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Judiciary Committee  
September 15, 2017

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[LR114 LR191 LR198 LR221]

The Committee on Judiciary met at 9:30 a.m. on Friday, September 15, 2017, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LR198, LR221, LR191, and LR114. Senators present: Laura Ebke, Chairperson; Patty Pansing Brooks, Vice Chairperson; Roy Baker; Matt Hansen; Bob Krist; and Adam Morfeld. Senators absent: Ernie Chambers and Steve Halloran.

SENATOR EBKE: Good morning. Welcome to the Judiciary Committee. As you can see, we're having a bit of a class reunion atmosphere going on here. We're starting to kick off our interim studies and a lot of us haven't seen each other for a while so we're getting reacquainted and having a good time doing it. My name is Laura Ebke. I'm from Crete and I represent Legislative District 32. I Chair the Judiciary Committee. I'd like to start off by allowing my colleagues who are in attendance--and there will be some others making their way in I think--introduce themselves, so.

SENATOR PANSING BROOKS: Hi. I'm Senator Patty Pansing Brooks, Legislative District 28, right here in the heart of Lincoln.

SENATOR KRIST: Bob Krist, I represent District 10, northwest Omaha and the city of Bennington.

SENATOR MORFELD: Adam Morfeld, I represent the "Fightin' 46th" in northeast Lincoln.

SENATOR EBKE: Okay. And Tim Hruza is our legal counsel. And we have Laurie Vollertsen who is our committee clerk and we have Kaylee and Emma who are serving as committee pages today. If you have anything that needs to be handed out to us, find the pages and they will hand you...they will hand them out for you. If you need copies, they will make copies for you. There are yellow testifier sheets over on the table. And if you plan to testify, please fill those out and hand it to the page when you come up. We'll begin testimony with an opening statement by the introducer of each resolution. Interim studies operate just a little bit differently, at least in this committee. It's not an adversarial relationship. What we're trying to do is to have a discussion

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and to look at different issues. And so rather than going with the proponent, opponent, it's just come on up and we'll talk and we'll fit you in where it makes sense; and we will let those senators who are introducing resolutions return to their seats if they...that are on the committee return to their seats should they so choose. Let me just also note that it's 9:35. It is my very fervent wish that we're done by 12:30, hopefully. We have four resolutions to hear, so we're going to have five- minute time--is that what we decided?--five-minute time limits on testimony. And don't feel the need to use up all of those five minutes unless you've got something you absolutely think needs to be added. So with that, Senator Pansing Brooks.

SENATOR PANSING BROOKS: (Exhibit 1) Thank you, Chair Ebke and fellow members of the Judiciary Committee. For the record, I'm Patty Pansing Brooks, P-a-t-t-y P-a-n-s-i-n-g B-r-o-o-k-s, representing District 28, and I have to say it again, right here in the heart of Lincoln. I am here to introduce LR198, an interim study to examine the impact of incarceration on children in Nebraska. I brought this interim study because children face enormous trauma when a parent is taken into custody. LR198 examines two major components of this trauma. One is what happens to the child immediately...one is what happens to a child during and immediately after the arrest of a parent. The second is what happens to facilitate ongoing best practices for children when their parent is in custody for an extended period of time. Today's hearing will primarily focus on the latter. Research shows that family is crucial to stressful outcomes for children. We all know that. Studies also consistently show that incarcerated individuals who maintain close contact with family while they're incarcerated have much better post-release outcomes and lower recidivism rates. A report from the Annie E. Casey Foundation found that nearly one in ten Nebraska children have had a parent in prison or jail at some point in their childhood. We also know that 95 percent of inmates will be released at some point according to the Bureau of Justice statistics. So we need to ensure that Nebraska is fostering an environment that is conducive to those continued family connections. This is especially important because of the intergenerational components of incarceration. In fact, 70 percent of children with an incarcerated parent will end up behind bars according to Defy Ventures. Clearly the statistics show that the pipeline to prison for children of incarcerated parents is straight and direct. This contributes to the overcrowding crisis. We need to reroute that pipeline with productive procedures and best practices that encourage and foster family connections while parents are incarcerated. To shed light on the current landscape in Nebraska and identify areas of opportunity, I have invited members of the

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state Ombudsman's Office, including Inspector General Doug Koebernick, to testify today. I've also invited Voices for Children in Nebraska to testify on best policy practices and I've invited the ACLU of Nebraska to testify on research they have conducted regarding rules and practices related to phone usage for those in state and county facilities. I also invited Director Scott Frakes from the Department of Corrections to testify on current family-friendly programs and visitation policies in Nebraska. Unfortunately, he had a scheduling conflict; and when we reconnected again, said that he chose not to send a subordinate. I hope this hearing will help us determine how Nebraska is doing when it comes to both meeting the needs of the children of incarcerated parents and facilitating family-friendly programs and visitation policies that promote successful rehabilitation and reentry into our communities. With that, I'll take any questions you have.

[LR198]

SENATOR EBKE: Okay. Senator Baker has joined us. And as just sort of a gentle reminder, if you plan to testify on any one of these, as the resolution is being discussed if you'd move kind of towards the front so we can facilitate. So, any questions for Senator Pansing Brooks at this point? [LR198]

SENATOR PANSING BROOKS: Thank you. [LR198]

SENATOR EBKE: Okay. First up. Go ahead. [LR198]

JERALL MORELAND: (Exhibit 2) Senator Ebke, Judiciary Committee members, good morning. My name is Jerall Moreland, J-e-r-a-l-l, Moreland, M-o-r-e-l-a-n-d. I am here today representing the state Ombudsman's Office in the capacity as deputy ombudsman for institutions. I would like to thank Senator Pansing Brooks for the invitation to offer our views on the possible subjects that the committee might be interested in as it relates to the impact of mass incarceration on children in Nebraska. LR198 looks to examine opportunities to ease the traumatic effects of parental incarceration on children. Two areas of interest that this committee identified for study deal with the examination of local jail visitation and phone call policies as they relate to communication between a detained parent and children, and the existing parenting programs offered within state correctional institutions. Today, I would like to submit my written testimony into the record but will offer a couple of remarks about the history of parenting programs within

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the State Corrections system and touch on what parenting programs look like in several of Nebraska's largest jails. When taking a look at how institutions such as the State Corrections system view the importance of parenting education, you need to look at the evolution of NDCS and the advancements made in this area today. In 1974, the warden at the Nebraska Correctional Center for Women developed a program that allowed children to stay overnight. This program, known as the Parenting Program to many folks then, was visionary as it took steps toward maintaining parent-child relationships and, in some cases, created relationship opportunities. Several decades later, the concept behind the Parenting Program expanded to include an on-ground nursery for babies born to inmate mothers during their incarceration. Today, the nursery program continues to operate, in general, for those inmates who have a parole eligibility date or tentative release date within 18 months of the birth of their baby. There would be educational criteria as part of the eligibility process. If we ask ourselves what parenting programs resemble in the Nebraska Corrections System today, we will find forward movement that appears to have occurred in early 2000. This is the point in time in which stakeholders across the country began noticing possible effects of mass incarceration and the impact it was having on families, society, and children of incarcerated parents. In particular, research indicates that nationally in some parts of the country efforts were made to begin intervening on transforming the relationships of incarcerated men with their children. We believe that when you take a look at the evolution of parenting programs within the department for male inmates, you don't need to look past the leadership of previous Corrections Director Robert Houston. In about 2007, Director Houston's Administration began focusing on parenting skills and education for inmate males based on an understanding of the significance of fatherhood. Implementation policy by the department at this time consisted of parenting programs that focused on a mission of increased contact visits, education of parenting skills, new ways to look at programs, and cognitive thinking as well. Also, the department began partnering with Christian Heritage, a private community provider, to offer parenting services to the inmate male population. It is this very reason that we think that with the current issues surrounding program offerings at the department, partnerships with other providers to be important and beneficial to Nebraskans. Therefore, we would encourage Director Frakes to continue his support of the Parenting Program and suggest that he consider expanding his private provider pool of partnerships with those providers to include other faith-based groups that offer educational opportunities for parenting programs that are grounded in fatherhood and address parental education, child visitation, and reunification approaches. As mentioned in our

