those rebuttal witnesses to the other side. This statute would require that the state hand those rebuttal witnesses over to the defense so that they could also depose and prepare their defense if that case is going forward. I don't really have any further. If there are any questions, I will attempt to answer them. [LB299]

SENATOR SEILER: Okay. Nathan, it's been good to see you again. [LB299]

NATHAN COX: Good to see you too. [LB299]

SENATOR SEILER: It's been a long time. [LB299]

NATHAN COX: (Laugh) It has. You look well. (Laugh) [LB299]

SENATOR SEILER: Thank you for your testimony. [LB299]

NATHAN COX: Thank you. [LB299]

SENATOR SEILER: Next proponent witness. Next proponent witness. Seeing none, opponent witnesses. [LB299]

MANDY GRUHLKEY: Good afternoon, Committee. This...my name is Mandy Gruhlkey. I'm an attorney at the Sarpy County Public Defender's Office and I'm here before you today representing the Nebraska... [LB299]

SENATOR SEILER: Would you spell your first and last name. [LB299]

MANDY GRUHLKEY: Oh, I'm so sorry. You don't know how to spell that? (Laugh) It's a tricky one. It's Gruhlkey, it's G-r-u-h-l-k-e-y. And again, I'm with the Sarpy County Public Defender's Office, here speaking on behalf of the Nebraska Criminal Defense Attorneys Association. The NCDAA opposes LB299. The reason for our opposition is that the Fifth Amendment clearly provides that no person shall be compelled in any criminal case to be a witness against himself. This provision maintains that a criminal defendant cannot be required to give evidence, testimony, or any other assistance to the state to aid it in convicting him of a crime. Proposed LB299 is a violation of that constitutional provision because it requires a defendant to disclose information to the state so the state can use that information to destroy him, essentially. It proposes to now allow the state to demand from the defendant a step-by-step list of details of any possible alibi the defendant may use and including specifics such as any alibi witnesses' names, addresses, or telephone information. And if the defendant doesn't provide this information, then sanctions, including the inability to use these witnesses, can be...can happen to the defendant. Needless to say, this is a stretch to suggest that this procedure may have some beneficial effects for a defendant. It is no answer to this argument to suggest that the Fifth Amendment as so interpreted would give to the defendant an unfair element of surprise, for that tactical advantage to the defendant is inherent in the type of trial required by our Bill of Rights. The framers were aware of the vast investigatory and prosecutorial powers of the government and it was in order to limit these powers that they spelled out in great detail in the constitution the procedures to allow in criminal trials. The defendant is entitled to notice of the charges against him, trial by jury, cross-examination. All these rights are designed to shield the defendant against the state power; none were designed to make convictions easier. So together they clearly...this clearly indicates that our system...the entire burden of providing (sic) criminal activity rests on the state. The defendant has the absolute burden, unqualified...excuse me, the absolute, unqualified right to compel the state to investigate its own case, to find its own witnesses, and prove its own facts and provide the jury with their own resources. The Bill of Rights requires the state itself to bear the burden of convicting individuals of crimes. The theory of LB299 is to permit the state to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics the defendant plans to use at trial. The rationale of LB299 requires the defendant to assist the state in convincing...convicting him or to be punished for failing to do so. [LB299]

SENATOR SEILER: Okay. Any questions? Senator Morfeld. [LB299]

SENATOR MORFELD: Thank you for testifying today. So I'm looking at the current law which is stricken. So my understanding is that they simply need to provide notice. Can you explain the current process a little bit for us? [LB299]

MANDY GRUHLKEY: The way the law is now? Yes. [LB299]

SENATOR MORFELD: The way it currently is. [LB299]

MANDY GRUHLKEY: Currently, the way that the law is now, my understanding of it, is that 30 days prior to trial the defense is required to provide the prosecution with notice that they will be using alibi defense. [LB299]

SENATOR MORFELD: But you're not required to give the name or anything like that? [LB299]

MANDY GRUHLKEY: No. [LB299]

SENATOR MORFELD: It doesn't appear? Okay. [LB299]

MANDY GRUHLKEY: No. [LB299]

SENATOR MORFELD: And this is just bringing this in line with the current federal requirement, is that right? [LB299]

MANDY GRUHLKEY: It is bringing it into line with the current federal requirements according to this...the federal statute, hence, the discrepancy in languages with the "government" and "state." One thing I wanted to note, because I don't practice in federal court at this time, I'm a young lawyer, but there is some of my colleagues in my office that do and what they pointed out to me is that the state, you know, there's a six-month speedy trial. So when the prosecution brings a case in the state level, there's six months before that has to become a trial. In federal government, it's my understanding, or in federal court, it's 70 days, so the process getting a case to trial is a lot shorter. So that could be why there's the 14 days that they...the government wants that notice of an alibi. [LB299]

SENATOR SEILER: Senator Williams. [LB299]

SENATOR WILLIAMS: Thank you, Chairman Seiler. Would you explain to me...if this is the federal law, would you walk through your constitutional argument again to a federal law that is already on the books and has survived the test of constitutionality. [LB299]

MANDY GRUHLKEY: Yes, sure. We just look at the Fifth Amendment. And I understand that on the federal law, this is what's on the books. But again, like I said, the federal trial process is a little bit different. The constitutionality... [LB299]

SENATOR WILLIAMS: But it's the same constitution. [LB299]

MANDY GRUHLKEY: Right, it is the same constitution, yes, sir. But the way that we look at it is, even though it's the same, it doesn't mean that Nebraska necessarily has to adopt the federal law. There's, you know...I'm certain other laws that we...that's why we are a state. That's why we don't have to take on all the federal laws. If we see that this is something that for our citizens this is actually going to be stepping on their constitutional laws, then we don't actually have to adopt. I mean that's the beauty of having the system that we have. And the way that we see this is that this is actually stepping on the toes of the defendants because we're...and this is the adversarial process and the prosecution is the one that is...has the burden of proving that these crimes are being committed. Essentially, what this...the changes in this statute would mean would be that the defense, if we...the defendant has an alibi witness, if they think they're going to use the alibi witness, then they have to provide the prosecution with the names, the telephone numbers, the addresses of these witnesses so then the prosecution can carry on their investigation, get more information. And then the defendant may actually not decide in the end because when you have a trial...I haven't done a whole bunch of trials, but I have done several. I've been part of a second-degree murder trial. You have no idea what's going to happen in that case. You have no idea what's going to happen and whether or not you'll need to use your alibi. So here what we're doing is giving the prosecutor all of the defense tactics that we could be using when it may not even be something that we will need considering what the prosecution will bring at trial. Did that answer your question? [LB299]

SENATOR WILLIAMS: I'll leave it there. Thank you. [LB299]

MANDY GRUHLKEY: (Laugh) Okay. [LB299]

SENATOR SEILER: Senator Chambers. [LB299]

SENATOR CHAMBERS: I wish I had gotten here earlier so I could have talked to those who support this legislation. The federal law is not something that I have confidence in. I don't have confidence in federal prosecutors. They overcharge. They compel and coerce people to make plea bargains and tell them, if you don't make it right this minute you might be allowed a plea bargain but later on it's going to be a lot harsher, to compel people to do that. They have heavy dockets, they have a lot of work to do, they're understaffed, all those things, but about 97 percent of their federal cases, criminal, end in plea bargains. So they have it something like a cattle-call

system. The state can set a higher standard than what the federal law does. And even when it comes to a decision by the U.S. Supreme Court that it's protective of the rights of people, the Nebraska Supreme Court has said that's the floor. The Legislature can give greater protection and the Nebraska Constitution can give greater protection than the federal constitution does. What the federal constitution does is say you cannot give anybody less than this protection, but the state can give a lot more. And these prosecutors are lazy, they're often unfair, they're often incompetent, and they want everything done for them. Now I haven't had a chance to read this thoroughly, but is there anything that would prohibit the prosecution from contacting these alibi witnesses prior to trial? [LB299]

MANDY GRUHLKEY: No. No, Mr... [LB299]

SENATOR CHAMBERS: So they can intimidate; they can coerce; they can do the kind of things that a self-respecting, decent prosecutor would not want to do. The prosecutor has a higher standard to meet than an ordinary lawyer because the prosecutor represents the sovereign and should be interested in justice, not just winning cases by hook or by crook. This is a crook law that the prosecutors want and it is not anything that I will support. And the reason I say it: because I like to give notice of what I'll do if it gets on the floor. I don't believe that anybody has read everything in this law, looked up all of the cases that interpret this federal statute to know exactly what this law really means at the federal level. So to import something in total from the federal laws or their rules or anything is something I would never do without a great amount of study and consideration. So I'm glad that you came to testify today. And they might have had additional people who were going to testify for the bill, but when I walked in the room they might have changed their mind. [LB299]

MANDY GRUHLKEY: Perhaps. [LB299]

SENATOR CHAMBERS: But anyway, that's all that I have. [LB299]

MANDY GRUHLKEY: Thank you. [LB299]

SENATOR SEILER: Have...I noticed in United States C.S. (sic) Federal Rules of Criminal Procedure's Rule 12.1, in the annotations, there's been numerous cases under this and they've been upheld each and every time in federal court. Do you have a case that says that a court has held this unconstitutional under your theory? [LB299]

MANDY GRUHLKEY: Not that I have found. [LB299]

SENATOR SEILER: Okay, but there are a number of cases upholding it for the alibi defense and the procedure that's outlined here. Did you... [LB299]

SENATOR EBKE: Well, I did. I think you sort of got to it, but I think perhaps...and I don't want to speak for him, but Senator Williams maybe was getting at this, at the question of, okay, if it's been upheld at the federal level in federal court, why would we not think that it was constitutional, perhaps? And you can correct me if I'm wrong that what you might be suggesting is that just because it's been upheld doesn't necessarily mean that it's consistent with the constitution. [LB299]

MANDY GRUHLKEY: Correct, yes. Yes. [LB299]

SENATOR CHAMBERS: Ahem. [LB299]

SENATOR SEILER: Yes, (laughter), excuse me, Senator Chambers. [LB299]

SENATOR CHAMBERS: When I talked about cases, I don't mean federal cases striking down the law. [LB299]

MANDY GRUHLKEY: Right. [LB299]

SENATOR CHAMBERS: But they often expand the reach of it in the way that it's applied. So we might read these words and think they are limiting words; but the federal courts might expand the reach of this law, and that's what I'm talking about. And when it comes to what we do as a state, there are principles that I don't like that are in the federal law. So the mere fact that it's in the federal law does not make me believe it ought to be in the state's law. So they could have had a thousand cases and it could have been held up at the federal law...level in federal cases. But because Nebraska has its own constitutional provision against self-incrimination, I interpret that the way I think it should be interpreted when I'm formulating policy. And it's not necessarily that every law that should not be on the books would be unconstitutional. Some are unwise. Some are unfair. And the constitution often doesn't talk about fairness, but as a policymaker that's what I look at. And in this state, the prosecutors have everything. They can determine what charges will be filed. They can determine whether there will be any plea bargaining, whether a plea agreement is accepted or not. They can delay the case if they choose. They have control of everything and here they come for more. And when you give lazy people something that encourages and facilitates their laziness, they want more and more. I want the prosecutors to know. And I wish the head of their group had been here because they...it was a lady at the time, was very disingenuous in dealing with me on a particular bill last session. So whenever I see

something from the prosecutors, they know that I'm not automatically on their side. Now they'll have people who will be, but they're going to have to overcome me on the floor and the little bit that I've done so far is nothing compared to what I'll do when something like this comes on that I think is really hurtful to the public. I'm not ever trying to say that somebody who committed a crime should not be punished, but I am also saying people who have not committed crimes, they shouldn't be punished. I heard on the news when I was coming down here up in one of those New England states they kept a man in prison for two decades for a crime he didn't commit. In North Carolina, one had been in prison 40 years for a crime he didn't commit. That's what the prosecutors do. Then people say, well, there's no such thing as perfection, when they're messing over people. Well, I hold to the belief that when it comes to the action by the state, it would be better for 100 guilty people to escape than that one innocent person should be locked up and punished. But in this country it's the opposite. They would rather punish 100 people than allow an accused to escape. But I didn't want the Chairman to think I'm saying that there would be federal cases that struck this down. Under Judge Roberts they get anything they want. And the federal court system is a political system. It is not a system of justice. The top legal officer at the federal level is the Attorney General and the Attorney General is appointed by the President and the President is elected by a certain political party and that political party governs what that Attorney General, by and large, is going to do. I don't operate at the federal level. I operate at the state level and, I assure you, whether they like it or not, my presence is going to be felt. And this kind of thing is worthy of discussion because it will make us attentive to the efforts made by prosecutors to undermine the rights of citizens and give them additional, unfair advantages that they already have. I don't even think you should have to notify the government that you're going to use an alibi. [LB299]

MANDY GRUHLKEY: One interesting thing to point out, too, is in the first part of the bill. It's within 14 days the prosecutors...the defendant has to answer the prosecutor with whether or not they'll have an alibi. I don't even get police reports within 14 days on many of my cases. So I don't even...won't even know the facts against my client and then I'm expected to know what my alibi is going to be on that. I have...there is an investigator that works for our office at the public defender's office that will have to go out and do research and stuff. So the 14 days just...the very beginning, the first part of it, that is completely...there is no way that...I don't...I could even see how we could comply with that. [LB299]

SENATOR CHAMBERS: Now I have a question. [LB299]

SENATOR SEILER: Yes, go ahead. [LB299]

SENATOR CHAMBERS: A person who might be a witness and provide an alibi may not be somebody the defendant or the accused knows. [LB299]

MANDY GRUHLKEY: Right. [LB299]

SENATOR CHAMBERS: It doesn't have to be an acquaintance or a friend, so... [LB299]

MANDY GRUHLKEY: It could be the convenience store person or some...yeah. [LB299]

SENATOR CHAMBERS: Right, and it could be somebody who didn't even realize there was going to be a trial and then they find out that there is and then they come forward and say, hey, I got some information, but it's outside of this time frame. [LB299]

MANDY GRUHLKEY: Right. [LB299]

SENATOR CHAMBERS: And the defendant may not know about that witness, may not know his or her name, address, or anything else, and maybe it could be found out if you become aware that this person exists. But anybody who talks to the police, the prosecutor will know; any report that a police officer writes, the prosecutor will have it. And prosecutors have been known to withhold evidence and information that they have. And I can get the Chairman cases on that, where prosecutors have withheld evidence. And it was so bad in some cases they were sanctioned for misconduct. So prosecutors, I put them one inch away from being a criminal because they've got a license to do wrong and the criminal doesn't, just so they know. And had I been here when they were talking, they would have had a chance to answer my questions and come back at me. But if this gets on the floor, they're going to know what kind of statements they're going to have to feed the people who support this bill to try to counteract what I'm going to say because they won't have to confront me on the floor. That's all that I have, for real this time. [LB299]

SENATOR SEILER: Anybody else have a question? The question I have for you is, what's your thoughts on the current bill? You want to do away with that too? [LB299]

MANDY GRUHLKEY: In a perfect world, yes, yes, because, again, I mean, with something like this... [LB299]

SENATOR SEILER: Excuse me, not the current bill, current law. I misspoke. [LB299]

MANDY GRUHLKEY: Current law, yes, yes, the current law, because with...in a perfect world, yes, do away with it, because, like I said, you never know what's going to happen as far as the defense investigating the case, or you also never know what's going to happen at trial. [LB299]

SENATOR SEILER: I always knew. [LB299]

MANDY GRUHLKEY: Do you? Did you? [LB299]

SENATOR SEILER: Yeah, I did my discovery. [LB299]

MANDY GRUHLKEY: Yeah. [LB299]

SENATOR SEILER: If you don't do your discovery, you're not going to know. [LB299]

MANDY GRUHLKEY: We do the discovery. You never know what's going to come in, the Rules of Evidence, you know. There will be things that you wish would come in or that wouldn't and... [LB299]

SENATOR SEILER: Oh, come now, you know what's coming in and what isn't. [LB299]

MANDY GRUHLKEY: Oh, different judges rule different on all kinds of evidentiary... [LB299]

SENATOR SEILER: How many judges do you appear in front of? [LB299]

MANDY GRUHLKEY: Currently, right now, three. [LB299]

SENATOR SEILER: And you know the judges. [LB299]

MANDY GRUHLKEY: And I...yes. And I know one is wild hair, depends on what his mood is. [LB299]

SENATOR SEILER: That's right. Thank you very much for your testimony. [LB299]

MANDY GRUHLKEY: Thank you. Thank you. [LB299]

SENATOR SEILER: Next opponent. [LB299]

JOHN BERRY: Good afternoon. My name is John Berry. I'm the president of NCDAA. I wasn't going to speak, but I do have experience in federal court and I wanted to shed some light on what happens in federal court. That 70-day speedy trial, there is usually a progression order, a very

tight progression order issued by that federal judge that says prosecutors have to get discovery, 14 days. We have then 16 more days for pretrial motions. They're due in 30 days. And so you're talking about a very tight time line that is very controlled by the judges. Here, we have 180-day speedy trial. If you want to have a 70-day speedy trial and have this rule, great. But the way the rules are now, you know, it doesn't make sense for a lot of practical, practical reasons from individuals actually, you know, out there trying the cases. You know, right before trial is a pretty magical time. Prosecutors sometimes become a little bit more sensible about deals and sometimes clients become a little bit more truthful with their attorneys about what's going on. And I know that, you know, some of us have been in the situation where the day of trial we get a different story. And I have had clients protecting witnesses or guilty parties that they don't want to tell me what's going on, maybe because I was appointed to their case. And I don't take state appointments, but I take federal appointments and I know some of the public defenders go through the same thing at the state level. And so here I am, showing up, and finally we have a meeting and it's...we're ready for trial and I have my strategy and I've gone over it with my client and we're good to go and they come to me that day and say, you know, look, I got to come clean, here's what happened, this is the person I was protecting, and there really is an alibi defense. Well, guess what, I didn't get it in. Now I got to show good cause; I got to make the argument. But the way the law is now with the...you know, I can make...if I think it's possible, I can say, yeah, I may have an alibi defense, and go from there. I think some of the things that...Senator Chambers is certainly correct about that if we disclose that alibi witness, you bet law enforcement is going to be over there, talking to that witness. And people get scared and they don't want to come to court. And, you know, the prosecution a lot of times, someone doesn't...send the cops to go get them. Defense attorneys, I've had to ask judges to have people arrested to bring them in to testify. But I would just point out that this rule, this proposed bill does not make sense in our current system, is contrary to justice, and especially in a system where the prosecution has so much power, so much authority, they have the investigators. You know, most criminal...public defender's office, they have maybe one investigator if they're lucky. Private defense attorneys, sometimes people who hire me, they can't afford to hire an investigator, so we do our own investigation. But we do not have the investigative power, we do not have the financial resources the prosecution has. This is just one more tool that they have. And what our clients have is their constitutional rights and that is not only the protection of the United State Constitution, but also the protection of Nebraska law. And Nebraska law can protect more than federal law. And that's why I am opposed to this bill and I suggest that it do, that it protect the rights of our citizens more than the federal law, because the federal system is completely different, different system, shouldn't apply here. Thank you for your time. [LB299]

SENATOR SEILER: Questions? I have one. [LB299]

JOHN BERRY: Sir. [LB299]

SENATOR SEILER: The current law is 30 days prior to trial. [LB299]

JOHN BERRY: Yes, sir. [LB299]

SENATOR SEILER: And even if you miss that and you get in the middle of the trial, you can still under the current law apply to the judge without sanctions if it promotes justice. [LB299]

JOHN BERRY: Correct. You know, it's strange, as a defense attorney, I've test...you know, I've tried cases in a lot of counties, a lot of jurisdictions and, you know, some judges are pretty friendly towards that motion. Some judges, I will tell you, you show up with something like that, it's not going to happen. You show up at trial the day...and you say, hey, you know, I've got an alibi defense, I want a continuance or whatever it takes, Judge, this is in the interest of justice, there are some judges that will say, you know, you missed it, sorry. And of course, I've also been involved in situations where judges are a little friendlier to prosecutors when it comes to these missing time lines and certain technical violations of the rules. And once again, considering the balance of power, this is, like I said, I see this as just another roadblock for justice. [LB299]

SENATOR SEILER: Well, I see this as an adoption of a federal system that isn't conforming with our system. Like you said, the 180 days versus, what, 30 days,... [LB299]

JOHN BERRY: 70. [LB299]

SENATOR SEILER: ...70 days? [LB299]

JOHN BERRY: Right. And of course, you get your discovery after 30 days, so it's not a lot of time in the federal system. [LB299]

SENATOR SEILER: Right, right. Any other changes you'd make in the current law? [LB299]

JOHN BERRY: No, sir. [LB299]

SENATOR SEILER: Okay. Anybody else? Thank you. Thank you, John. [LB299]

JOHN BERRY: Thank you, Senator. [LB299]

SENATOR SEILER: Any other oppositions? Anybody in the neutral? Seeing none and the--Paul Schumacher--senator waived his closing, so that will close the bill. Does anybody have anything

written that they wanted to put into the record? Seeing none, the record will be closed then. And, Senator Cook, LB434. [LB299 LB434]

SENATOR COOK: Thank you, Mr. Chairman. Honorable members of the Judiciary Committee, my name is Tanya Cook. That is spelled T-a-n-y-a C-o-o-k. I appear before you as the state senator representing Legislative District 13 and the introducer of LB434. This bill as introduced would require secondary metals recyclers to register for a metals theft alert notification system. LB434 also requires that Nebraska law enforcement agencies register for a metals theft alert notification system. The bill also creates a Class II misdemeanor penalty for metal recyclers who fail to comply with the metal theft alert notification system. A metals theft alert notification Web site is an effective aid to the prosecution of metal theft. These Web sites allow for law enforcement to notify metal recyclers of recent metal thefts, including any details of the crime, like the type of metals stolen and a vehicle or suspect description. Metal recyclers are then able to view and verify whether a potential customer is a potential perpetrator of property crime. Here is why LB434 is needed: Metal theft is a blight on the safety, security, and emotional well-being of our neighborhoods. My neighborhoods...my neighbors in Legislative District 13 and my constituents have been frustrated by this issue and are dismayed at the continued prevalence of metal theft crime and property crime in general. Industrial air-conditioning units were recently stolen from more than 25 churches in Omaha. Loss of property, destruction of property, in addition to the loss of security and peace of mind, impacts those directly experiencing the crime as victims but also those in proximity. There has been an emergent uptick in this crime in the Omaha area, statewide, and across the nation. This uptick is likely attributed to a rise in copper prices and the price of other nonferrous metals, as well as a population of desperate people willing to take a great risk with the chance of little reward. When I first researched the issue of metal theft I was pleased to find that Nebraska's statutes are meeting or exceeding national standards for addressing metal theft itself. Despite this fact, the crime continues. Once fully implemented, the metal theft notification system will greatly increase the prosecution of these crimes. Representatives from the community and representatives of the metal recycling industry are here today to testify and indicate to this committee why they support strict self-regulation and how metal theft notification Web sites have worked in other states. I would like to thank the committee for its thoughtful consideration of LB434 and look forward to working with you to address your concerns. Thank you very much. [LB434]

SENATOR SEILER: Any questions of the presenter? Seeing none, thank you, Tanya. [LB434]

SENATOR COOK: Thank you, Senator. [LB434]

SENATOR SEILER: Proponent testimony. [LB434]

EDWARD ROLLERSON: Good afternoon, Senators. Edward Rollerson, E-d-w-a-r-d R-o-l-l-e-r-s-o-n. I'm the pastor of Fellowship Christian Center and we were one of the churches that Senator Cook just mentioned that had our air conditioner stolen. And you know, they say, I don't know what or how much, you know, money they received from the copper that they took, but I know it costs $5,000 to replace, you know, the air conditioners. You know, the police, Omaha Police, doesn't really seem to be able to, you know, slow this, you know, copper theft down, like I said. And I am abreast of churches that have had their air conditioners stolen and when they're replaced they put them on the roof of the church and the thieves went up on the roof and still, you know, stole the copper out of the air conditioner. So we need, you know, something, like I say, you know, here, you know, 100 percent, you know, for this bill that, you know, Senator Cook has implemented because something needs to be done. I mean, like I said, the Omaha Police, I'm sure...I imagine they're doing the best that they can. But something else needs to be done in order to slow these individuals down from stealing the copper, so thank you. [LB434]

SENATOR SEILER: Any further questions of this witness? Seeing none, thank you for your testimony. Next proponent witnesses. Yeah, if there's more witnesses, move toward the front so that we can... [LB434]

DANIELLE WATERFIELD: (Exhibits 1 and 2) Good afternoon, members of the committee. My name is Danielle Waterfield, D-a-n-i-e-l-l-e W-a-t-e-r-f-i-e-l-d, and I am here as assistant counsel and director of government relations on behalf of the Institute of Scrap Recycling Industries. We are a nonprofit trade association that represents more than 1,600 for-profit recycling entities that process and broker commodity gray materials into raw manufacturing feedstock in this country. I ask your permission to submit my full statement for the record and have submitted it here and just would like to offer just a few comments about this bill and express the industry's support of LB434 for various different reasons. I will also thank you for the opportunity to speak about the issue of metals theft, including one of the most effective tools that is out there to fight metals theft, and that is scraptheftalert.com. First and foremost, I'd like to point out that scrap recycling industry is part of the solution to the issue of metals theft, not the problem. Legitimate recycling businesses do not intentionally take stolen material. And we realize, however, that this crime is a significant plague on our communities and we have a role in the solution to try to stop this theft. We believe that collaboration and cooperation among all the stakeholders is the most effective means to fight this metals theft. Without the open communication and partnership with all stakeholders, we will not win this war. But collaboration and coalition works, and I'm here to describe to you a system that is in place nationally that we have found does work. There currently are nine states in the nation that have recognized the importance of collaboration and cooperation and the value and benefit of an alert network system. Nine states have enacted into their law the requirement to use a theft alert notification system into their metal theft statutes, the most recent being the state of California which just went into effect this month. And in that law, the state specified the ISRI scraptheftalert.com system as the statutory standard for compliance

with that requirement of the law. Of those nine, six states also recognized the ISRI system as the statutory standard for compliance with the theft alert notification system. And the system does work. I am here. I have one example to share, but there is someone else that will testify with an example. I'm out of time, but I will mention real quick about how in Tennessee, recently, in November AT&T reported $5,000 worth of stolen copper and two weeks later it was reported found at a recycler in Kentucky and, as a result of that, the law enforcement in Tennessee was able to apprehend the suspect and also found out that 25 other thefts were connected to this thief. And that's all a result of the alert system. [LB434]

SENATOR SEILER: Thank you. [LB434]

DANIELLE WATERFIELD: Thank you. [LB434]

SENATOR SEILER: Thank you for your testimony. [LB434]

SENATOR WILLIAMS: Chairman Seiler. [LB434]

SENATOR SEILER: Senator Williams. [LB434]

SENATOR WILLIAMS: Thank you. Ms. Waterfield, would you please just explain, cut through all the...what states have done what and explain how this process would technically work in Nebraska under this LB434. [LB434]