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understanding of LR198, we look to examine local jail visitation and phone call policies as they relate to communication between a detained parent and their children. We support this examination, as typically a state Corrections inmate has spent time in county jail prior to placement at NDCS. In some cases, inmates have spent a significant amount of time in county jail. To obtain a better idea of what parenting programs may look like in Nebraska jails, recently, the Ombudsman's Office surveyed several of the larger jails in Nebraska for information about any type of parenting program that may be offered with the goal of keeping family ties strong during incarceration. Where all the jails contacted encouraged family communication and visitation, only one jail had specific parent programming policies in place. Another, however, reported plans in place to implement parenting program in the near future. Additionally, we found that some jails reported working closely with HHS Child Protective Services and Nebraska Families Collaborative, who provide case management services in conjunction with CPS cases. Some jails have a work release program that affords furloughs for some visitations but do not offer specific opportunities for parenting programming in the facility; that includes education. Finally, the jail that does offer Parenting Program that includes educational curriculum to its eligible inmates, contracts with a private provider for services. It should be noted that the services provided are paid for by the Inmate Welfare Fund. In closing, research across the country estimates that approximately 2.7 million children in the United States have an incarcerated parent. This number jumps considerably when looking at the number of parents who had been incarcerated at some point in their lives. With this realism comes a dynamic of collateral consequences such as challenging social problems, economic difficulties, and the absence... [LR198]

SENATOR EBKE: I'm going to cut you off. We've got your written statement and I think there will probably be some questions. So, questions? Senator Pansing Brooks, did you have some? You looked like you were getting ready to ask a question. So let me ask you, by way of letting you kind of clean up here. [LR198]

JERALL MORELAND: Okay. [LR198]

SENATOR EBKE: What recommendations do you have for us? [LR198]

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JERALL MORELAND: In our view, taking consideration of the progress that has been made with the department, we believe we need to further look at the current data that the department has on just how effective the programming is that they offer the inmate population. As we know, mass incarceration affects minorities at a high level. And one of the suggestions we have made in our report is that we should look at trying to obtain segmented data into that area. Other areas that we would...other questions that we believe should be considered is, what kind of programs are offered in other states? What are we doing good here in Nebraska? As well as, why...are there...what barriers are in place for inmates currently that do not participate in the Parenting Program offered by the department? We do know that there are some barriers. We know that based on placement that may keep certain inmates from participating in those opportunities. So we would suggest that we increase data. We would also suggest that we create some kind of method to accurately measure the impact of the program being offered. [LR198]

SENATOR EBKE: So you certainly advocate for a data-driven program. [LR198]

JERALL MORELAND: Yes. [LR198]

SENATOR EBKE: And that seems to be something that we've heard a lot about from both sides. Corrections Department certainly wants to move in that direction, too, it seems. Is space a problem? [LR198]

JERALL MORELAND: I think space is a challenge for the department on offering program. And I would suggest that, you know, we've been...we've talked about reform in corrections. We talked about how overcrowding is impacting the ability for the department to offer that programming. So yes. [LR198]

SENATOR EBKE: Thank you. Any other questions? [LR198]

SENATOR PANSING BROOKS: I have a question. [LR198]

SENATOR EBKE: Senator Pansing Brooks. [LR198]

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SENATOR PANSING BROOKS: Thank you so much for coming. And I am wondering, number one, what kind of...can you answer, I presume that the general public out there would say, well, why do you want this? This is dangerous. We can't put..we can't put these children in the arms of their dangerous parents. So can you speak to that a little bit and maybe about...I don't know if you know what's happening in other states. They did just...we had a fabulous couple three movies that Voices for Children put on two days ago which I wish everyone had seen about how important and how beneficial it is both for the kids and for the inmates to be able to connect with their families. But could you speak a little bit since you are in the prisons and see those people, not everybody is going to be dangerous and a danger to their child. But I think John Q. Public might have this impression like, why would we let them be there? And that's their punishment. That's...they made the mistake, they've got to pay their crime. And they don't realize, too, that the kids are being punished at the same time. So if you could maybe speak to that a little bit and your perception of the danger to the children, the higher risk of that interaction. [LR198]

JERALL MORELAND: I think I would say my first comment, Senator, in regards to your comment--about 95 percent of inmates will be back in the community. How do we want that to look when they're transitioned back into the community? There are studies out there, as you're aware, that suggests that there need to be some kind of assistance to help with how that looks when they go back to the community. Most jails in Nebraska and state Corrections offer some kind of visitation policy. That visitation policy allows that connection, allows family relations to continue. And so the way I look at it is the Parenting Program offers one step past consistent visitation policies that are out there. There are cases where it's not appropriate for inmates to have visits with their children. On those cases, those are ones that are scrutinized by the department or the jail. The department does have a criteria within their policy that goes through a review of your sentence, and there is a child related to your sentence then it's a review that has to go through administration as well as Behavioral Health to determine the appropriateness of that visit. So I guess to finalize my final comment is that 95 percent, again, will be released, and what kind of assistance such as parenting programs can we offer those individuals? [LR198]

SENATOR PANSING BROOKS: Okay, I have two more quick questions then. What...and I presume you don't have an exact percentage. Are the bulk of the inmates people that you don't want to have direct contact with the children? I presume not. [LR198]

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JERALL MORELAND: I don't want to put a percentage. I don't have a percentage. [LR198]

SENATOR PANSING BROOKS: Is it over half? [LR198]

JERALL MORELAND: I don't have a percentage. However, I think there is data out there that suggests that we do have an increase in certain sex offense crimes. And so that needs to be considered as we look at this. However, I also believe, in my opinion, there is a large population that we would not have to submit to that scrutiny of if it's appropriate or not. [LR198]

SENATOR PANSING BROOKS: Okay, and one more question. Since the department was unable or unwilling to show up to this hearing, do you have a feel for how the department treats access to children? Do they look at it as a program, and we know that programming for many inmates is put off towards the very end, if ever, of their term. Are we looking at access to children as a program that, oh gosh, they're about to start consider being released, we better connect them to their family finally at the end of the term? Or is it something that they realize is different than programming? We wish programming were going on through the whole thing, but certainly access to families is much more critical the whole way along, especially for the kids. Do you have a feel for whether they look at this as programming versus another separate category which is access to children and families and connections? [LR198]

JERALL MORELAND: The recommendation we have made is that there needs to be consideration to enhance their current Parenting Program. Where there has been a history of progress within the department such as 1974, it was not until 2007 that we realized the need to expand that to the male population as well. So we believe there needs to continue to be improvement in that area. We believe they need to try to continue to partner with other private providers as well. And we would encourage the department to continue down the path that history has shown the department has went. [LR198]

SENATOR PANSING BROOKS: Thank you. [LR198]

SENATOR EBKE: Anything else? Thank you, Mr. Moreland. [LR198]



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JERALL MORELAND: All right, thank you. [LR198]

DOUG KOEBERNICK: Good morning, Senator Ebke and senators on the Judiciary Committee. My name is Doug Koebornick, spelled K-o-e-b-e-r-n-i-c-k, and I work for the Legislature as the Inspector General for Corrections. I think Mr. Moreland did an outstanding job. It was very comprehensive and I want to thank him for all the work that he's put into this subject. I know he did a lot of work over the last week or so looking into this. I was asked to testify today on LR198 due to the fact that in my annual report that was released yesterday I wrote about this subject. I made this a part of my report after a former correctional employee who has a deep concern regarding the welfare of children of incarcerated parents contacted me and talked to me about this issue. She shared that...she shared what other states are doing, especially in the state of New York where they have some pretty promising practices going on and asked me to look into it. So I haven't spent a lot of time on it but in a nutshell I found the obvious, that strengthening the bonds between an incarcerated parent and their child can minimize trauma inflicted on the child and enhance parenting skills for when the incarcerated parent returns to their home community. I also did a little looking at the...some information that the department had and found out that 66 percent of the female inmates are actually parents and 65 percent of the male inmates are parents in our system. There are some things that the Department of Correctional Services is already doing in this regard such as the Destination Dad program that Christian Heritage runs, the parenting programs Mr. Moreland talked about, and there are some things in the recent history that they've done as far as visitation rooms where they've added some TVs for the kids to watch, have children's movies, and things like that, fish tanks, some of those kind of things to make them a little bit softer, a little more kid friendly. And I want to kind of applaud them for that. But there's definitely more that can be done. This is why I recommended in my report that the department assess the need for an expansion of family programs from inmates within the department. However, I think that this is probably bigger than the Department of Correctional Services and I would actually recommend that a number of agencies or divisions begin to look at this issue together including Education, Behavioral Health, Child Welfare, Corrections, and even Parole. Finally, I would like to briefly touch on the connection between mothers in our correctional system and their children. This isn't exactly found in LR198 but I think it's relevant. Right now nearly every female inmate resides in York, Nebraska, which is not where most women in the system are from. The distance from York to their home communities presents a