DANIELLE WATERFIELD: Absolutely. The alert system is an Internet-based system. It is easy to use. All you need is a computer with an Internet connection. And what happens is, when there is a theft reported stolen, the law enforcement officer can go into the...onto the Internet system. There are fields built in--as we describe very easily, the "TurboTax" function--fields that are built to answer the questions that you need to put in, what the material is, what its estimated value is, more importantly, the officer's contact information so that the recycler knows who to contact when they see the material come through. The system then automatically sends out via e-mail the alert information to a 100-mile radius, does not matter about jurisdictional borders. And anybody that is subscribed to the system--the system is free of charge and can be used to anyone who registers--will receive that alert, along with whatever information the officer includes, which could be photographs as well as descriptions. But not only law enforcement can send out alerts. Property owners themselves can send out alerts, such as AT&T security did. And recyclers may also use the system to turn around and report something suspicious that has come into their yard that they want the other yards to be on...to realize they've received. [LB434]

SENATOR WILLIAMS: So the system is...exists to make this notification and do all this right now. [LB434]

DANIELLE WATERFIELD: Absolutely, yes, sir. [LB434]

SENATOR WILLIAMS: Why does it take a law to move us forward then? [LB434]

DANIELLE WATERFIELD: Very interesting question. We have found that legitimate recyclers are using it already. We also have found that law enforcement are using it. In Nebraska, unfortunately, we are having trouble apparently getting the word out because, unlike surrounding states, Nebraska has only 47 registered users as of this morning and 57 alerts that have gone out, whereas Iowa, for example, has had 243 alerts that have gone out and more than 100 registered users. So some of this is really just a way of getting the word out because we believe the system itself will prove its worth in that those that, once they realize it's there as a tool, they will use it regardless of whether there's a law. [LB434]

SENATOR WILLIAMS: So LB434 would require law enforcement to use the tool. [LB434]

DANIELLE WATERFIELD: Yes, sir, as it is currently written. [LB434]

SENATOR WILLIAMS: Is the law or a law like this enforced in Iowa right now? [LB434]

DANIELLE WATERFIELD: Not in Iowa. [LB434]

SENATOR WILLIAMS: Okay. [LB434]

DANIELLE WATERFIELD: There is a law that requires scrap dealers in Colorado and nine total states, which are outlined in my written testimony. [LB434]

SENATOR WILLIAMS: Okay, thank you. [LB434]

DANIELLE WATERFIELD: You're welcome. [LB434]

SENATOR SEILER: I have a couple questions. On page 2, line 25, you're talking about secondary metals recycler is offered suspicious materials according to the standard industry business practices. Can you describe what you're talking about there... [LB434]

DANIELLE WATERFIELD: I certainly... [LB434]

SENATOR SEILER: ...because the law doesn't define those terms. [LB434]

DANIELLE WATERFIELD: I certainly can give you an overview, although I will defer. There are two recyclers that will testify after me. [LB434]

SENATOR SEILER: Okay. If you want to defer, that's fine. [LB434]

DANIELLE WATERFIELD: Okay, I think they will be best to answer that. [LB434]

SENATOR SEILER: The other problem, when you talked about Kentucky and Tennessee, we would have a similar problem in Hastings, where I'm from, because Kansas is only 45 miles away. [LB434]

DANIELLE WATERFIELD: Yes, sir. [LB434]

SENATOR SEILER: And how do...what...is Kansas one of the nine? [LB434]

DANIELLE WATERFIELD: Kansas is not one of the nine. [LB434]

SENATOR SEILER: Okay. [LB434]

DANIELLE WATERFIELD: And the industry supports this, advocates for this in any state that would express interest, because we do believe that it is a cross-border solution/tool that is effective. [LB434]

SENATOR SEILER: Thank you. Any other questions? Thank you for your testimony. [LB434]

DANIELLE WATERFIELD: Thank you. [LB434]

SENATOR SEILER: Next proponent. [LB434]

MICHAEL POTASH: (Exhibit 3) Good afternoon, Mr. Chairman, Senators. My name is Michael Potash, P-o-t-a-s-h, like the stuff you put on your lawn. I'm with Sioux City Compressed Steel, a scrap processing yard in Sioux City with additional yards in South Dakota, Minnesota, and Iowa.

We are members of the Institute of Scrap Recycling Industries, or ISRI, based in Washington. ISRI represents more than 1,600 members nationwide plus many yards in other countries. The United States scrap industry employes more than 130,000 people and process and generates more than $87 billion annually in economic activity. I'm here today as the chairman of the ISRI materials theft task force to tell you that we scrap processors know that material theft is a problem and we're committed to being part of the solution. As a trade association we've spent several hundred thousand dollars in development of solutions to the problem. We've empaneled a Law Enforcement Advisory Council we call LEAC, consisting of chiefs of police, sheriffs, district attorneys, and private-industry security people in order to help us focus our efforts and to assist us with access to stakeholder groups. The council has helped us understand that metal theft is really a quality-of-life problem as much as a materials theft issue. When critical infrastructure such as signal lights or power lines are damaged through stolen copper, our communication lines are cut and everybody's safety is compromised. I would remind the panel that we are not the thieves in metal theft crimes. In fact, our members are often victims of metal theft, too, so we're interested in the problem on many levels. One of our areas of concentration has been the development of the Web site named in this bill, scraptheftalert.com, in order to provide law enforcement agencies the ability to post metal theft at any time and have a notice sent quickly by e-mail to subscribing processors within a 100-mile radius. We've developed and run this site at our expense and no charge to law enforcement. Scraptheftalert.com is in use to varying degrees in all 50 states. We currently are having the site enhanced to allow law enforcement access to information within their state as to who has subscribed to this service. The last provision of this bill requires law enforcement to verify scrap processors that are registered, so this change will make that easy. We recognize that law enforcement agencies are reluctant to accept unfunded mandates; however, scraptheftalert.com is very easy to use. And without posting of the theft, the system won't work at all, therefore, we support this bill and its objectives. We've found that prompt information about stolen materials can sometimes help us catch the criminal when they attempt to sell it. [LB434]

SENATOR SEILER: Sir, your time has run. [LB434]

MICHAEL POTASH: Okay. Thank you very much. [LB434]

SENATOR SEILER: Any questions of this witness? Go ahead, Senator Chambers. [LB434]

MICHAEL POTASH: Mr. Chambers. [LB434]

SENATOR CHAMBERS: Senator Seiler touched on it, but it wasn't developed. How are the standard industry business practices to be determined? Is there a manual of some kind that is used industrywide? [LB434]

MICHAEL POTASH: There is not a single manual. There are certain items, of course, that we don't accept as a responsible scrap processor. We don't take cemetery plaques. We don't... [LB434]

SENATOR CHAMBERS: But, see, I don't want to go into the specifics. I'm trying to find out the standard because this is a criminal statute. It imposes a criminal penalty. And everything in a criminal statute should be very precise and clear so a person knows exactly what he or she is allowed to do and what he or she is not allowed to do. And as the Chairman pointed out, there is no definition in the statute. So where...let me ask it this way as a lead-in so you might can follow what I'm saying. Would everybody who is considered legitimate, whatever that means so I can ask my question, in the industry agree on what standard practices are? If you gave each one of them a sheet of paper and said, write down in bullet-point fashion the standard energy...industry standards, would we get the same thing from all of them? [LB434]

MICHAEL POTASH: You would get certain items that those legitimate scrap processors won't accept. But I have to say, I don't believe that they would all be the same because there is no single standard in the industry. [LB434]

SENATOR CHAMBERS: So then what we're offering as a standard by which to judge doesn't really exist, does it? [LB434]

MICHAEL POTASH: Except by the judgment of the scrap processors, and I can describe to you our process, how we decide that. [LB434]

SENATOR CHAMBERS: No, no, I'm not trying to individualize it. [LB434]

MICHAEL POTASH: I understand. [LB434]

SENATOR CHAMBERS: Well, okay, I've at least asked the question so that it's in the record. But what I'm understanding, you could have two individuals, both of whom are legitimate, 100 percent, but they between them might disagree on certain specific elements and items. Is that true? [LB434]

MICHAEL POTASH: Let me check one fact. Danielle, we don't have a...ISRI hasn't developed a manual on this, have we? [LB434]

DANIELLE WATERFIELD: Not on suspicious transactions. [LB434]

MICHAEL POTASH: Right, right, just verifying that we don't have anything that's been developed. The answer is, no, we don't have a single, specific manual describing these. [LB434]

SENATOR CHAMBERS: Okay. So if somebody is going to be charged with a crime, the prosecutor couldn't prove what the standards are and the defendant could not cite a standard. Neither side could establish what these standards are, factually, isn't that true? [LB434]

MICHAEL POTASH: As to whether it was suspicious material? [LB434]

SENATOR CHAMBERS: Only in the context of Section 2 which mentions that the suspicious materials would be determined according to standard industry business practices. And I don't want you to have to mention specific materials that you would use. For example, I think if you ask people in the automobile industry, what is the standard for a suspension system that's deemed safe? And that...it's hard to give an example, but there are certain things in an industry where all of those who are part of that industry would agree. But there is no such standard here and that's what's being mentioned in the bill as the basis for making a determination as to whether or not the bill is violated. [LB434]

MICHAEL POTASH: Okay, and I... [LB434]

SENATOR CHAMBERS: But I've asked you all I've answered...I've asked you all I wanted to ask and I believe you've answered as thoroughly as you could based on the way I asked the questions, so I'm not going to keep repeating the question. [LB434]

MICHAEL POTASH: Well, one clarification. You cite this section. I would assume that would be questions of...that would be asked of the scrap processor as to whether that was a suspicious material when it came in. As far as whether or not it was stolen, that's a whole nother issue that the law enforcement or detectives would have to determine. [LB434]

SENATOR CHAMBERS: This is a subjective standard though. Different people could disagree as to what it means. [LB434]

MICHAEL POTASH: Understood. [LB434]

SENATOR CHAMBERS: Okay. [LB434]

SENATOR SEILER: Any other questions? Thank you very much for your testimony. [LB434]

MICHAEL POTASH: Thank you. [LB434]

SENATOR SEILER: Next proponent. [LB434]

DAVID BORSUK: Good afternoon. My name is David Borsuk, B-o-r-s-u-k. I represent Sadoff Iron and Metal Company. I'm from the corporate office in Fond du Lac, Wisconsin, but we have two facilities in Nebraska, one at 4915 "F" Street in Omaha and one at 4400 West Webster Street in Lincoln which is in the Lincoln Airpark. I just wanted to make two rather brief comments. One is what the...this proposed law is about and that's really the sharing of information. And if we can get scrap theft information out, both with quick notification, that will allow the scrap processor to be aware and to be the watch out...on the outlook for incoming material. Conversely, if the scrap dealer can let...alert law enforcement of suspicious material, this allows perhaps a red-flag alert. And we've had two successes that I wanted to share with you in Wisconsin where we have a little more in-depth use of the system. One was an immediate where we had a...we were notified of a theft of cemetery urns. And within several hours of receiving that theft alert, and in this instance from the FBI, the people came to our facility, we were able to notify the authorities, and they were arrested. In a little different manner, in another one of our facilities, we received a theft alert of a sizable theft of brass valves from a manufacturer in Illinois. And approximately five days later, a scrap dealer that we have dealt with for many years had brought this material in and it matched the description. We notified the authorities and the manufacturer which was...and they identified that this material was theirs. We found that the scrap dealer that brought it in was the second dealer that already had that material. But the fact was that we were able to trace it back and the material was returned to the rightful owner. The rightful owner in this particular instance even reimbursed us. But...and I can't tell you the follow-up on the arrest or the apprehension and prosecution of the dealer. The one last thing is there was some question about identifying suspicious material and I think you're...everybody works a little bit differently, but we work on the basis of what is in particular state statutes and practices. And we have written procedures that we use to identify suspicious material and, particularly, private individuals. If I were to come in with a bunch of athletic aluminum bleacher sheet...seats, one might think, why would that be, and it would be the red flag to call local enforcement or law enforcement or notify, which is our practice currently. And there...we've enumerated other items that would follow that practice. [LB434]

SENATOR SEILER: Thank you for your testimony. Questions? That standard you referred to, is that your company standard or is that an ISRI standard? [LB434]

DAVID BORSUK: No, no, that's a company standard. We incorporated that in our ISO procedures. [LB434]

SENATOR SEILER: Okay, thank you. [LB434]

SENATOR PANSING BROOKS: I guess I have a question. [LB434]

SENATOR SEILER: Yes, Senator. [LB434]

SENATOR PANSING BROOKS: I think I'm hearing that the...thank you for coming. [LB434]

DAVID BORSUK: You're welcome. [LB434]

SENATOR PANSING BROOKS: I'm hearing that the industry standard in Nebraska, at least, has not informed people of this Web site. Is that correct? Is that what's happening because Iowa is doing a better job of reporting than Nebraska on whatever their Web site is? [LB434]

DAVID BORSUK: I believe, in talking at least to our manager, that law enforcement has been aware of it but has, for whatever reason, has felt not to, you know, to use it. [LB434]

SENATOR PANSING BROOKS: Okay, I thought...okay, somebody I think earlier, Ms. Waterfield,... [LB434]

DAVID BORSUK: Well, I believe it was sort of like as a broadcast but it is a targeted... [LB434]

SENATOR PANSING BROOKS: Okay. [LB434]

DAVID BORSUK: ...let's say on a one and one as opposed to a targeted...or, you know, let's say a shotgun approach... [LB434]

SENATOR PANSING BROOKS: I see. [LB434]

DAVID BORSUK: That may not, but on local law enforcement, we...at least in some instances, we've reached out to let people...let law enforcement know that this service is available. [LB434]

SENATOR PANSING BROOKS: So is the communication good within that group of 1,600, that I see, companies--I think she said 1,600--because it seems like that would be a good way to...is that...are those 1,600 companies in Nebraska or across the nation? [LB434]

DAVID BORSUK: Oh, our member...the ISRI member companies? [LB434]

SENATOR PANSING BROOKS: Yes. [LB434]

DAVID BORSUK: That's throughout the United States... [LB434]

SENATOR PANSING BROOKS: Okay. [LB434]

DAVID BORSUK: ...and some international. [LB434]

SENATOR PANSING BROOKS: Okay, and so how many are in Nebraska? [LB434]

DAVID BORSUK: I think that we have approximately 12 processing members,... [LB434]

SENATOR PANSING BROOKS: Okay. [LB434]

DAVID BORSUK: ...people that have yards, if you will, as opposed to just an office. [LB434]

SENATOR PANSING BROOKS: And are you talking about the...so really you're trying to communicate within 12 people and if one finds the property... [LB434]

DAVID BORSUK: No, it's... [LB434]

SENATOR PANSING BROOKS: Okay. Sorry (inaudible)... [LB434]

DAVID BORSUK: What...I think what's trying to be hoped is that all police would enter scraptheftalert.com. The receivers would be all scrap dealers, irrespective of if they were members of ISRI. [LB434]

SENATOR PANSING BROOKS: I see. [LB434]

DAVID BORSUK: Anybody, any scrap dealer could be the receptor of this information, the receiver of this information. So it would be the universe. So it would be the people that are in this business. [LB434]

SENATOR PANSING BROOKS: Okay, so you're saying, beyond Nebraska, you...I'm just trying...it seems to me that all the companies could communicate pretty well together through this ISRI. Is that right? Or are there way more companies that aren't included in ISRI? Is that the issue? [LB434]

DAVID BORSUK: That's correct, that there are people...not only are there not...there are scrap dealers that are not part of ISRI, but also I would think you would...you may have auto dismantlers that also are...maybe are similar to scrap dealers but are not...you know, that buy and sell scrap or have the ability to receive scrap or, you know, potentially stolen material. So the universe of who would be...who would sign up to receive these theft alerts would be much greater than what just the ISRI membership is. [LB434]

SENATOR PANSING BROOKS: Thank you. [LB434]

SENATOR SEILER: Do I have the communications correct? The police put the...let's say the police find that a farmer is missing a center pivot and there's evidence that it was chopped up in the field and hauled off. The police then put that on the alert, and then you as a scrap metal dealer spot some guy bringing in chunks of center pivot pipe. Then you react and call the police and say, I've got a guy here selling pipe. Is that correct? Is that the communication? [LB434]

DAVID BORSUK: That is...it is not only the police but also if you were, for instance, a utility, you...and as long as... [LB434]

SENATOR SEILER: Right. [LB434]

DAVID BORSUK: ...you report it that there was something stolen, you had a case number, you could also enter that yourself. [LB434]

SENATOR SEILER: Okay, thank you. Yes. [LB434]

SENATOR WILLIAMS: Chairman Seiler. But if I understand the law as I've interpreted and read it here, this creates a misdemeanor on the fact that...if that utility company did not report. Is that...am I reading that correct? This law requires people to be a part of this Web-based system of notification and it also creates penalties for noncompliance. So if...your example of the aluminum sheets from stadium seats, if somebody brought in...if an individual brought in 100 of those to you and did not then make notification somehow, they would be violating the provisions of this law. [LB434]

DAVID BORSUK: That is correct, and I'm going to apologize, I mean... [LB434]

SENATOR WILLIAMS: Under our interpretation. [LB434]

DAVID BORSUK: Yeah, yeah. [LB434]

SENATOR WILLIAMS: I know we have this... [LB434]

DAVIS BORSUK: And there's a little dancing here, but there may be some rough spots in this and that may need to be... [LB434]

SENATOR WILLIAMS: Yeah, and my question then... [LB434]

DAVID BORSUK: Yep. [LB434]

SENATOR WILLIAMS: ...beyond that goes back to I think down the line that Senator Seiler and Senator Chambers were asking, is where you draw that line. What if I bring in 10 sheets versus 100? What if I bring in 2 sheets versus 100? They happen to be stolen, but there's still only two. And I'm concerned with that aspect. [LB434]

DAVID BORSUK: And I... [LB434]

SENATOR WILLIAMS: And that...we're just talking about fine-tuning your bill. [LB434]

DAVID BORSUK: Yeah, and I think that's always...is always going to be difficult where you have some kind of, you know...what is best judgment, if you will. [LB434]

SENATOR WILLIAMS: But I am correct, am I not, that the potential penalty reaches to the potential purchasers of the metal? The potential person that it was stolen from, do they have a duty to report? [LB434]

DAVID BORSUK: I believe it's just the law enforcement agencies (inaudible)...just the law enforcement agencies. [LB434]

SENATOR WILLIAMS: Okay. [LB434]

SENATOR SEILER: Sir, I have one more question. Is...you've attached in Section 4 a misdemeanor, a Class II misdemeanor, for a violation of Section 2. Section 2 says, "a secondary metals recycler shall register," so if I don't register, I'm guilty of a misdemeanor. That... [LB434]

DAVID BORSUK: Yeah, as it's written, that is to make mandatory that all secondary metal recyclers...yeah. [LB434]

SENATOR SEILER: I just want to make sure the record shows that this is a violation, as well as further down, on the standards, because that to me is pretty severe. It's not a volunteer operation. This is "shall," meaning they will; and if you don't, you could face six months in jail or a $1,000 fine. [LB434]

DAVID BORSUK: And there is also a verification procedure within scraptheftalert.com to see if somebody is registered. [LB434]

SENATOR SEILER: Okay, thank you. [LB434]

DAVID BORSUK: Can I go? [LB434]

SENATOR SEILER: Thank you, you may be dismissed. [LB434]

DAVID BORSUK: Thank you. [LB434]

SENATOR SEILER: More proponents. [LB434]

KRISTEN GOTTSCHALK: Senator Seiler and members of the Judiciary Committee, my name is Kristen Gottschalk, K-r-i-s-t-e-n G-o-t-t-s-c-h-a-l-k. I'm the government relations director and the registered lobbyist for the Nebraska Rural Electric Association and I'm here to testify in support of LB434. Our membership is comprised of 34 rural electric systems across the state. They serve about 230,000 meters over 85,000 miles of distribution line. Now our lines and some of even our service outposts are in some of the most remote areas of Nebraska and copper wire is a major component in those distribution systems. And so, as you can expect, copper theft is a big issue for our membership. Copper theft directly from our power lines and substations is dangerous both for our employees and customers but also for the thieves who risk their lives stealing these little bits of copper from the poles and the substations. There definitely is a risk of death in this process. The latest trend that we're finding in our industry is that they're breaking into our gated and locked storage yards and service buildings. Just recently in northeast Nebraska we had two systems who had scrap stolen where a vehicle pulled up, the fence was cut

open, they went in, they broke a simple window, and stole nothing but copper, and that would include big spools of copper worth over $7,000, from those facilities. The vehicles used were stolen to begin with and then abandoned later. So it...this is an alarming trend. We really want to thank Senator Cook for introducing this bill. It's going to provide an additional tool in eliminating copper theft in Nebraska. Having the database information is a good first step. In fact, several years ago we did a presentation with our managers, introduced them to the ISRI reporting system, and encouraged all of them to participate. The biggest problem with that was there's...it's nonpervasive in Nebraska, there aren't very many people using it, not very many law enforcement, and so it has limited application in that. And by making it mandatory for both law enforcement and scrap metal dealers is a good thing. Now we shouldn't stop there though. I mean this is a tool to catch someone after the theft has been in place. And our members are really more concerned with preventing the theft in the first place, and I think we need to continue to look at ways to do that, such as holding payments or mailing payments for copper or other high-value metals. Our members are using technology to try and prevent this. You can buy branded wire with your utility name etched into the wire, copper-coated steel wire, which has limited value, but again, those only help in the aftermath. And, you know, as I said, we had whole spools stolen. They're not going to take that whole spool to a metal recycler. Oftentimes, and most often, they are going to manipulate the...what they've stolen into a different form, so we often see the wires burned so that the coatings are taken off and any identifying features are gone, or they chop it into smaller bits. So with that, I thank you for your time. I would be happy to answer any questions. [LB434]

SENATOR SEILER: Seeing none, you may step down. Thank you for your testimony. Any further proponents? Any opponents, people against this bill? Anybody in the neutral? Seeing nothing further, Senator Cook, you may close. [LB434]

SENATOR COOK: (Exhibit 4) Thank you, Mr. Chairman, and thank you, members of the committee, for so carefully listening to the testimony and reviewing what the statute actually says right now. Did I introduce this bill to create jail time for a righteous businessperson? No, sir, no, ma'am, I did not. Did I introduce it to have vague definitions of behavior that could be matched with a criminal penalty? I did not. I introduced it because I feel very strongly that as part of my responsibility as a state senator is to zealously represent the constituents in my district, my neighbors who are concerned, and you've heard the testimony, about this issue as it presents itself. I look forward to working with the committee to tighten the language so that it can be another tool to minimizing this kind of crime. And I'll also do my work in the Health and Human Services Committee to reduce some of the reasons why this type of crime occurs in the state of Nebraska. Thank you. [LB434]

SENATOR SEILER: Thank you. Any questions? Yes, Senator Morfeld. [LB434]

SENATOR MORFELD: So, Senator, you would be amenable to changing the Class II misdemeanor to a fine or something like that, that would be... [LB434]

SENATOR COOK: I'm amenable to a conversation that would include that, absolutely. As I said, the idea, as you so carefully put it, of you don't register for this Web site and you're going to jail, that's not why I ran, that's not why I introduced the bill. I introduced the bill to address the issue of this particular kind of property crime in my district and across the state. [LB434]

SENATOR MORFELD: Okay. [LB434]

SENATOR WILLIAMS: Thank you, Senator. [LB434]

SENATOR MORFELD: Thank you. [LB434]

SENATOR SEILER: Thank you, Senator Cook. [LB434]

SENATOR COOK: Thank you. [LB434]

SENATOR SEILER: That will close this record. The records of testimony will be included for the overall transcript and record. Senator Pansing Gun (phonetically)...or Brooks--I almost said it again--introduce LB244. [LB434 LB244]

SENATOR PANSING BROOKS: Thank you. Senator Seiler and members of the Judiciary Committee, for the record, my name is Patty Pansing Brooks, P-a-t-t-y P-a-n-s-i-n-g B-r-o-o-k-s. I represent Legislative District 28 right here where we are sitting in Lincoln. I am privileged and honored to be here today to introduce my first bill to the Legislature. Of all the bills, I am particularly grateful to be able to introduce this legislation on a topic about which I care so deeply: improving the pursuit of justice for all. I am here to introduce to you LB244. This is a bill that attempts to remove the current postconviction time limit for a motion for a new trial in cases of newly discovered evidence. According to a 2012 report by the National Registry of Exonerations, there were 873 exonerations from 1989 through 2012. Of those, 548, which is 63 percent, were cleared without DNA evidence, more than 75 percent of whom spent at least five years in prison. As lawmakers, I believe we have an obligation to balance procedural protections and rights of defendants against the need for the integrity and finality of verdicts of the courts. This bill I believe strikes such a proper balance. Currently, a defendant only has three years from the date of a verdict in their original trial to file a motion for new trial based on newly discovered, non-DNA evidence, even if there was no way the evidence could have been discovered within that three-year time frame. To use an example similar to the one which

Senator Chambers used when this issue was discussed on the floor of the Legislature in 2001, there could be a case where a person convicted of murder and serving time would not be able to receive a new trial even if the alleged murder victim turned up alive. If three years have passed since the verdict, under the current law, a judge could not even consider a motion for new trial based on this indisputable evidence. I realize that this may seem like an extreme example, but we all know that wrongfully convicted persons have served for crimes that they did not commit. We are privileged to have representatives from the Innocence Project, the national Innocence Project, a national litigation and public policy organization dedicated to exonerating wrongfully convicted individuals. I submit that placing an arbitrary time limit for such persons to prove their convictions were wrongful does not promote the interest of justice. This legislation simply establishes a process by which an incarcerated person can present new evidence to the court that might prove wrongful conviction. LB244 would allow a judge to decide, based on the merits of the claim, whether or not the defendant should get a new trial, notwithstanding the passage of any arbitrary time frame. Only three other states--Arkansas, Idaho, and Wyoming--have absolute time restrictions on when newly discovered evidence may be introduced in a postconviction proceeding with no exceptions. When the Legislature passed the DNA Testing Act in 2001, it created an exception to the three-year limit for DNA evidence. During that debate, there was discussion that, I presume, Senator Chambers remembers on whether or not to eliminate the limit for non-DNA evidence as well. No agreement was reached on the issue and it was left out of the final version of the bill with the intention of revisiting the issue later. We have not thus far addressed this issue. LB244 does. Not only is it important to make sure that wrongfully convicted people get justice, it is vital that in the interests of justice and public safety we pursue the apprehension and conviction of the true perpetrator. I hope that you will listen to the compelling testimony to be presented today and that you will favorably consider this important legislation. [LB244]

SENATOR SEILER: Any questions? Yes, Senator Morfeld. [LB244]

SENATOR MORFELD: Senator, first, thank you for bringing this legislation. And second, maybe somebody behind you can answer it better and, if so, that's perfectly fine, but other than the DNA evidence exception, what is somebody's remedy, say, if...there's no remedy whatsoever. So the person that you're accused of killing does show up alive. [LB244]

SENATOR PANSING BROOKS: Well, other people will speak to that. [LB244]

SENATOR MORFELD: Okay. [LB244]

SENATOR PANSING BROOKS: But as far as having a judge look at it, if they look, they will see it's a motion to present new evidence. And what I have heard is the judge won't even look at the reason because they'll look at the date and that's it. [LB244]

SENATOR MORFELD: Okay. [LB244]

SENATOR PANSING BROOKS: They're not going to look at everything. So, arguably, there are some other things that can be done, and we'll speak to that. But I think that, on its face, this law is improper. [LB244]

SENATOR MORFELD: I agree. Thank you. [LB244]

SENATOR PANSING BROOKS: Thank you. [LB244]

SENATOR SEILER: Senator, I have one question. [LB244]

SENATOR PANSING BROOKS: Yes. [LB244]