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barrier to visits between women and their families. However, when a woman is reclassified as community custody and moves to work release opportunity, they can either go to Lincoln where there's 88 beds for women or Omaha where there is currently 20 beds which can help with the connection between her and her family if she is from that community. However, the department will be closing the 20 beds in Omaha by 2019 even though about one-third of all women in our system are from that area. This will make it even more difficult for those women to build positive relationships with their children as they transition back to their home community. I would still encourage the...I would definitely encourage the department to rethink this decision. I've said this publicly in the past. Or better yet, I think the Legislature could look at the ability of the Office of Parole Administration to run a pilot program for women in Omaha at the end of their sentences. And maybe they can be creative and innovative and we can figure out different ways for them to reconnect and transition back into the Omaha area and then we can branch out, see how that goes, and then go into other communities as well. With that, I'll end my testimony and be open to any questions. [LR198]

SENATOR EBKE: Thank you, Mr. Koebernick. Any questions? Senator Krist. [LR198]

SENATOR KRIST: Thank you for the report. [LR198]

DOUG KOEBERNICK: You're welcome. [LR198]

SENATOR KRIST: It was very good. Do you know if the department has reprogrammed either the money or the beds for other uses, or are they just discontinuing the Omaha program? [LR198]

DOUG KOEBERNICK: What they will do is they're expanding the Community Corrections Center in Lincoln right now. They're starting to. And they're going to add about a 150-bed unit for women. And then that will free up about 88 beds for men there. And then they're going to move, because right now there's 88 beds for women in Lincoln. Then they'll move the 20 beds from Omaha to Lincoln to fill that 150-bed unit. And then they'll put...use those 20 beds in Omaha to have men in them. [LR198]

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SENATOR KRIST: So there's a net gain in terms of the number of beds available with the new unit in Lincoln. [LR198]

DOUG KOEBERNICK: Correct. [LR198]

SENATOR KRIST: But proximity is an issue as well with the Omaha area. [LR198]

DOUG KOEBERNICK: Correct. [LR198]

SENATOR KRIST: Okay. Thank you very much. [LR198]

SENATOR EBKE: Anything else? Thanks for coming. [LR198]

JULIA TSE: (Exhibit 3) Good morning, Chairwoman Ebke and members of the Judiciary Committee. My name is Julia Tse, J-u-l-i-a T-s-e, and I am a policy coordinator at Voices for Children in Nebraska which is a nonprofit, nonpartisan policy advocacy organization that's dedicated to building pathways to opportunities for all children in our state. Earlier this year Voices for Children sought to uplift the untold story about what happens to a child when their parent is taken away to jail or prison. We hope that their voices will drive the policy reform that we desperately need, and to my testimony I've attached the full report that we published. As we talked to over two dozen young people, grandmothers, and parents it became clear that the last half-century of a tough-on-crime stance has created many barriers to success for children of incarcerated parents, oftentimes pushing them into the justice system. Healthy attachment relationships and contact with the parents are the foundation of childhood development and have been shown to have lifelong consequences for proper functioning. The physical loss of a key figure in life poses a tremendous challenge to children and can permanently damage parent-child relationships. Visits require significant investment of time and money from families that are already stretched too thin. Current visitation policies are far from child friendly and have unreasonably strict requirements on child behavior and physical contact. There is no opportunity for parents to interact with their children in a way that contributes to positive development in bonding outside of those programs that were referenced through Christian Heritage. And for children who are unable to visit, phone calls which are expensive are typically limited to 15

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minutes a day and that's the only lifeline that they'll have. The research shows that we as a state cannot afford to allow these children to fall through the cracks. Incarceration of a family member is an adverse childhood experience, also known as an ACE, and brain science tells us that this triggers a biological response in a child's brain. It affects their development, their physical and mental health, and it's linked to an increase in risk-taking behaviors. These effects only serve to exacerbate what we know of everyday life for these children. Mass incarceration is more likely to affect communities that are high in crime, high in violence, low income, and underresourced in being able to provide those important services and supports that children need to buffer the consequences of an ACE. In an attached document we've outlined possible paths forward in strengthening family relationships through incarceration that we've sort of looked through at other states and their policies, including easing restrictions on physical contact. Currently if you're 3 and under that's the limit for being held in a parent's lap. We think that's far too low, especially because anything...after that you can only have a kiss or a hug at the beginning and end of a visit. And this in a state facility. We'd also encourage natural and positive interactions during visits, investing in more community-based treatment alternatives to incarceration that allow children to remain with their parent when it's possible and appropriate, providing trauma-informed training to correctional staff on engaging with children in an age-appropriate manner. Something that we hear oftentimes is that children are treated as criminals themselves by officers, which whether they mean to or not that's sort of the way that they're treated when they enter a facility. Reducing primary barriers to contact which include transportation, time limits on phone calls and visits and communication to family, and finally coordinating resources and contact with families. We heard quite frequently that families were often left in the dark. Maybe they drove an hour to come visit and were told nothing about why their visitation was canceled. As this committee well knows, almost all of our men and women in state prisons will someday be released to our communities. But the role of most of them will still be mom and dad when they get out. A failure to adequately support them in taking up this role--a source of support, financial stability, and most importantly love--is a failure on our part to many of the children who have shared in the sentences that our justice system has delivered to their parent. We thank this committee for their work in protecting Nebraska children and Senator Pansing Brooks for her commitment to this important issue. Thank you. [LR198]

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SENATOR EBKE: Thank you and thanks for the information you brought us as well. Senator Pansing Brooks. [LR198]

SENATOR PANSING BROOKS: Thank you, Ms. Tse, for coming. I appreciate it, and for all your work and your...could you quickly summarize this report or do you have anything that you want to highlight for us in this? [LR198]

JULIA TSE: Sure. [LR198]

SENATOR PANSING BROOKS: And also, we heard from people about the varying problems in Nebraska while we saw the three movies that you presented at the Ross this week, which I was grateful that you did. Thank you. We heard about varying policies at the institutions and that there's not communication with parents and they'll drive to Tecumseh and there will be a lockdown and then all of a sudden they're just told, no, they can't see them no matter what. Or we've heard lots of information about...I've had people coming to my office talking about the fact that they would call because they have an ability to call and try to connect with the inmate and they'll just be told, no, you can't talk. And it could be three more weeks before they hear. And they don't know if that person is in trouble, if it's a lockdown, what are the issues. It makes family members more agitated, we heard, and it makes it much more difficult, especially on children who don't...get in their mind they think, oh my gosh, well, this is about the fact that, you know, we don't...I've done something bad or mom or dad doesn't want to talk to me. Of course children internalize and even though they're told something, they don't always believe what they're told. That's a long question, but could you speak to some of the things that are happening in Nebraska that we heard and the best practices. [LR198]

JULIA TSE: Sure. So to start off with your first question about a quick overview of the policy options that we've looked into in other states, simply allowing or creating a more child friendly space where I think it's unreasonable for anyone who has ever met a toddler to expect that a parent can 100 percent of the time ensure that a toddler can sit still, don't touch anything, don't run around, don't yell, don't do this, don't do that. So I think maybe looking at those restrictions and considering easing them for children and bringing in...allowing more toys or a special space for children to be in during visitations are some of the things that other states have looked into.