SENATOR SEILER: Would you look on page 2, line 20. It says, "subdivision (6) of section 29-2101." I have two other places where that is subdivision (5) and I'm wondering if that's a typo. [LB244]

SENATOR PANSING BROOKS: On line...excuse me. [LB244]

SENATOR SEILER: Page 2, line 20, "subdivision (6)," I show references under 29-2101. [LB244]

SENATOR PANSING BROOKS: Yes, I... [LB244]

SENATOR SEILER: In two other places it's subdivision (5). [LB244]

SENATOR PANSING BROOKS: I would...I think I would...yes, I think I would...yes, it says up above that it was sub...it looks like it was a typo. Thank you for noticing that. [LB244]

SENATOR SEILER: Okay. [LB244]

SENATOR PANSING BROOKS: So we will...I will propose that we amend that if that...because if we can check that out, I believe that is a typo. Thank you. [LB244]

SENATOR SEILER: Any other questions? [LB244]

SENATOR PANSING BROOKS: Thank you. [LB244]

SENATOR SEILER: Thank you. Proponent witness. Okay, so (6) is right. Senator, subdivision (6) is right. [LB244]

SENATOR PANSING BROOKS: Oh, it is right. [LB244]

SENATOR SEILER: Five is the one above it. [LB244]

SENATOR PANSING BROOKS: Okay, thank you. [LB244]

SENATOR SEILER: So you're okay. Thank you. [LB244]

SENATOR PANSING BROOKS: Thank you, Diane. [LB244]

TRACY HIGHTOWER: (Exhibit 1) Good afternoon. My name is Tracy Hightower. That's T-r-a-c-y H-i-g-h-t-o-w-e-r. I'm the executive director of the Nebraska Innocence Project. Under Nebraska's current law, a defendant has only three years to file a motion for new trial based on newly discovered, non-DNA evidence, and that three years begins to run on the date of their original conviction. If a Nebraskan is wrongfully convicted of murder and a videotape emerges with someone else committing that murder after three years and one day from the original verdict, the innocent person has no right to a new trial, even if there is no way that evidence could emerge with...prior to the three-year deadline. This time limit is preventing access to justice in many non-DNA cases. At the Nebraska Innocence Project, we receive applications from inmates requesting help and investigation in their innocence claims. We've read some claims of innocence that likely have merit but procedurally, under the three-year statute of limitations, there is nothing we can do to help. It often takes years for new evidence to surface, and by the time these Nebraskans contact us for help it's too late. Some have expressed concerns that this would strain court resources but those fears are unfounded. LB244 would simply entitle defendants to have a judge decide, based on the merits, whether or not they should get a new trial. So under the existing law, a judge simply has to compare the date of conviction to the file stamp date on the motion for new trial, and the date...the judge doesn't have to even read a single word in the motion if that time frame is longer than three years. So the judge in essence is not

determining if the motion for new trial has any merit for a claim of innocence. There would not be a flood of litigation because the defendants who would be eligible under LB244 are currently already filing claims alleging constitutional violations. LB244 is just to redirect the flow of claims to a more appropriate legal channel. And my colleague, Sarah Newell, can speak on the issue of other remedies, as the question was posed previously. It's clear that there was legislative intent to address this issue when the original DNA Testing Act was enacted in 2001. And at the time, the Judiciary Committee approved the amendment, creating an exception, as you heard form Senator Pansing Brooks. So we ask that the time is now for the Legislature to reconvene this issue and ensure that Nebraskans have a fair access to justice, as was left on the table that this would be addressed at a later time. I'm happy to answer any questions and I ask support for LB244. [LB244]

SENATOR SEILER: Any questions? Just so I can clarify in my own mind, there's really two sections, subdivision (5) and subdivision (6), and what we're dealing with in this bill is strictly subdivision (5). [LB244]

TRACY HIGHTOWER: That's correct. [LB244]

SENATOR SEILER: We're not making any changes in (6). [LB244]

TRACY HIGHTOWER: That's correct. So subdivision (5) is the section that deals with newly discovered, non-DNA evidence. [LB244]

SENATOR SEILER: I understand. I understand. [LB244]

TRACY HIGHTOWER: Subdivision (6) is just simply DNA. [LB244]

SENATOR SEILER: Thank you. Any other questions of this witness? If not, you may step down, and thank you for your testimony. [LB244]

TRACY HIGHTOWER: Thank you. [LB244]

TRICIA BUSHNELL: Good afternoon. My name is Tricia Bushnell, T-r-i-c-i-a B-u-s-h-n-e-l-l, and I am the legal director at the Midwest Innocence Project, or MIP. MIP is a nonprofit organization that's dedicated to investigating, litigating, and exonerating wrongfully convicted individuals in a five-state area. That area includes Nebraska, Missouri, Kansas, Arkansas, and Iowa. We're part of a larger network of organizations and innocence projects, but we are the only ones who take cases that do not involve DNA evidence in Nebraska. Proving innocence without

the benefit of DNA is a different and a difficult process and one that currently, in Nebraska, expects indigent inmates to navigate on their own in a nearly impossible time frame. Here in Nebraska, an indigent defendant who is incarcerated with no resources, no right to an attorney, is expected to investigate and find that new evidence on his or her own within a three-year period. That means that he or she must contact witnesses, collect evidence, collect records, consult experts, all on their own and very, very quickly. In short, as a result of this, we at MIP are almost totally unable to assist indigent defendants in Nebraska simply because our wait list is, at the very least, three years. In that regard, this current law, the three-year time limit to file a motion for a new trial and newly discovered evidence, is a barrier to justice and, as Senator Pansing Brooks stated, out of line with the rest of the country. There are only three other states with absolute time restrictions. That's Arkansas, Idaho, and Wyoming. On the other side, however, there are 21 states who have no time limit on all...on newly discovered evidence, and an understanding of the nature of this evidence can reveal why. First, it can take years for an inmate to receive that assistance necessary to find that evidence. That was exactly what happened, for example, in the case of Anthony Faison and Charles Shepard in New York. They were convicted of killing a taxi driver in 1988 based on a witness' identification which we know there are problems with. It took 12 years for a private investigator to look into that case and it was only at that time that they found that the witness had lied to collect reward money and they were able to do further investigation that led to the confession from the real killer, who was also identified through his fingerprint at the taxicab. And had that conviction occurred in Nebraska, that would not have been possible. Second, a time bar is also troubling because scientific developments can take longer than the statute of limitations provides for. So for example, two years ago, David Lee Gavitt's 1986 arson conviction was overturned in Michigan after it was shown that all of the evidence used to convict him has since been scientifically disproven. However, this advancement in that scientific process for arson, that took decades, not three years. And arson is only one of a number of forensic sciences that have been called into question, particularly since the 2009 NAS report. We know that wrongful convictions occur, but the current law leaves us without any way to remedy them in terms of newly discovered evidence. As explained, the National Registry of Exonerations has identified a number of exonerations of newly discovered evidence but only three in Nebraska. We ask you to support this bill. [LB244]

SENATOR SEILER: Thank you. Any further questions? Did you have any other point that you wanted to close out? [LB244]

TRICIA BUSHNELL: It was just that there were only three here. [LB244]

SENATOR SEILER: Okay, thank you. [LB244]

AMY MILLER: (Exhibit 2) Good afternoon, Senators. My name is Amy Miller. That's A-m-y M-i-l-l-e-r. I'm legal director for ACLU of Nebraska. We're a nonprofit, nonpartisan organization with one job: protect the constitution. And we're proud to be able to partner with the Nebraska Innocence Project on some of their cases both on the legislative side and as amicus curiae in front of the Nebraska Supreme Court. We're here to support LB244 because of the Fourteenth Amendment's due process clause. Fourteenth Amendment due process clause protects us against deprivations of life and liberty without due process. And I'm about to lay down some dramatic, highfalutin language. If Nebraska doesn't provide relief for a possibly innocent prisoner, that amounts to an arbitrary abridgment of the freedom that has always been at the core of liberty protected by the due process clause. It shocks the conscience and it offends the principle of justice so rooted in our traditions that it's fundamental that the innocent must go free. That highfalutin language is not coming from the ACLU. That's an amalgamation of five U.S. Supreme Court decisions over the decades. It's so fundamental to our concept of the constitution that of course you should have your day in court without arbitrary deadlines. The right to secure your freedom based on new evidence surely has to be at the top of whatever the due process liberty protection is intended to be. We anticipate there may be objections about whether or not there would be floodgates of litigation. As Ms. Hightower mentioned, prisoners who know that they are innocent may not have a remedy right now for a motion for a new trial, but that just means they're going to be filing other filings. They're trying to put their foot into a shoe that wasn't designed for that. The courts are already filled with these types of cases, but just on the wrong procedure, and we're not going to see a rise or an uptick in litigation. And even if there was a floodgate, that's not going to swing very far. The Nebraska Supreme Court has set a very high test for what constitutes newly discovered evidence. It can't be just any old evidence that looks good to the prisoner. It has to be of, quote, such a nature that if offered and admitted at the former trial it probably would have produced a substantial difference in result, it must be relevant and credible and not merely cumulative. It's a high bar and that's going to keep most people out of the courts. The U.S. Supreme Court final quote I'll leave you with: The government's goal in a criminal case is to see that justice shall be done. It's not to put people behind bars. It's not to put a notch in anyone's belt. We're all there--prosecutors, defenders, and amicus curiae--to make sure that the right person is behind bars and, for that reason, we support LB244 and thank the senator for her good work in making sure that Nebraska does not have anyone languishing behind bars that doesn't truly deserve to be there. [LB244]

SENATOR SEILER: Senator Williams. [LB244]

SENATOR WILLIAMS: Thank you, Senator Seiler. One quick question: The definition of new evidence does not change? [LB244]

AMY MILLER: Correct. [LB244]

SENATOR WILLIAMS: Thank you. [LB244]

SENATOR SEILER: Any further questions? Seeing none, thank you. [LB244]

AMY MILLER: And, Senators, I will not be testifying live on the next bill, but I'll leave my written testimony for the following hearing on LB245. [LB244]

SENATOR SEILER: It will be made part of the record. [LB244]

AMY MILLER: Thank you. [LB244]

JOHN BERRY: Good afternoon again. John Berry for the Nebraska Criminal Defense Attorneys Association. I wanted to give more of a practical insight into this bill. As a criminal defense attorney, I get up and there's two questions on that verdict form: guilty or not guilty. Innocence is not addressed. The question in a criminal case is whether the government has proven the case beyond a reasonable doubt. And often in jury trials that I have won, I have not called a single witness, and the reason for that is because it's my job to hold the government to that standard. I do not have to prove my client innocent; and if I do, sometimes I take on an extra burden which could cost my client the trial. Sometimes, as a criminal defense attorney, we become aware of evidence and we have to make a strategic and, later, tactical decision as to whether or how we will use that evidence at all. Sometimes we want to do no harm. We see that the state does not have a good case and that attorney makes a judgment call that he does not need to have that evidence tested or he does not want to use the evidence in the case or perhaps there is not a credible witness around that he can use to lay foundation to get that evidence into trial and decides not to use it. You know, when a criminal defendant comes through the process, he gets to make a few decisions. He gets to decide whether to have a preliminary hearing, whether to testify, whether to have a jury trial, whether to take a deal, whether to plead guilty, and whether to appeal. But while the attorney should strategize or confer with the client about strategy, it is the attorney's duty to decide on both the strategy and the tactics. And some of those decisions mean holding the government to the burden without creating an additional burden for the defendant. And so when the criminal defense attorney develops that theory of the case, sometimes the best course of action...many times the best course of action is to provide no evidence but simply to show the jury that the government has not proven the case beyond a reasonable doubt. And if there is a piece of evidence that is missing or that has not been tested and the government has the burden, well, why as a defense attorney would you give up that portion of your defense? And that is a very difficult decision to make. Sometimes, as defense attorneys, we make the wrong decision and an innocent person should not be incarcerated because an attorney made a tactical or strategic error. Even if he had all the right information at the time, good information, information changes over time and we do the best we can with what

we have. But certainly there is room for error and certainly criminal defense attorneys are looking at the legal standard. And proving clients' innocence, while sometimes it's necessary to get a not-guilty verdict, is not always the aim of the attorney. Sir, subject to your questions. That's all I have for my statement. [LB244]

SENATOR SEILER: Okay. Any questions? I have one, John. [LB244]

SENATOR WILLIAMS: I'm thinking. [LB244]

SENATOR SEILER: Oh, excuse me. Go ahead. [LB244]

SENATOR WILLIAMS: (Laugh) No, I'm thinking. Go ahead. [LB244]

SENATOR SEILER: The definition of newly discovered evidence, has that been expanded in the last 10-12 years, or narrowed? [LB244]

JOHN BERRY: I don't believe so. Fortunately, Sarah Newell is a lot smarter than me. I think she's going to testify next. [LB244]

SENATOR SEILER: Oh, okay. [LB244]

JOHN BERRY: So she might know the answer. [LB244]

SENATOR SEILER: Okay, thank you. Senator Williams. [LB244]

SENATOR WILLIAMS: Yes, thanks, Senator Seiler. You're talking about trial strategy,... [LB244]

JOHN BERRY: Yes, sir. [LB244]

SENATOR WILLIAMS: ...defense attorney making those decisions for the defendant. [LB244]

JOHN BERRY: Yes, sir. [LB244]

SENATOR WILLIAMS: And we're talking about in this bill newly discovered evidence. I want to be sure that if you as the defense attorney had evidence that you chose not to use at trial and you lose, what can we do, what can you do with that evidence from that day forward? [LB244]

JOHN BERRY: Well, it's a good question. I mean, obviously, what happens then if I lose and a different attorney handles the case on appeal or handles the postconviction, generally, if that attorney is doing his job, he will contact me, the trial attorney, and say, hey, what happened, you know, is there something you could have done differently? And then that information should come out. I think a lot of times though it's not so much having the evidence; sometimes it's...well, going back to what I said in my previous testimony, law enforcement has a lot more resources. So as a defense attorney, there are...there is a lot of chatter out there and you've got to decide what your strategy is going to be, what your theory of the case is going to be. And sometimes there are...there is information that comes out, but it just doesn't seem credible. You vet it and you think, gee, if this person testifies, you know, they're going to get blown out of the water. Why: because the prosecution is going to call police officers who have testified hundreds if not thousands of times. They're going to come off as polished. I've got somebody who has a criminal history, is a little bit nervous on the...you know, maybe a little bit nervous on the stand, maybe not well spoken. And I have to decide whether I'm going to call that person and go with this whole theory that could totally tank based on the credibility of this one person who doesn't seem as credible as the government's witnesses, or do I go with the a different theory, which is to have them prove the case beyond a reasonable doubt. And that's a tough decision to make, so it's not always about having evidence and not presenting it. I think that I would imagine that every criminal defense attorney if they were in that situation would then let the appellate attorney know or the postconviction attorney know, gee, you know, I think I kind of screwed this up, and then that can be handled on postconviction. But that doesn't always happen and sometimes, for whatever reason, that information is not shared and then that's the situation we're in. But once again, it's a judgment call about a lot of information that, you know, sometimes you have to look at...you're looking at the big picture and I think sometimes some of the smaller things are missed. And some of those smaller things could have been pieces of evidence that could have resulted in an acquittal and could have proven innocence. [LB244]

SENATOR WILLIAMS: Thank you. [LB244]

SENATOR SEILER: Nothing further? You may step down. Thank you. [LB244]

JOHN BERRY: Thank you, sir. [LB244]

SARAH NEWELL: (Exhibits 3 and 4) Senator Seiler, members of the committee, my name is Sarah Newell, N-e-w-e-l-l. I'm an attorney with the Nebraska Commission on Public Advocacy.