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We...in terms of some of the barriers to contact, you know, the caregivers that are bringing children to these facilities are already taking on more responsibilities. They're responsible for everything. They probably have a second job. So I think looking at some of those barriers to transportation are really significant and possibly prioritizing proximity to home at D&E in initial placement might be an option. And then your question about sort of communication with families I think is something that we've heard a lot from mothers and from grandparents that are trying to navigate this relationship. They understand the importance of maintaining that contact, but they are so stressed out and beaten down by not having the information that they need. You know, simple English, what can we do and what can we bring, what can we not bring? And I think you're right that people have highlighted that there's sometimes inconsistencies in the policies regarding visitation. So maybe one day you wore these pair of pants to visit but the next day the person that is doing the intake says that's not...that's unacceptable. So a thorough assessment of... [LR198]

SENATOR PANSING BROOKS: We heard about skinny jeans was accepted one day and skinny jeans were not accepted the next day... [LR198]

JULIA TSE: Yes. [LR198]

SENATOR PANSING BROOKS: ...by a person that was coming to visit an inmate. [LR198]

JULIA TSE: Yeah, and certainly that could be a function of what we've heard a lot about in terms of understaffing, that perhaps the intake officer changes from day to day and so their interpretation of what the facility's regulations are may differ a little bit from another officer. So looking to create more consistency in that would be really helpful I think to families, especially because they're not going to take time out of their day to read a 15-page-long administrative regulation the way that maybe a correctional officer is more familiar with. [LR198]

SENATOR PANSING BROOKS: Okay, and can you just summarize what we understand now to be the policy on touching. [LR198]

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JULIA TSE: Touching, so 3 and under children are allowed to remain in the laps of their parents. For those who are 4 and over, you can have a single kiss and a hug at the beginning and the end of the visit to say hello and goodbye. And then after that... [LR198]

SENATOR PANSING BROOKS: So a 4- or 5- or 6-year-old or 10-year-old cannot hug and hold their parents or be held by their parents while they're visiting. [LR198]

JULIA TSE: Yeah. And so... [LR198]

SENATOR PANSING BROOKS: Okay. There is part of the issue right there. [LR198]

JULIA TSE: Right. A 4- or 5-year-old is not going to understand that it's a rule why mom or dad is not touching them. It's they maybe understand it as, well, maybe she likes my younger sibling more and that's why I have to sit over here. I think that's far too low. [LR198]

SENATOR PANSING BROOKS: I think we know that we're talking about love and the withholding of love does not lead to the rehabilitation of criminals. So I don't understand what's happening. It's not best practices. I understand the overcrowding. This is really disturbing to me that this is going on. Thank you. No more questions. [LR198]

SENATOR EBKE: Okay. Thanks. Any other...Senator Baker. [LR198]

SENATOR BAKER: Thank you. I'm going to ask you about the phone calls. I'm reading here we're talking about \$15 for a 15-minute phone call. Are you talking about outgoing calls from the facility to the home? [LR198]

JULIA TSE: Yeah, I believe so. I don't think there's the capability for someone on the outside to make a phone call in. I could be wrong about that. [LR198]

SENATOR BAKER: Okay, so that's what our system is charging, \$1 a minute? [LR198]

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JULIA TSE: Yes, so that's regulated through the Public Service Commission. I think that we might require some more digging into that. And I believe that there will be a testifier following me from the ACLU that has done a more comprehensive comparison of the costs in our state facilities and then in our county facilities. And there's, from what I've heard, there seems to be a wide range of what folks are charged. [LR198]

SENATOR BAKER: Thank you. [LR198]

SENATOR EBKE: Okay. Any other questions? Thank you. [LR198]

JULIA TSE: Thank you. [LR198]

SENATOR EBKE: Next up. [LR198]

AMY MILLER: (Exhibit 4) Good morning, Senators. My name is Amy Miller; it's A-m-y M-i-l-l-e-r. I'm legal director for the ACLU of Nebraska and we appreciate Senator Pansing Brooks allowing us to talk about this issue while we're discussing LR198. But I also want to thank Senator McCollister who introduced LR208 which was specifically about this issue of the cost of phone calls out of our correctional facilities. Now as you've already heard from previous testifiers, the impact on incarceration isn't just on the individual; it's also on the children and the family members who are at home. And success for everybody improves when they have more contact. The national studies show there is less recidivism when someone has maintained familial contact and the kids are more likely to have successful outcomes if they stayed in touch with their parents. The shocking statistic from Voices for Children's work is that one out of ten Nebraska children have a parent who either has been or currently is in a correctional facility, a county, or state facility. So with one out of ten kids affected by these issues, we wanted to specifically look at phone calls because for many parents driving to these far-flung places can be quite difficult. The phone call costs are high and, unfortunately, for a family already living in poverty means that a parent who is behind bars, especially in county jail where they're pretrial, might only have some money on the books they need to decide if I can only make one phone call, do I call my attorney to keep working on my defense so that my trial coming up next week is ready, or do I call home and talk to the kids? For the family members who are at home



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accepting collect call living on the brink of poverty, they have to decide do we keep talking to the family member behind bars or do we put food on the table? We want to make sure this access is fair and, unfortunately, we're in the position that without the help from the federal government we are going to be looking for help from the Nebraska State Legislature. What happens in county jails is each county makes their own contract with a private company to provide a secure phone service. Now these are done not competing for how good the service is but for how much of a commission comes back to the county sheriff. The charges are set by the private company and the county. They vary widely across the state and they're not the actual cost of what it requires to provide the service. Instead, the amount results in a profit that's split in varying percentages between the county and between the private company. Now keep in mind, sometimes it's the person behind bars who's making the call in county facilities that they can call out in some county facilities, but not in state facilities, to answer Senator Baker's question. So sometimes the incarcerated person has a phone card or money on their books and they're making it. But sometimes it's a collect call home and so it's the family on the other end that's bearing the cost, not the person behind bars. Nebraska is not unique in having incredibly high phone call rates. That's why the FCC a couple years ago finally issued new rulings capping how much facilities could charge incarcerated families. And you'll see on the second page there they had proposed a graduated rate depending on the size of the county jail so that smaller facilities could charge a little bit more because they are usually the ones that have more of an economic problem and that larger facilities should be charging a little bit less because theoretically they have more money. But unfortunately after those FCC regulations came down, the for-profit telephone companies sued and won. A D.C. court ruled just earlier this year that because of the Commerce Clause, the FCC can govern what happens across state lines but can't govern what's happening in-state, so that the FCC has no authority over the county jails but does over state or federal prisons that are calling across state lines. That means if there's going to be any reform it's going to have to happen here in Nebraska. And so I wanted to make sure that I gave you both the good news and the bad news. The good news is that our Nebraska State Department of Corrections has been rated number one in the country for best phone rates across the U.S. They charge one cent or slightly less per minute in contrast with many states that are very expensive. So we want to give props to that. That's through an administrative regulation. The bad news is though that our pretrial detainees and our less serious offenders who are at county jails are facing very high rates. We have done a survey of all 68 county jails. I know there's 93 counties but only 68 of them have

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a county jail. And what we discovered is someone who is sitting behind bars in state prison can call home and talk for 15 minutes for about 19 cents to call home. A county jail inmate who calls home for 15 minutes can expect to pay almost \$20. Now you'll see on the third page there there's also additional surcharges and fees. There's a fee if you want to see your bill. There's a fee if you call with a service problem. There's a fee if you are calling from a different company than what they do. And these are all foreign, Kansas-based, Texas-based, Virginia-based corporations. I see I've run out of time so I'm happy to stop. We have an upcoming report and I'm happy to answer any questions you have. [LR198]

SENATOR EBKE: Thank you, Ms. Miller. Any questions? Guess not. You covered it all. Thank you. Can I ask, are there any other people wanting to testify on LR198? Okay, come on up. And we're going to, because we're already running behind and I hate that, we're going to ask you to limit yourself to three minutes. And when we get outside of the invited testimony we're going to move to three minutes. [LR198]

MARGE SCHLITT: (Exhibit 5) Good morning, Senator Ebke and Judiciary Committee. I want to particularly thank Patty Pansing Brooks for this work on this issue which is extremely important to everybody. I'm Marge Schlitt, S-c-h-l-i-t-t. I'm a volunteer with people in prison, have been for nearly 30 years. One of the pieces that occurred to me just recently that might be helpful to this committee that we use in some of our workshops, it's called a Bill of Rights for Children of Incarcerated Parents. It was done by the San Francisco Children of Incarcerated Parents Partnership in 2005. One, I have the right to be kept safe and informed at the time of my parent's arrest. Two, I have the right to be heard when decisions are made about me. Three, I have the right to be considered when decisions are made about my parent. Four, I have the right to be well cared for in my parent's absence. Five, I have the right to speak with, see, and touch my parent. Six, I have the right to support as I struggle with my parent's incarceration. Seven, I have the right not to be judged, blamed, or labeled because of my parent's incarceration. Eight, I have the right to a lifelong relationship with my parent. I would be delighted if the Nebraska Legislature would pass this or some similar Bill of Rights for Children of Incarcerated Parents. This was done in 2005. I realize that everything in Nebraska happens about 15 years later than everywhere else, but it's nearly 15 years since this was passed then, so I ask that maybe you'd be interested in considering this. That's all. [LR198]

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SENATOR EBKE: Okay, thank you. Any questions? Thank you, Marge. Okay, anybody else for LR198? Do you want to close on it? [LR198]

SENATOR PANSING BROOKS: No, I waive closing. [LR198]

SENATOR EBKE: Okay, that closes the hearing on LR198. Senator Hansen and LR221. Cleared them out. [LR198]

SENATOR HANSEN: (Exhibit 1) Well, good morning. Good morning, Chair Ebke and fellow members of the Judiciary Committee. My name is state Senator Matt Hansen, M-a-t-t H-a-n-s-e-n. I represent Legislative District 26 in northeast Lincoln. I'm here today to introduce LR221 which looks to consider possible reforms to our criminal sentencing laws to allow for probation option of deferred judgment probation. This idea was originally brought to me by Joe Nigro, the Public Defender in Lancaster County. After discussions with him and Senator Pansing Brooks, I decided to introduce this interim study to further explore the issue. Essentially the way that deferred judgment probation has been explained to me is that a person would be convicted of a charge and the judge sentences that person to a term of probation. The period of probation could last for a year or two and during this time the offender will be required to create...complete treatment program, drug test, and do other things the court requires. This is all similar to a very traditional probation. However, deferred judgment probation gives the option that after the person has successfully completed the term of probation, he or she can appear before the judge and ask that the case be dismissed in light of their successful completion. For people who have successfully completed deferred judgment probation, it has sometimes been described as a win-win situation. Offenders are held accountable for their crimes; but once they complete the term of deferred judgment probation, the case is dismissed and they will not suffer the collateral consequences of having a criminal record and a criminal conviction. My thought on the option of deferred judgment probation could be available for first-time offenders for lower level crimes. It is not meant to replace our regular probation for more serious offenses or subsequent offenders. I feel this concept of deferred judgment probation is consistent with other components of our justice system we've considered as a committee. For example, we already have the option for offenders to ask to set aside or expunge records. This committee advanced two bills earlier this year to expand and clarify that process. It is also consistent with our recent efforts to encourage

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problem-solving courts like drug courts, veterans' courts, and mental health courts which have shown success here in Nebraska. I know we'll have testifiers behind me who will explain in further detail how they envision deferred judgment probation would work in Nebraska and what legislation would be required to authorize and enact it. I will note I have also visited with our Lancaster County Attorney Joe Kelly about this interim study. He shared his thoughts with me on the subject and other related programs and I encouraged them to come here and testify today. Stemming in part from that conversation, which was a very good and productive conversation, I'd like to just kind of consider the committee and testifiers to use this opportunity to discuss more on any alternative to incarceration whether or not that fits into kind of the traditional framework of a deferred judgment probation. With that, I will close and look forward to testimony. [LR221]

SENATOR EBKE: Any questions? Senator Krist. [LR221]

SENATOR KRIST: Do we have a model of another state that employs this kind of deferred action? [LR221]

SENATOR HANSEN: Yes, there are multiple states that do some form of it. And I believe a testifier behind me might cover that better. [LR221]

SENATOR KRIST: Okay. Thank you, sir. [LR221]

SENATOR HANSEN: Thank you. [LR221]

SENATOR EBKE: Anything else? Okay, thanks. How many people do we have testifying on LR221? Okay, let's...come on up, somebody. No rush, or do. [LR221]

JOE NIGRO: Good morning. Senator Ebke, members of the committee, I'm Joe Nigro, the Lancaster County Public Defender, and I appear on behalf of my office and on behalf of the Nebraska Criminal Defense Attorneys Association. I'm pleased that you're doing an interim study on deferred judgment probation. I became interested in this concept about five years ago when I saw people who did not qualify for our drug court because their drug problem wasn't severe enough left with the option of hoping a judge would place them on probation and

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knowing that even if they completed probation they would wear the scarlet letter of a felony conviction. Thirty-seven states offer deferred judgment probation as an option for at least some offenses. And under Nebraska law, the court makes a finding of guilt after accepting a plea or a verdict, a presentence investigation is conducted, and then sentence is pronounced. The case is then final. Someone who completes probation has a felony on their record carrying not only the disabilities of a felony conviction but especially...especially including the difficulties in obtaining employment, but also making them ineligible for benefits such as housing, federal student loans. All of these impairments can make it difficult to fully return to society and these difficulties increase the risk that someone will reoffend. A defendant can ask years later to vacate and set aside a conviction, but it isn't easily granted. And I'm not even sure how it impacts some of these other disabilities. In states with deferred judgment probation, if the court places someone on deferred judgment probation, the case is essentially put on hold instead of becoming final, similar to a problem-solving court. When somebody enters our drug court, they enter a plea but their sentencing is delayed. And in deferred judgment probation, the case isn't final. The person is going to come back before the court, or the matter is at least going to come back before the court. And if the defendant completes probation successfully, the court dismisses the case. This helps to restore people more completely to society. It isn't a gift. You must complete probation successfully. If you run a record check on one of those people, it will show that the case was dismissed. Someone who's completed deferred judgment probation can answer no when asked if they've been convicted of a felony when applying for a job. This philosophy is consistent with banning the box. It will create incentives for people to seek probation instead of just doing the time. This should help...there are sometimes people who think probation is much harder than incarceration and they may not have much incentive for probation. And obviously the sentence is up to the court, but I can tell you there are circumstances that happen where people decline it and wind up doing incarceration instead and...or it may come across in their attitude in the presentence investigation. I think that this would cause more people to want probation because of that possibility of getting the case dismissed and hopefully might reduce the prison and jail population. I believe it will reduce recidivism because, again, people supervised on probation I think are less likely reoffend than people who have simply been incarcerated. And taking away that disability of a felony conviction will I think make people able to be more successful after they complete their obligations under probation. I do not believe it will hurt any pretrial diversion programs. Pretrial diversion programs are run by county attorneys; and this is

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something where at the beginning stages, if you're eligible, you can enter the program. Some county attorneys dismiss right up front because of some changes on access to records. Some of the county attorneys have now kept the case open until a person completes diversion. I don't believe this is going to deter people from entering diversion. I think people will still opt for these opportunities because they'll have the chance to get their case dismissed without ever entering a plea. However, prosecutors get to decide who qualifies for pretrial diversion and some counties do not have diversion programs. So deferred judgment will help people who can't get into a diversion program. And so I think for those reasons, I don't think it's going to hurt diversion; it will just complement, supplement it. I had a law clerk look at what some other states are doing two to three years ago and it was a starting point for looking at what others are doing, which offenses are eligible, the timing of hearings, etcetera. And I left those spreadsheets for you in my copier; and so when somebody arrives here, I'll be happy to provide them to you. But again, I believe deferred judgment probation would offer people an opportunity to be more fully restored to society after they have successfully completed probation, and I urge you to introduce legislation to accomplish this. And the only other thing I would add, I mean if you look through what these other states allow, they're all over the place in terms of which offenses are eligible, when there are hearings, if it's...some courts have hearings obviously at the time of sentencing, some bring people back at the end, some just do it automatically sort of administratively if somebody has completed it. And it's a variety of states--a lot of southern states, Iowa. So the 37 out of 50, I mean obviously it's happening lots of places; and I urge you to look at it at least for some offenses. Any questions? [LR221]