I'm not sure if you...some of you guys are new. I'm not sure if you're familiar with what we do. We're a statewide...essentially, a statewide public defender's agency, so we go, we travel around the state, and we handle murder, sex assault, major, major felonies, to help provide property tax relief to the counties that would be taxed with public defender duties otherwise. The other thing that we do that makes...I guess we don't normally testify on bills of a criminal nature. It's a pretty rare day when I get the authority to walk over here. This bill is near and dear to our hearts because we are one of the few sets of attorneys that handle postconviction cases and handle these types of issues. And I know a lot of you are attorneys and I give this little bit of history or just a little bit of context, one, because, Senator Morfeld, you asked about it, but also because this is a really mystifying and complicated area of the law that I would venture to guess that probably 95 percent of criminal defense attorneys and really good, competent criminal defense attorneys don't understand. And so it's a lot to throw at you and I'm going to try to not overwhelm you with specifics but...and you're certainly welcome to give us a call. I will get you any help that you need. The two cases that I just gave to the page are kind of bookends of the court kind of dealing with these types of issues. The way that this process works is that after a client goes through a trial, you have a right to a direct appeal. That is an automatic right. Everybody gets to do it. At that trial or at that direct appeal you get to argue what you think either your lawyer or the court or the prosecutor messed up in the course of that trial. But once you do that, you don't really get another bite at the apple unless you can show that there's some other type of problem above and beyond what you didn't raise before, because this concept of finality, which is what I suspect opponents will say is the primary objection to this type of...or to removing that three-year limitation, is to say that, you know, we don't want to keep letting this appeal process drag on and on. You don't want to keep giving people 10,000 bites at the apple. And really, we don't. I mean every type...every remedy that is...that exists for a criminal defense or for a criminal defendant is limited and tailored to his narrow circumstance. One is the motion for a new trial, which is what this provision specifically changes. Motions for a new trial can arise for a variety of reasons. Most of the time you have to file them within ten days of the conviction. There's an exception for DNA, which is subsection (6), and then there's an exception for newly discovered evidence, subsection (5). My understanding is the definition of newly discovered evidence has not changed. It's not anything that's particularly in statute. It's largely case law. But that has not evolved. And one thing I would tell you is that our caseloads, we've been in...our...we were created in 1996. The postconviction cases that we have, our numbers have remained incredibly steady throughout that time. The only thing that changed a little bit was when we had...when the DNA statute went into effect, we had a number of cases that took that on. But those have remained relatively stable as well. We've had 22 total and we have 2 open now, so it's not as though there is a, you know, a glut in the system of all these people coming forward and saying, I want this remedy. And even if you did, you only qualify for what you qualify for. May I continue? [LB244]

SENATOR SEILER: Yeah. [LB244]

SENATOR WILLIAMS: I would ask that question, if you'd continue with your testimony, please. [LB244]

SARAH NEWELL: Okay. And I'm sorry, it's just...there's a lot to talk about, so I apologize to... [LB244]

SENATOR WILLIAMS: Oh, we'll stop you. [LB244]

SARAH NEWELL: Okay. (Laughter) Oh, I'm...I believe you. The Supreme Court is not as tolerant, so. I forgot where I was at. But...so, okay, 22, we've had 22 cases total on DNA, 2 that are open now, and then...and so as far as postconviction cases, we tend to have between one and three a year, so it's not an abundance of cases. And the only reason we've had a slight influx in the past two years is because of a U.S. Supreme Court decision that dealt with giving juvenile...I'm blanking on the name right now. I would be...I'm so ashamed. Basically, it says that juveniles can't be given life sentences without mitigation hearings and things of that nature. So we've had four cases this year and two cases last year. But again, even when you're providing broader rights, there's only a certain number of people that are going to even qualify for this. And it's really not hard for a judge to read through and see...you know, you can tell pretty quickly when you're reading a motion if it's going to pass the smell test. But what happens here is, like Senator Chambers' example, or I guess it was kind of Senator Pansing Brooks who cited Senator Chambers, if someone were to walk in tomorrow who is, you know, a murder victim, there really is not much of a recourse. There is postconviction actions which are only for legal issues and you only get one...well, there's limitations on how many times you can raise postconviction. You can never relitigate something that has been litigated before. Most of the time, postconviction is used when there is some...it's got to be a constitutional violation, so most of the time it is, you know, prosecutorial misconduct that comes up. You figure out that the prosecutor hid evidence. And that's kind of a messy thing, too, because I think most of the time newly discovered evidence is going to fall in that prosecutorial misconduct area as well. And that's the real problem with a three-year window is that I don't know what the prosecutor has hidden from me until it falls in my lap and I don't have any control over when that's going to happen. And a specific example I have of a case that I'm working on now, and we filed it under three different types of remedies: the motion for new trial, which is...with the three-year window, I've got no argument, or I'm making an argument but I'm not going to win is what that means. I've got postconviction issues because there is some constitutional issues that went into play, mainly prosecutorial misconduct. And then we have...and the prosecutorial misconduct evidence is somewhat newly discovered because as we were...as my client filed his initial motion basing...alleging ineffective assistance of trial counsel and postconviction issues with prosecutorial misconduct, while we were working on that, new things came up because we got more discovery that we had never seen before. And so when you get that new discovery, you find out that there's other issues there that couldn't have been raised before. And that's the whole

concept behind this bill is that sometimes you dig into things and new things come up that you couldn't have known. But you...and you also have to demonstrate that you couldn't have known it before. The example that John gave earlier in terms of trial strategy, those are kind of things that you'd have to raise either on direct appeal or in postconviction alleging ineffective assistance of counsel. But those are the kind of things that if that defendant knew at the time that that evidence existed, he doesn't get to raise that now under this bill. So those things, I mean, there's all kinds of checks and balances already built in. What this does is it provides...basically just allows us to use the existing structure for those newly discovered evidence pieces that there really is no other way to know without...you know, within that three-year window. Again, most of the time I think that's going to come up in a postconviction...in a prosecutorial misconduct kind of context. One of the things that you may hear about and the cases kind of talk about this, there's this other remedy that's called the writ of error coram nobis and it is...it is...it's based on old English common law. There's actually not a case that I have found where it has been successfully applied. And it is supposed to deal with new fact issues that come up that you shouldn't or that you didn't know at the time of trial that now would demonstrate actual...not actual innocence but would demonstrate that different verdict. Again, it's never been used successfully. And the court, in that 1935 Opinion I gave you when they first recognized it, it was another situation kind of like you would have here or kind of like would apply here saying, there's nothing else you can do, we've got to have...there's got to be some kind of remedy for when there's no other remedy. And they go through and explained how pardons are not an effective remedy, habeas corpus isn't effective remedy. And at that time the postconviction statutes hadn't been adopted so there was no statutory remedy. If you look at that other case I gave you, I think it's 2000, El-Tabech, that case talks about...it was when...before the DNA statutes were enacted and they basically go through again and say writ of error coram nobis doesn't apply here, you know, postconviction doesn't apply here, nothing applies here, and so you have to have a statute. Both of those cases the court clearly says, look, we don't want to step in, we don't want to create this remedy, this is the Legislature's province, we want the Legislature to tell us how to do this. And what I would submit to you as the appropriate way to do that is to just take out that three-year window because you've already got a provision in place that handles motions for new trial. There's limitations to control the floodgates opening. But there's also...it gives people an opportunity to raise those issues. And one of the folks who's going to talk on LB245 is a gentleman who has been exonerated, and I think there might be someone here from the Beatrice Six as well. And they can tell you that there is no more disparaging feeling than to be sitting in prison, knowing you're innocent, knowing that there's actual evidence that you have that demonstrates your innocence, and knowing that you have no procedure to actually present that to a court. And although the writ of error coram nobis is a nice theoretical way to approach that, it's never been used and the court has made it really clear that they don't want to use it. It's a far more conservative position to use the preexisting condition or preexisting procedure that we have and just take out that window. It's an arbitrary time line. I don't know how you can arguably justify just picking three years. There's nothing about three years that controls when I'm going to find out when, you

know, evidence is hidden, especially with prosecutorial misconduct. As Senator Chambers pointed out earlier, I mean, not everybody, not to say that all prosecutors are bad, just like not all defense attorneys are bad, but I don't know what I don't have until it falls in my lap. And a lot of times, also, the prosecutor may not necessarily know what they have. It might be that the law enforcement officers either didn't want to turn that evidence over or they didn't understand the significance of it because they're not attorneys. So there's lots of different ways that people can fall through the cracks. What this bill does is it allows people a remedy...it just...there's usually...I can't...I really, honestly can't think of a reason why you wouldn't remove the window. [LB244]

SENATOR SEILER: Thank you. Any further questions? (Noise from microphone.) They've been trying to solve that for two years, so. [LB244]

SARAH NEWELL: I feel like that's what everybody hears when I talk, so. (Laughter) [LB244]

SENATOR SEILER: Does anybody have any further questions? I just have the one on... [LB244]

SARAH NEWELL: Okay. [LB244]

SENATOR SEILER: ...going back to what I asked the previous witness. On newly discovered, is it still the testimony that if you could have discovered it or should have discovered it, it's not newly discovered? [LB244]

SARAH NEWELL: Precisely, and actually the language of the statute as it currently exists has, you know, has language in here that kind of addresses that issue: shall be filed within a reasonable time after the discovery of the new evidence. So, I mean, reasonable time period, if it's one of those things...and also, there's language in the cases that talk about the use of due diligence. So if it's somebody that's sitting on their laurels, there's not a court in the state or probably in the nation that's going to say, yeah, you could have brought this up before but, ah, we'll take it up now. That's just not what courts do. [LB244]

SENATOR SEILER: So even though we've removed the three years or asked to remove the three years, you still have that timely new discovery still sitting there. [LB244]

SARAH NEWELL: Yes. I think that it's still a very high burden and, you know, all...we're just asking the court to actually read the petition and consider the...on its basis. [LB244]

SENATOR SEILER: No, I understand. Thank you very much for your testimony. I don't see any further questions. [LB244]

SARAH NEWELL: Thank you. [LB244]

SENATOR SEILER: (Exhibits 5-7) Any further proponents? Seeing nobody scrambling from their chair, any opponents? Anybody in the neutral? The records will be included as testimony, and anybody that signed up. And the record is closed on LB244. [LB244]

SENATOR PANSING BROOKS: I have a little closing. [LB244]

SENATOR SEILER: Oh, you want closing? [LB244]

SENATOR PANSING BROOKS: Yeah. [LB244]

SENATOR SEILER: I shouldn't give you that. (Laugh) Oh, go ahead. I'm sorry. [LB244]

SENATOR PANSING BROOKS: No, that's okay. Senator Seiler, Judiciary Committee, we all know that there have been and there probably are still present persons sentenced to decades in prison or who sit on death row who are innocent. I believe that we have not only a moral duty, but fiscal and safety issues are incumbent upon us to pass this law. Of course you understand where I'm...what I'm talking about with the moral issues of hoping to not have innocent persons wrongly sitting and incarcerated in jail, but the fiscal responsibility is of course what has happened in our own state where, if we wrongly incarcerate people, we have...we are at risk of paying great sums of dollars to people for, and rightly so, for that incarceration, for that wrongful incarceration. Furthermore, I believe that part of our duty is to protect the public and those safety issues are dependent on finding the right perpetrator and getting them in prison and releasing the person who is wrongly incarcerated. So I just want to thank those who so articulately explained much of the law to us today and those who came here to tell us about their support of LB244. And again, there was a question about subdivision (6) on page 2, line 20, and as Senator Seiler noted, there is no change to that. There was no change in the original, in our bill, and subdivision (6) is correct. So thank you for this time. [LB244]

SENATOR SEILER: You're done? [LB244]

SENATOR PANSING BROOKS: I am. [LB244]

SENATOR SEILER: Okay. This record will be closed then. [LB244]

SENATOR CHAMBERS: Excuse me one second. [LB244]

SENATOR SEILER: Oh, go ahead, Senator. [LB244]

SENATOR CHAMBERS: I just want my presence to be in the record, but I have a point to make. It is irritating to me to have pundits or editorialists write about a person being released on what they call a technicality. It's not a technicality. It's something that the law allows. But let's say that that's what they want to call it. When we say that, arbitrarily, after three years you cannot offer new evidence, and they can easily say you should of or you could have discovered it, now that is indeed a state-created technicality because it should never be too late to grant justice. And if this were a society of laws and if justice means anything, and a democracy, one that preaches about democracy to everybody else in the world, the courts and the legislatures should be willing to leave it open for however long it takes for evidence of innocence to be made available because the way it is now...and probably it's been said but I just want it in the record to show that I haven't changed my position on it. Let me give an example. There was a man in the early 1900s or the late 1890s who was convicted of murder in Nebraska. Governor Bob Kerrey issued a posthumous pardon because the man years later was found alive in Kansas. They convicted the person whom they convicted, and executed, because they found clothing of the purported victim in a stream or a lake and concluded that the person whose clothing that was had been murdered, the body or remains had been spirited away someplace, and that person was done away with. So there are instances when, even if a court says you could have or should have found this evidence, in practical terms, you couldn't and nobody should be expected to. But even if through carelessness or giving up because you say it's too hard to find or you can't find legal assistance but it becomes known that the evidence of innocence is out there, the court on its own motion, if this is brought to the court's attention, should be allowed to do something. And I just had to say that and I'm sure that somebody did. But in case they didn't, I wanted to say that and give that example of where Governor Kerrey in Nebraska had to give a posthumous pardon. Well, he didn't have to, but I meant he felt required to do so when the facts came out that an innocent man had been executed. [LB244]

SENATOR PANSING BROOKS: And thank you for clarifying those facts on that case. It's not such an extreme possibility. It's happened. Thank you. Anything else? [LB244]

SENATOR SEILER: Nothing further? Senator, you may open on LB245. [LB244]

SENATOR PANSING BROOKS: Okay, thank you. Senator Seiler, members of the Judiciary Committee, for the record my name is Patty Pansing Brooks, P-a-t-t-y P-a-n-s-i-n-g B-r-o-o-k-s, and I represent Legislative District 28 right here in the heart of Lincoln. And I'm here to introduce to you LB245. Again, I'm honored to be here today and present to you my second bill for your consideration, also dedicated to the pursuit of justice. In 2001, Nebraska was among the early states to pass a DNA Testing Act. LB659, introduced that year by our own Senator

Chambers, allowed for DNA testing of biological material by convicted persons. The passage of that law gave the well-known case of the Beatrice Six access to DNA testing which led to their release. Currently, in Nebraska, a person in custody may file a motion at any time after conviction requesting DNA testing of biological material that was not previously tested or can be tested with more current techniques that might produce more accurate or probative results. The court, however, can only order the testing if such testing was effectively not available at the time of the trial. LB245 provides that the court may allow such DNA testing upon a determination that the biological material was not previously subjected to DNA testing or that that biological material was tested previously but current technology would provide a reasonable likelihood of more accurate and probative results. Not only can DNA testing remedy a terrible miscarriage of justice, but it can lead to the identification of the real perpetrator. Statistics from the Innocence Project show that 325 DNA exoneration cases happened world...nationwide, that in those cases the real perpetrator was identified in 160 of the cases. Those criminals committed 77 rapes, 34 murders, and 33 other violent crimes while all...while an innocent person was being held behind bars. We are painfully aware of the hideous consequences of the wrongful convictions of the Beatrice Six and their remarkable exoneration through DNA evidence. In fact, you will hear moving testimony from one of the wrongfully incarcerated Beatrice Six and her counsel, as well as another tragic story of a wrongfully convicted person. It is clearly in the interest of justice that the opportunities for the courts to order DNA testing be clarified and expanded in accordance with this legislation. We should take advantage of any opportunity to identify a miscarriage of justice. Again, I hope you will listen carefully to this remarkable testimony that we will be honored to hear this afternoon. Any questions? [LB245]

SENATOR SEILER: Senator. [LB245]

SENATOR CHAMBERS: Just one point. I did bring that first DNA bill in Nebraska and the fact that this amendment is being offered to that bill kind of bears by analogy on the previous bill. [LB245]

SENATOR PANSING BROOKS: Yes. [LB245]

SENATOR CHAMBERS: I didn't have any other states to use. I had to bring this out of whole cloth. I had asked some groups of defense attorneys to comb other states' statutes and see if there was anything and there was nothing. So I did the best I could in covering as many contingencies as I could think of. But now let's say that in legislation writing, if you have not anticipated everything that could happen, that law cannot be amended. It would mean that as changes occurred in the technology that the law is dealing with, we could not amend this statute and make that available because I should have thought of that... [LB245]

SENATOR PANSING BROOKS: Ahead of time. [LB245]

SENATOR CHAMBERS: ...at the very beginning, which I didn't. So this I think is educational not only in terms of the justice that it can bring about, but in the way of writing legislation and trying to keep it up to date in terms of what is possible. Now I had heard about the exonerations, but I didn't realize that many actual perpetrators and the crimes that they had committed were discovered as the corollary to the other part of the exonerations, so thank you. [LB245]

SENATOR PANSING BROOKS: This current law as written was visionary, in my opinion. And of course, as time goes on and we are able to more easily work with these laws, we can add additional changes that become more clear. So I thank you for that foresight, Senator Chambers. [LB245]

SENATOR SEILER: Senator Krist. [LB245]

SENATOR KRIST: So that brings me to the point: Have you taken other states and their model legislation? Does this cover? I mean, in your mind, obviously, it does, because you've brought it to us. But we've basically lined out "such testing was effectively not available at the time of the trial, that," and we've added the biological material "was not previously subjected to DNA testing or," which could mean I had a stupid lawyer but he didn't ask for it, not that there's any stupid lawyers out there,... [LB245]

SENATOR PANSING BROOKS: No. [LB245]

SENATOR KRIST: ...but it just wasn't tested; or the second condition, "the biological material was tested previously, but current technology could provide a reasonable likelihood of more accurate and probative results." You're confident that this is inclusive of what we now want to make a 21st century addition to this? [LB245]

SENATOR PANSING BROOKS: I'm confident because we've worked with the national organization of the Innocence Project and they are actually looking through the bill...through the different laws regarding DNA testing across the country and they will speak to that. [LB245]

SENATOR KRIST: Okay. [LB245]

SENATOR PANSING BROOKS: And they are far better experts on the rest of the laws across this country than I am. [LB245]

SENATOR KRIST: Good. Thank you very much. [LB245]

SENATOR PANSING BROOKS: Thank you. [LB245]

SENATOR KRIST: Thank you, Chair. [LB245]

SENATOR SEILER: Thank you. [LB245]

SENATOR PANSING BROOKS: Thank you. And I might... [LB245]

SENATOR SEILER: First proponent. [LB245]

MICHELLE FELDMAN: (Exhibit 1) Good afternoon. My name is Michelle Feldman. It's M-i-c-h-e-l-l-e F-e-l-d-m-a-n, and I am from the national Innocence Project. And we're a national organization that works to exonerate the wrongfully convicted through DNA evidence. And as was mentioned before, Nebraska was one of the earlier states to enact a postconviction DNA statute, and it's a model law in many ways. But there is one provision that's creating an obstacle for some deserving Nebraskans to access justice. So right now, in order to be granted testing, a defendant has to prove that DNA technology was not available at the time of his or her trial or that a more probative form of DNA technology has since emerged. Evidence that could have been but was not tested at trial for various reasons would not be eligible. There are many reasons why DNA testing may not have been conducted, despite the existence of the technology. State labs with limited resources may not test every piece of evidence at a crime scene that doesn't seem probative at the time. A defendant who fears a harsh sentence might plead guilty or falsely confess to a crime and testing is not done. A defense attorney who does not specialize in DNA evidence may not know that a newer technique can get results from evidence in their case. To speak to your point earlier, Senator Krist, there is 39 other states that do not require defendants to prove that DNA technology or newer methods were not available at their time of trial, so we are confident that this language would now put Nebraska in line with the vast majority of other states. And in these 39 other states, there have been innocent people who have been exonerated, and they might not have qualified for testing under Nebraska's law. And Ted Bradford from Washington state is one of those people and he will be testifying next and he'll tell you his story. Another example is, in Texas, DNA evidence proved that Ricardo Rachell was innocent of a 2003 sexual assault and the testing also identified the real perpetrator. And the testing wasn't done in his original trial, even though the technology was available and the evidence was available. And had he been convicted in Nebraska, he still may be in prison and the real criminal could be out harming others. And Rachell's case reminds of why all Nebraskans have an interest in ensuring that the right person is convicted. It's a matter of justice and public safety. Real perpetrators have been identified in 160 of the nation's 325 DNA exonerations. And while the

innocent person was sitting behind bars, these real criminals went on to commit and be convicted of 145 additional crimes, including 77 rapes and 34 murders. So supporting this legislation would ensure that DNA testing is effectively used to exonerate the innocent, identify the guilty, and keep Nebraskans safe. [LB245]

SENATOR SEILER: Any questions? Seeing none, thank you very much. [LB245]

MICHELLE FELDMAN: Thank you. [LB245]

SENATOR SEILER: Next proponent. [LB245]

TED BRADFORD: Good morning, Senators. My name is Ted Bradford, T-e-d B-r-a-d-f-o-r-d. I am the first person to be exonerated in Washington state due to DNA evidence. I was wrongly convicted in 1996 for the crime of first-degree rape and first-degree burglary. I was sentenced to ten years in prison and at that point, you know, my life was over. You know, I lost my family, my job. I was just recently married at that time and we had two kids, my son, Trenton (phonetic), and my daughter, Carissa (phonetic). So they were under...both under two years old when I got sent to prison, and so I missed out on a lot of their early years and their first days of school and a lot of firsts due to this wrongful conviction. In 2002, I contacted the Innocence Project Northwest. They're based in Seattle. And they took on my case. And our first struggle, our first hurdle that we had to get over was actually getting approval to have the DNA testing done in my case on the crime scene evidence because at that time, from what I understand, it was completely up to the prosecutor to approve or deny the testing. And time and time again I was denied. So our first hurdle was to pass legislation in Washington to allow the testing to be done, not just for myself, but for other wrongly convicted people that were trying to get their cases overturned. So we eventually got that law passed and moved on to getting the DNA testing done, which took several more years. And this was around the time that I actually got released from prison. I completed my whole sentence, and so I was released in 2005. And I returned to Yakima County, the city of Yakima, where the crime and conviction took place, because I was placed on two years of what they call community custody, which is similar to parole, where I had to notify the sheriff's office of my address, meet with a probation officer once a month, and comply with their strict rules and regulations. And finally, my conviction was overturned in 2007. A judge was ordered to review the case because we had filed a motion for a new trial based on newly discovered evidence, which was DNA evidence, and my case was overturned. But at that time, my nightmare wasn't over because within a year I was arrested for a second time for the same crime and taken to jail, handcuffed, the whole bit, and I was informed that they were going to try me again for the same crime. Luckily, the judge at my arraignment released me on my own recognizance, because the second trial did not get underway until 2010. So that would have meant, if he did not release me, that would have meant that I would have had to stay in it for like

a year and a half to two more years awaiting the second trial. And that was due to continuances from both sides and it just seemed to be taking forever for this second trial to go and get underway. And so when that second trial did come about, it was February of 2010. And at the end of that week-long trial... [LB245]

SENATOR SEILER: Excuse me just a second. Your button is red. You're supposed to stop your testimony. [LB245]

TED BRADFORD: Oh, sorry. [LB245]

SENATOR SEILER: I will defer to Senator Morfeld. [LB245]

SENATOR MORFELD: I'd like you to continue, if you would, please. [LB245]

SENATOR SEILER: Thank you. [LB245]

TED BRADFORD: My apologies. I was acquitted at that second trial, fully exonerated, and I can't help but notice, like, the similarities between this bill before you and what happened to me and my case because if, like, for instance, if I was in Nebraska, I would not be able to even get the DNA testing done. And that's similar to what happened to me in Washington state was it took legislation and, you know, changes being made to the procedures and the laws in order for me to be exonerated. I guess that's...I'd just like to thank you for taking the time to hear my story. I appreciate it. [LB245]

SENATOR SEILER: Questions? Thank you very much for your trip and for your testimony. [LB245]

TED BRADFORD: Thank you. [LB245]

SENATOR SEILER: Next witness. [LB245]

TRACY HIGHTOWER: Good afternoon again. My name is Tracy Hightower. That's T-r-a-c-y H-i-g-h-t-o-w-e-r. I'm the executive director of the Nebraska Innocence Project. And just a moment ago I was sitting in between JoAnn Taylor from the Beatrice Six, who you will hear from in a couple of moments, and Ted Bradford, who you've just heard from. And the two of them combined spent more time in prison than I am old, and I am more than 30 years old. As a practitioner, I've seen firsthand how Nebraska's current requirement that defendants prove that

DNA testing was unavailable at trial has prevented access to justice for deserving Nebraskans. In one example, in March 2014, the Nebraska Supreme Court denied testing for Antoine Young. Mr. Young was convicted of murder in 2009 and is currently serving a life sentence. The court said that Mr. Young was not entitled to DNA testing of a shirt found at the crime scene because he could not prove that DNA testing was unavailable in his 2009 trial. In this case, the testing could provide answers about whether or not the right person was convicted. This is important not just for Mr. Young and his family, but also for the victim's family and the community. As a public policy matter, in this one example, if Mr. Young is not the right person, then, folks, we have a murderer that's still out there. Currently, our intake for the Nebraska Innocence Project are coming from more recent cases. And we know that DNA testing has been available since approximately the year 2000, which is effectively resulting in no avenue under our DNA Testing Act under the current law. Some have raised concerns that this revision to the statute would result in a flood of litigation, but that's not occurring in the 39 other states that don't have this type of restriction. In Arizona, for example, 43 DNA testing petitions were filed in a nine-year time frame, from 2000-2009, according to the Arizona Justice Project. And the prison population in Arizona is eight times that of it is in Nebraska. The Minnesota Innocence Project reported that only five of its cases have involved DNA testing since the state passed its postconviction statute for testing in 2005, and Minnesota's prison population is more than double that of Nebraska. DNA evidence is only probative in 5-10 percent of criminal cases, so we're talking a very small number of people that this will affect. Also, a defendant still has to meet a number of requirements in the statute, and we are not asking for any of those to be amended. Specifically, they still have to show that DNA testing may produce noncumulative, exculpatory evidence relevant to wrongful convictions. So just like in LB244, there's still burdens to overcome. And the legislative history for LB659, which was Nebraska's original postconviction testing law enacted in 2001...I'm sorry. May I finish my testimony? [LB245]