SENATOR EBKE: Thank you, Mr. Nigro. Questions? I have one question. So we currently have sort of a presumption of probation for Class IVs currently. [LR221]

JOE NIGRO: Yes. [LR221]

SENATOR EBKE: Okay. So these could certainly fall within that, right? [LR221]

JOE NIGRO: Yes. [LR221]

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SENATOR EBKE: But you wouldn't have the felony conviction, is that what you're suggesting?  
[LR221]

JOE NIGRO: (Exhibit 2) Well, yes. If somebody is able to complete probation, they would be able to get the case dismissed. Now, if you run an NCIC check on somebody who's been on deferred judgment probation, it will show that they had this case, they received probation, but it was dismissed. And I think...and that's somebody from my staff, so I'll have those copies for you. But it says it's dismissed and so it can't be used as a prior conviction. You know, the people in law enforcement are going to know this person had that. But I think where it really would help is somebody can answer...somebody could go to apply for a job and say, no, that they haven't been convicted of a felony. And currently under Nebraska law...and the thing is you could craft this in a variety of ways. It wouldn't have to be mandatory that somebody receives presumptive probation. It could be that the court has the option of traditional probation or presumptive or deferred judgment probation. It could work in a variety of ways. And obviously if it's not mandatory, I mean that's something where county attorneys could be heard at the time of sentencing. And people will have to earn this by completing probation successfully. So, what they've passed out is a spreadsheet and it shows the information that we were able to gather. Now there may have been some changes in the last couple of years, but I think it's a good starting point to look at what other states are doing and, again, some of the differences. I'm not proposing that this is there for everyone. I understand that some of the issues that may come up with particular types of offenses. But I think that this would be very consistent with some of the things you've done in the last few years like banning the box and some of the other things with sealing records to help people move forward once they've paid their debt to society by completing probation. And again, I think it will encourage more people to seek probation and to try and be successful on probation. [LR221]

SENATOR EBKE: Okay. Any other questions? Thanks for being here today. [LR221]

JOE NIGRO: You're welcome. Thank you. [LR221]

SENATOR EBKE: Next up. [LR221]

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PATRICK CONDON: Chairman Ebke, members of the panel, my name is Patrick Condon, P-a-t-r-i-c-k C-o-n-d-o-n. I am the chief deputy Lancaster County Attorney and I'm also on the Nebraska County Attorneys Association's executive board. I had a chance to speak with Senator Hansen along with Joe Kelly, our county attorney, in regards to this bill. And I think what's important and what I'm here to do is basically let you senators know where we are at least here in Lancaster County. We do have, as Mr. Nigro has already testified to, we do have a pretrial diversion program here in Lancaster County. And in the pretrial diversion program, that is basically a program where depending on the type of charge, either a felony charge or a misdemeanor, I think there's approximately 13-15 felony charges that are covered by our pretrial diversion program, there's over 30 misdemeanor charges that are covered in our pretrial diversion program. But if you are charged with a crime and you go through pretrial diversion, that case remains open for anywhere from about 12 to 24 months depending on the nature of the charge. You go through classes, you go through counseling if need be, and if you're successful with that program your case is dismissed. Under the new law that was passed, any cases dismissed after January 1 of this year are as if they never occurred. So there is the pretrial diversion program. We have drug court. Drug court is another program where, again, if the...depending on the nature of...generally a felony charge, it is a felony charge, they're in...they have entered a plea. They go through...and that can be up to three years, three, four years. I mean that can be a lengthy program. Once they complete that program, that charge is dismissed. Again, as of the new law, it is as if that case never occurred. We now have a new program called intensive supervision diversion. Again, same type of a deal--they go through a number of programs and throughout a number of years in the program and if they're successful with it the case gets dismissed. We have a vet court. We have or we are in the beginning of the implementation of a 24/7 program here in Lancaster County. Also, then you get in when you start looking at what's in the court. You have the pleas that we enter into, plea negotiations with offenders, probation, and then prison. You know, we hear a lot about the low-level drug offenders. In Lancaster County an individual with a small amount of cocaine or methamphetamine, say, under a gram, for the first time they get caught they can look at pretrial diversion. If they successfully complete it, that case goes away. If they get caught a second time, generally it's going to get reduced to a misdemeanor. They're going to get a fine. They're going to go out the door. A third time, very possible it gets reduced to a misdemeanor again. In county court, they get a fine, maybe a jail sentence. They're done. A fourth time, maybe then it gets bound over to district court, but generally they're going to get a



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misdemeanor. It's going to be reduced. They're going to get a fine, perhaps probation, and at the end of probation they can seek to have...or at the end of a fine they can seek to have those convictions set aside. Probably not until about the fifth or sixth time you're going to get a felony conviction on a small residue or a small amount of controlled substance. And even with that, you're probably looking at probation or a fine or a small amount of jail time. And it's not until that maybe sixth or so conviction that you're going to be looking at a felony. Now people think that prosecutors are here to put people in prison. We're not. We're here to do justice and that's what we want to do. I know the majority of the people that I prosecute are not going to see the inside of a prison cell. They're going to get a fine, they're going to get probation, maybe they get jail, but they're not going to get prison. I don't like sending people to prison. I don't think there's a prosecutor in the state of Nebraska that likes to put people in prison. It's not something that we like to do. But I do think it's important to maintain public safety. I do think it's important to not diminish the seriousness of the crimes. I do think it's important to not promote disrespect for the law. And at times, it is necessary to put people in prison. It is also necessary that people have...they did something wrong. There should be circumstances and consequences that follow that. They can get pardons. That takes away basically the conviction the same way as the dismissal would do. In Lancaster County, again, I'm speaking Lancaster County, after about three to five years on a felony conviction you can generally get a motion to set aside your conviction. And that conviction is set aside, civil rights are restored and then you could look to perhaps go on and get a pardon from the Board of Pardons. With that, I have nothing further and I would entertain any questions. [LR221]

SENATOR EBKE: Any questions? Senator Pansing Brooks. [LR221]

SENATOR PANSING BROOKS: Thank you for coming, Chief Condon. I was wondering what percent of the cases get pretrial diversion in Lancaster County. [LR221]

PATRICK CONDON: Senator, I...and again, I'm not...are we talking misdemeanor, felonies, all cases? I mean I would have to go back and look. I mean we have a large...our community corrections I know can give those numbers to me immediately. I'll be happy to get those for you and get you the number of those. I know we filed about 2,000. Generally...and what I'll say here is generally you cannot go to pretrial diversion once you've been bound over to district court. For

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felonies, we filed about 2,000 felony cases last year. But there are a large number of cases that are diverted out through the pretrial diversion program. And I'll get those numbers for you, Senator. [LR221]

SENATOR PANSING BROOKS: I'd appreciate it. Thank you. Do you have a feel then what percent of the cases that...how many of the cases are dismissed that go to pretrial diversion because you're saying we have pretrial diversion. That's not what this issue is necessarily addressing. It's talking about dismissal after successful completion of probation is what I understand. [LR221]

PATRICK CONDON: Right. If they successfully complete pretrial diversion, it's dismissed. [LR221]

SENATOR PANSING BROOKS: Okay, but we don't know how many are doing pretrial diversion. That's what you're going to try to find for me. [LR221]

PATRICK CONDON: Yeah. I mean it's...yeah, I'll...I mean I'm sure it's hundreds if not thousands. [LR221]

SENATOR PANSING BROOKS: Okay. You know, clearly the goal is to, number one, help the overcrowding crisis and I understand that most county attorneys do not want to just send people to prison for the sake of sending them to prison. But it is an issue that as we continue to study all this, there is responsibility on the part of the Legislature, on the part of executive branch, on the part of the courts. And all of us bear some responsibility at how hard we are charging and placing people in prison so that...we are all contributing to that overcrowding crisis. [LR221]

PATRICK CONDON: But I would say we are not...the prosecutor is not placing people in prison. The courts are doing that. [LR221]

SENATOR PANSING BROOKS: You would say you aren't...you don't have any responsibility for sending people to prison? [LR221]

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PATRICK CONDON: I'm not saying we don't have any responsibility. I say we do the charging and the courts look at the criminal history background of these individuals and decide whether or not it's probation, it's a fine, it's jail, or prison. [LR221]

SENATOR PANSING BROOKS: But county attorneys can decide whether they're going to accept diversion or any kind of community correctional... [LR221]

PATRICK CONDON: We have a seven-page outline I'm glad to share with anyone of our...they're on-line, our pretrial diversion guidelines, who's eligible for pretrial diversion in Lancaster County. [LR221]

SENATOR PANSING BROOKS: Okay, well, that really worries me about the overcrowding crisis if county attorneys do not believe they have anything to do with the fact that our prisons are overcrowded. [LR221]

PATRICK CONDON: Senator, you're the ones that send us the laws. We enforce the laws that you give us. [LR221]

SENATOR PANSING BROOKS: Yes, but you have quite a bit of discretion in how you will charge, whether you're going to send somebody to probation, whether you're going to send somebody to community corrections, whether you're going to send somebody to Tecumseh. You have a lot of discretion on how county attorneys are going to take the charge and what you're going to bring forward to present to the judge. So I don't think that the county attorneys can wipe their hands and say we're done with this. Here's the law. We're going to charge as hard as we can on this. And if the judges choose to send them to prison, it's the judge's fault. We don't have any responsibility. [LR221]

PATRICK CONDON: So I guess...I'm just not sure, if I have somebody that steals \$10,000 worth of stuff, you're asking me, why don't you just charge \$1,500 worth of stuff even though you... [LR221]

SENATOR PANSING BROOKS: That's not what I'm asking at all. [LR221]

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PATRICK CONDON: Well, that's what I'm asking you, Senator. [LR221]

SENATOR PANSING BROOKS: It's unreasonable for you to even suggest that. [LR221]

PATRICK CONDON: Well, but... [LR221]

SENATOR PANSING BROOKS: Of course not. [LR221]

PATRICK CONDON: But we have an ethical duty to charge cases that we feel that we can prove. [LR221]

SENATOR PANSING BROOKS: And you only have one thing that you can do if you have a \$10,000 theft? There's nothing else you can do but charge them for \$10,000? You cannot suggest probation? You can... [LR221]

PATRICK CONDON: And they can go to pretrial division. [LR221]

SENATOR PANSING BROOKS: Oh, okay. So then (inaudible). [LR221]

PATRICK CONDON: I cannot give them probation, Senator. I cannot give them probation. [LR221]

SENATOR PANSING BROOKS: You can suggest things. You can suggest pretrial. So anyway, I don't want to sit here and argue. I appreciate the work of the county attorneys. I don't appreciate the feeling that the county attorneys have no responsibility in how things are charged, whether or not children get counsel. So I don't want to argue this with you right now. I'll be happy to talk with you after. [LR221]

PATRICK CONDON: Well, Senator, I've sent you e-mails and asked you to call me if you had questions. I've not had anything yet. And that offer is still out there for you. My point is I can't give somebody probation. I cannot give somebody probation. That's the court's job. [LR221]

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SENATOR PANSING BROOKS: Could you suggest it? [LR221]

PATRICK CONDON: I can suggest it. [LR221]

SENATOR PANSING BROOKS: That's what I'm asking. Thank you very much. [LR221]

SENATOR EBKE: Senator Krist. [LR221]

SENATOR KRIST: Mr. Condon, my question is clearly by your testimony you don't think we need this extra tool in your toolbox. [LR221]

PATRICK CONDON: No, I just wanted to say...I'm just saying...what I'm saying to you, Senator, is I want to make sure everybody knows where we are, what tools are in the toolbox... [LR221]

SENATOR KRIST: Sure. [LR221]

PATRICK CONDON: ...because I think some people are not sure or are not aware of what tools are in the toolbox. And then I'm concerned about some of the language--a first-time offender. A first-time offender, does that mean a first-time offender that's been through pretrial diversion, that's been through other things, or does that mean a first-time offender that's a first-time offender? [LR221]

SENATOR KRIST: So, and I appreciate you reviewing with us once again what Lancaster does and I'm aware of what Douglas County does. And there are many options available to you and I think this committee and the Legislature have been pretty active in trying to...with drug courts, with vet courts, with other things along the judiciary. [LR221]

PATRICK CONDON: And I think the county attorneys' office have always been... [LR221]

SENATOR KRIST: Very supportive of all of that. [LR221]

PATRICK CONDON: ...very supportive of that. [LR221]

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SENATOR KRIST: And I guess in the spirit of an interim study, if you're concerned with the language then that's something Senator Hansen needs to take away from this. But more importantly I guess my point is that every one of these states...I'm pretty familiar with some of the stuff that's been going on in California lately after the overcrowding, after DOJ went in and took control of the system. So I've done some studying here. And I think there are as many programs available, at least in Los Angeles, as what you've just given us. And what I'd like to put on the record is that putting one more crescent wrench in that toolbox for whatever reason, if it's done properly, I think it's something that we should look at. But I do appreciate, again, the review of what you are already doing. And I think for the most part, both Lancaster, Douglas, and other counties out there are doing a fantastic job of trying to offer some kind of diversion. I'll use some language that we use in the juvenile justice system all the time as a concern, I'm concerned about justice by geography. And sometimes I don't think some of the smaller counties have either the funds or the capability or the programs that are out there. And I think that may fit closer for them. This program may fit closer for them because they don't have a lot of other things to fall back on so. That would be my comment for going forward and put it on the record. Thank you. [LR221]

PATRICK CONDON: And I will tell you, I didn't mark the sheet as somebody proponent or opponent to this because I want to hear what Senator Hansen has to say and see what he has and what he's suggesting and work with him on. [LR221]

SENATOR KRIST: Well, thank you for coming and thank Mr. Kelly for participating in the interim study. [LR221]

SENATOR EBKE: Absolutely. Any other questions? Senator Hansen. [LR221]

SENATOR HANSEN: Thank you, Chair Ebke, and thanks again for coming in. To continue the toolbox metaphor, and this hopefully isn't a surprise because I asked you something similar in the office when we met last week, are there any tools that we could give the county attorneys that you feel would be helpful, kind of just open floor? [LR221]

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PATRICK CONDON: I guess my question would be...well, I'm sure there are, Senator. If I could think about that I could get back to you. But you know, as I sit here today, again, I'm sitting here looking at your resolution. I think there's some...listening to Mr. Nigro in his comments that he made, is there something that's out there? Perhaps. I'm not closing the door to that. And I would like to see what the proposal would be and, again, would be more than happy to talk with you and work with you with that. [LR221]

SENATOR HANSEN: Thank you. [LR221]

SENATOR EBKE: I suppose the tools that we give them depend in some part on what we want them to build, is that reasonable to say? Thank you for coming today. [LR221]

PATRICK CONDON: Thank you. [LR221]

SENATOR EBKE: Any other questions? Okay, thanks. Next. [LR221]

SENATOR KRIST: Sorry I started that metaphor. (Laughter) [LR221]

JENNIFER GAUGHAN: Good morning. My name is Jennifer Gaughan. My name is spelled J-e-n-n-i-f-e-r G-a-u-g-h-a-n, and I am the director of the legal program at Legal Aid of Nebraska. And I'd like to thank Senator Hansen for inviting Legal Aid to testify this morning. Legal Aid is the largest statewide nonprofit law firm providing free civil legal services to low-income Nebraskans. Approximately 300,000 Nebraskans financially qualify for Legal Aid. And to give you an example of the volume of work we do, in 2016 we closed over 10,000 cases providing some form of legal assistance from advice to representation. We have about 40 litigation attorneys. Legal Aid does not typically handle criminal matters; but we do see every day the collateral consequences faced by those having a criminal record, including cases where there are no criminal convictions. We work on clean slate issues to help those with criminal records overcome barriers caused by having a record. There's a large number of individuals with criminal records. As I'm sure you're well aware, as many as one in three Americans have a criminal record. Between 25-40 percent of American adults have been arrested by age 23. Racial and ethnic minorities are disproportionately impacted with 49 percent of African-American men and