SENATOR MORFELD: Please continue. [LB245]

TRACY HIGHTOWER: Thank you. So the legislative history for LB659 indicates that the Legislature did not intend that the statute be interpreted this way. The statements of intent issued by the introducer and Judiciary Committee both state, quote, an applicant must allege that evidence to be tested was not previously subjected to DNA testing or to the form of DNA testing requested, end quote. So this means that previously untested evidence would be eligible for testing whether or not DNA testing was available at the time of trial, again, assuming the defendant meets the other requirements of the DNA Testing Act, thus allowing postconviction motion...allowing postconviction DNA testing of untested evidence is what the Legislature intended in 2001. And I urge you to support LB245. Thank you. [LB245]

SENATOR SEILER: Any questions? Senator Chambers. [LB245]

SENATOR CHAMBERS: Whenever a new idea is proposed to a Legislature in a state that is called conservative, the entire process is politicized. There are people who might believe that the idea is valid; but, being politicians, they will indicate that they cannot move too far from what is known and done for fear of being seen to be soft on crime. So I wish that not only myself, but others who try to do things and be on the cutting edge of the sickle instead of the back, blunt, backward-facing edge, could do things which would not be politicized. But when you have nothing, you get what you can get and just hope that, as today is showing, others will come along at a time when there is a different climate, where there have been exonerations because of the impact of DNA testing, there have been the discovery of actual perpetrators. None of that was available then. So I'm glad that all of this is being done and that people are coming forward to help and do what I couldn't do even if I wanted to. And I didn't ask the young man who testified...by the way, as old as I am, everybody is young, but you are young, for real. It's not easy to talk about some things anyway. But when it's so unpleasant, it is so unfair, and you can never be given back what was taken from you, that's not the person that I want to ask questions of. But I do want to state that I appreciate the fact that he was willing to come here and share those things with us because there's a difference even between reading statistics or actual documentary evidence and seeing a person in the flesh who actually experienced these injustices. And the final thing I'll say, maybe on all these bills, but it bothers me every time I hear politicians or even lawyers say that America has the best judicial system in the world. And the people saying that can't say it because, in the state they live, they don't know variations in how the law is interpreted within that state by various judges in various counties. They don't know what the law is in adjacent states. They don't know what the law is in every state, so how can they say America has the best system in the world? There are other countries existing where the prosecutor's job is to see that justice is done and prosecutors will inject themselves into some of the proceedings and terminate them because what is being presented is not going to bring justice. If there is false evidence or withheld evidence and the prosecutor becomes aware of it, judges can even intercede sometimes. That is not the case in America and the laws that are being addressed now would not exist as they do in a judicial system that is merely fair, let alone exemplary. So those things I wanted to say and express my appreciation for all of the people who came here. And when they were talking about those people who had been falsely convicted, and there was prosecutorial misconduct in the case of those known as the Beatrice Six, the Attorney General invited me to the Pardons Board hearing and he said, Ernie, I think you should be there, mentioned what I had done. He said, but I know you thought you'd never see the day when I would be the one, meaning himself, to say that these are people who are actually innocent, that the state was wrong, that the way the prosecutors handled it was wrong. So if there's such a thing as being paid back for what you did, that moment, if no other one like that ever occurs, made...it was a satisfactory conclusion, as far as I'm concerned, for what I did. So if we get these laws in place, these changes, everybody who offered something that helped should take pleasure and satisfaction in knowing that these are laws that really aim at bringing justice. We're not talking about what people call technicalities. We're not saying that the guilty should not be punished.

We're saying that the innocent should not suffer as though they were guilty. And that's my last lecture for the day. [LB245]

TRACY HIGHTOWER: May I make a short statement to that? [LB245]

SENATOR SEILER: Go ahead. [LB245]

TRACY HIGHTOWER: Senator Chambers, you mentioned that you hoped this isn't a political discussion. And I just want to point out that this isn't a liberal or conservative position. This is the importance of the DNA Testing Act, to get it so that we aren't seeing that the real perpetrators are not brought to justice. [LB245]

SENATOR CHAMBERS: Oh, no, I'm not referring to...I mean the process in the Legislature that we're going to have to go through. We're dealing in a political setting where we cannot just deal with the issues on their merits. We have to deal with people who might agree but they're thinking about how will it impact the people in the district that they serve, if they have designs on seeking a higher office, could doing what they know is the right thing come back to haunt them, and if they think that would be the case, they will not do what they know they should. So that's what I meant by a political setting, where we on this side of the table have to operate, not those of you on that side who are trying to do something. [LB245]

TRACY HIGHTOWER: Thank you. [LB245]

SENATOR SEILER: Thank you. I see no further questions. You may step down. [LB245]

TRACY HIGHTOWER: Thank you. [LB245]

SENATOR SEILER: Thank you for your testimony. Next witness. [LB245]

JEFF PATTERSON: Good afternoon. My name is Jeff Patterson, J-e-f-f P-a-t-t-e-r-s-o-n. I'm an attorney and I represent four of the individuals who are known as the Beatrice Six. My clients are Joe White, now Joe White's estate, Tom Winslow, Kathy Gonzalez, and Ada JoAnn Taylor. Three of my clients--Joe, Tom, and Kathy--were the ones that law enforcement claimed were the source of semen and blood at the crime scene. I was asked to share with you some observations on how our current DNA Testing Act both hindered and helped expose the wrongful convictions of the six innocent people. DNA testing didn't come easy for Joe White and Tom Winslow. Joe started the process in October 2005. The first DNA testing results, however, were not received until July 31, 2008. The reason for this nearly three-year wait was because the district court

initially denied DNA testing saying that DNA testing would not produce exculpatory evidence. Now it's hard to understand how discovering that Joe, Tom, and Kathy were not the source of crime scene biological evidence would not be exculpatory evidence and, fortunately, our Supreme Court came to that same conclusion and ordered the DNA testing to proceed. The first DNA test results excluded Joe, Tom, and Kathy as the source of any biological material found at the Wilson crime scene. And although that result was exculpatory, it was viewed as not being enough to exonerate them. The Beatrice Six were eventually exonerated when, in October 2008, DNA testing proved that Bruce Allen Smith was the sole source of blood and semen at the Wilson crime scene and an Attorney General task force investigation showed that there was no connection between Smith and any of the Beatrice Six. The provision of our current DNA Testing Act that is to be amended is the requirement that DNA testing was not effectively available at the time of trial and my point is this: We know there are people in prison for crimes they did not commit. Last year was a record year for the number of exonerations of wrongly convicted individuals and much of that was because of DNA testing. Structuring procedures for discovering the truth of a wrongful conviction too tightly serves almost no one's interest, not the victims' or their survivors', not the state, and certainly not the wrongly convicted, innocent men and women. The only person who benefits is the actual criminal who avoids being brought to justice as long as the wrong person, an innocent person, sits in prison. The provision of our current DNA Testing Act that limits DNA testing to cases where DNA testing was not available at the time of trial only benefits the criminal who is able to avoid justice. It doesn't benefit you, it doesn't benefit me, or the person currently in prison for something they didn't do. Thank you. [LB245]

SENATOR SEILER: Thank you very much. Questions? [LB245]

SENATOR CHAMBERS: Just one thing. [LB245]

SENATOR SEILER: Thank you for your testimony. [LB245]

SENATOR CHAMBERS: Just one... [LB245]

SENATOR SEILER: Oh, Senator Chambers. [LB245]

SENATOR CHAMBERS: How did you get into that case? How did you become connected with the case to represent the individuals? [LB245]

JEFF PATTERSON: Well, we...and we...I represent them in their civil actions. And Doug Stratton, an attorney in Norfolk, was the attorney who originally was contacted by Joe White.

And Doug was the one who thought about the...listened to Joe White and believed what he was saying was true. And then Doug was the one who pursued the DNA Testing Act and procedures, along with Jerry Soucie, and they were the ones that took then Joe White and Tom Winslow on as clients. And when they were exonerated, then Doug came to me and a guy that...a law partner of mine, Bob Bartle, and asked him to...asked us to help him in the civil actions. [LB245]

SENATOR CHAMBERS: And now that we can look back and see the result from here, you can also see places where somebody had to believe that a person who had been convicted was telling the truth. [LB245]

JEFF PATTERSON: Exactly. [LB245]

SENATOR CHAMBERS: And if there hadn't been somebody outside of the system who believed that and the subsequent actions occurred, we wouldn't be talking about their cases in the way we are now today, would you agree? [LB245]

JEFF PATTERSON: Well, I would agree with that and I would add to that. It takes not only belief, but you have to somebody, a lawyer, who has the wherewithal to effect a remedy. Doug was not the first person that Joe contacted. Joe had gone through two other postconviction lawyers before he came upon Doug. And Doug realized then that the DNA Testing Act would probably benefit Joe. [LB245]

SENATOR CHAMBERS: I just wanted the record to be a little fuller, so thank you. [LB245]

JEFF PATTERSON: You're welcome. [LB245]

SENATOR SEILER: Thank you for your testimony. Next witness. [LB245]

JOANN TAYLOR: Good afternoon, Senators. My name is JoAnn Taylor, and I am one of the Beatrice Six. I was wrongly convicted of the 1985 rape and murder of Helen Wilson, along with five other codefendants. Six years ago this week, I was exonerated with DNA evidence. While the police were interrogating me, all I could think about was my newborn baby at home. I came to believe that I was present when Ms. Wilson was murdered and pled guilty because I believed I was somehow involved. I spent almost 20 years in prison for a crime I did not commit. My codefendant Joseph White fought for DNA testing in 2008 and he got it. The results showed that all six of us were innocent and that Bruce Allen Smith, who had been an early suspect, was the real criminal. My case shows that sometimes the criminal justice system gets it wrong; and when errors occur, there must be a way for wrongly convicted individuals to get back into court and

prove their innocence. Thankfully, after many years, Joseph White was allowed to get DNA testing under Nebraska's current law. If he weren't granted testing, I would still be in prison and the real criminal would not have been found. But other deserving Nebraskans aren't as fortunate and the statute should provide them with meaningful access to justice. My story is a tragedy and a triumph. My son was a baby when I went to prison and now he is an adult. I will never get back those lost years, but I hope that I can make something positive out of...come out of this experience. That's why I'm here today asking you to support LB245, so that other wrongfully convicted Nebraskans like me can get the justice they deserve. [LB245]

SENATOR SEILER: Any questions? Seeing none, thank you for your testimony. [LB245]

JOANN TAYLOR: Thank you. [LB245]

SENATOR SEILER: Any other proponents? You may proceed. [LB245]

AMIE MARTINEZ: Good afternoon, Chairperson Seiler and Senators. My name is Amie Martinez, 1630 "K" Street, Lincoln, Nebraska, and I am the president of the State Bar Association. I wouldn't begin to be able to speak as eloquently as the speakers before me, but let me tell you that, on behalf of the State Bar Association, we do support this legislation. [LB245]

SENATOR SEILER: Okay. Any questions? Thank you. [LB245]

AMIE MARTINEZ: Thank you. [LB245]

SARAH NEWELL: Hello again. Sarah Newell, from the Nebraska Commission on Public Advocacy, N-e-w-e-l-l. I will be much more brief this time. I just wanted, I guess, wanted to state the position that our office is in support of the bill. We...our office represented, particularly Jerry Soucie, my predecessor, represented Mr. Winslow and it was a long, hard-fought battle. And we also represented Mr. Tabech, the case I'd...El-Tabech that I handed out earlier, the case with...where prior to Senator Chambers getting this law enacted there really was no remedy. So with that I'd just submit to any questions or I'll go. [LB245]

SENATOR SEILER: Seeing none, thank you. [LB245]

SARAH NEWELL: Thank you. [LB245]

JOHN BERRY: John Berry from Nebraska Criminal Defense Attorneys Association. Again, we support this bill as well. Subject to your questions, that's all I have, sir. [LB245]

SENATOR SEILER: That may be your shortest testimony. (Laughter) Thank you for it. Any other proponents? Any opponents? Anybody in the neutral? You may close. [LB245]

SENATOR PANSING BROOKS: Thank you. Senator Seiler, I just want to thank those who came to speak in favor of LB245 and those who came in the furtherance of justice, especially Ted Bradford from Washington state who gave remarkable, courageous testimony, and Nebraska's own JoAnn Taylor, who served 19.5 heartbreaking, life-shattering years. I want to express my deep remorse regarding the laws and process that so wrongly incarcerated both of you and also the law that released you. And finally, I do want to give my thanks to Senator Chambers for the DNA Testing Act which ultimately led to JoAnn's release. Thank you. [LB245]

SENATOR SEILER: Senator Krist. [LB245]

SENATOR KRIST: I moved to this committee off of HHS so I wouldn't need any Kleenex, but you changed that today. (Laughter) Thank you. [LB245]

SENATOR SEILER: Any further questions? Seeing none, thank you. [LB245]

SENATOR PANSING BROOKS: Thank you. [LB245]

SENATOR SEILER: (Exhibit 2) We will enter the written materials into the record and anybody that has signed, and there are sign-in sheets out there, will also become part of the record. Seeing no further evidence, this record is closed. [LB245]