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44 percent of Hispanic men being arrested by the age of 23. Criminal records are incredibly accessible, especially since on-line court databases such as JUSTICE are available to the public. The impact...having a criminal record or criminal case has extremely negative consequences. The impact immediately reduces opportunities which can last for as long as the record remains publicly available and, in some cases, that's for somebody's entire life. It impacts employment as many employers conduct background screening. It affects the ability to obtain a professional license. It affects the ability to obtain public and private housing as many landlords do background screening, to obtain public benefits. It impacts credit as criminal cases show up on people's credit reports. It impacts educational opportunities and it certainly impacts the stability of families. A criminal record serves as both a direct cause and consequence of poverty. And even though an individual's criminal case is dismissed without conviction or they complete their sentence, the record continues to impede their ability to successfully move on with their lives and for their families, community, and their local economy. As part of clean slate work, Legal Aid helps individuals set aside criminal convictions. And just to speak about set asides, they're only available in very limited circumstances. You have to be sentenced to probation or a fine, successfully completed both, and then it's within the discretion of the court of whether or not they're going to set aside the conviction. And that whole record still remains available to the public. We help people seal adult criminal records and we help seal juvenile adjudications. And we can provide help with pardons and expungements from the central registry. We help people understand and enforce their rights when facing collateral consequences of having a criminal conviction. We advocate for clients with employment, school, and housing issues as a result of their record. We have a juvenile Reentry Project in Lancaster County and through that project we help youth up to age 24 address collateral consequences of the juvenile adjudication or an adult criminal conviction. And Legal Aid is one of five sites in the country to be chosen to host a fellow with the National Juvenile Defenders Center. And we just received a grant from the Office of Juvenile Justice and Delinquency Prevention which is part of the Department of Justice to continue to do that juvenile reentry work in Lancaster County and expand it to...across the state. I do think that one of the things to consider, and this was...there was testimony about this is that other states have deferred judgment probation. And if those records indicate a nonconviction or are sealed from the public and an individual from one of those states competes with a Nebraska resident with a similar record but that resulted in a conviction or the record is publicly available, that that puts the Nebraskan at a disadvantage for employment, housing, and other opportunities.



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So deferred judgment probation provides an alternative to a criminal conviction for certain individuals. And I think it's a step to recognize and address the ongoing and significant impact a criminal record or a conviction not only has on an individual but on their family, their local communities, and the economy. So, that's it. I don't know if there's any questions. Thank you. [LR221]

SENATOR EBKE: Okay. Thanks. Thank you. Any questions? Okay. [LR221]

JENNIFER GAUGHAN: Thank you. [LR221]

SENATOR EBKE: Thank you for being here today. [LR191]

JENNIFER GAUGHAN: Sure. [LR221]

SENATOR EBKE: Anybody else testifying on LR221? Okay. Do you want to close? He'll waive closing. Okay, we're going to move to LR191. And in the interest of time I'm going to stay here, introduce it, and then I think we have two or three, is that right, people that are invited, who have been invited to testify. And then if there are others who want to testify, we'll hear that as well. (Exhibit 1) So LR191, I introduce to highlight the issue of possible reform of our laws related to mandatory minimum sentencing. Over the last few years, this committee has heard a number of bills that have proffered reform to our mandatory minimum laws in one form or another. One recent proposal was brought forth by Senator Schumacher with his proposition of LB53. Under his plan, Nebraska law would provide for a three-judge panel option to aid in sentencing any time a defendant is facing a mandatory minimum sentence. Another proposal came from Senator Chambers in the form of LB447 last year. LB447 remains pending on Select File and would remove mandatory minimum sentencing provisions for Class IC and ID felony drug offenses. The bill was advanced from General File after considerable floor debate and even received national attention from Newt Gingrich and others who made the case that mandatory minimum sentences are not a sensible fiscally conservative approach to criminal justice. One of the most concerning problems with mandatory minimum sentencing laws is that they limit judicial discretion for judges familiar with a case to determine the most appropriate sentence based on the individual circumstances of the criminal and the crime. Under these laws, a sentencing judge

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has no discretion to go below the mandatory minimum sentence available for the crime even when it is clear that the mandatory sentence will not further the interests of justice or the taxpayer. It's my firm belief that for our justice system to work for all Nebraskans we must trust our judges to impose the appropriate sentence and not arbitrarily impose mandatory sentences as a legislative body. It's also important to note that Nebraska is not the only state to look at reforming mandatory minimum sentencing laws. In fact, many states have made some recent reforms, particularly with respect to sentencing related to drug crimes. In my opinion, the present version of Senator Chambers' LB447 is a reasonable first step in addressing this subject. The changes made in LB447 would only apply to drug offenses. Furthermore, even if we adjust or remove the mandatory minimum sentence requirement for these types of crimes, judges would still maintain significant discretion to impose longer sentences for those criminals whose crimes justify more lengthy terms of incarceration. In other words, a judge can give more time to criminals who deserve it. To make meaningful improvement to our justice system, we have to think creatively when it comes to considering reforms. We have been working for years now to find ways to continue to be better in this area. Our work with the Council of State Governments was recently completed and during their final report to the Justice Reinvestment Initiative Implementation Committee, CSG told Governor Ricketts, Speaker Scheer, Chief Justice Heavican, and the rest of the group that Nebraska must be willing to engage in continued dialogue and analysis about how our state statutes impact the criminal justice system and serve the state. Continuing our conversation about adjusting our mandatory minimum sentencing laws through LR191 provides us just one opportunity for stakeholders throughout our criminal justice system to weigh in on these types of meaningful changes. So with that, I will allow those who have something to say about this to come forward. And if there are any questions, we can address those later. And again, if you're planning on testifying if you can kind of move to the front so we can expedite that would be wonderful. [LR191]

SPIKE EICKHOLT: (Exhibit 2) Good morning, Madam Chair, members of the committee. Spike Eickholt, S-p-i-k-e E-i-c-k-h-o-l-t, appearing on behalf of the ACLU of Nebraska testifying on LR191. And we want to thank Senator Ebke for introducing that. I have...being distributed is a written copy of my testimony and I've had a number of attachments that I also may reference here as I talk. But I'm just going to summarize that in the interest of time. As Senator Ebke indicated, this committee has heard a number of different bills and a number of different ideas in

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looking at mandatory minimum reform. LB447, Senator Chambers' bill, is on Select File. It does only apply to mandatory minimum sentences with respect to drug crimes. It does not apply to gun crimes. It does not apply to sexual assault of a child or any of the horror stories that you've heard from the opposition with respect to mandatory minimums. It applies to Class IC and ID drug crimes. In my opinion...and I think that's a...as Senator Ebke indicated, I think that's a reasonable compromise. But I don't know if that's going to be something to convince the opposition to it. I think when many people think about mandatory minimums they think these are the most serious crimes and these are deserving of mandatory minimum crime. But I would submit that that really is an arbitrary selection of crimes. In other words, there are some pretty serious crimes that are not subject to mandatory minimum--robbery, forcible sexual assault, manslaughter, burglary. Breaking into someone's home with the intent to commit a felony is not punishable with a mandatory minimum. As a matter of fact, if doesn't have any minimum sentence. That does not mean that people who break into people's homes get a fine and it does not mean they get placed on probation. They go to prison because the judge that hears that case and decides that person's fate exercises his or her discretion and imposes a sentence. If a person has ten grams of methamphetamine or cocaine and the jury or someone is convinced that was possessing with intent to distribute or give to somebody else or to sell somebody else, that is a mandatory minimum 3 to 50 years. Even if that person is a first-time offender, that judge cannot put the person on probation. If the person is sentenced to prison, and they will be, then they have to do at least three actual years in prison. They will not get paroled during that three years. They will not be considered for parole because they cannot be. In some of the materials that I distributed, I had the last numbers from the Crime Commission with respect to new admissions to the Department of Corrections. And it does indicate that there are a significant number of people who were convicted of IC and ID felonies who were admitted to prison in 2017. Now, that's not all drug offenses because they don't separate those, but certainly some of those must be drug offenses. As Senator Ebke indicated, we're not trying to suggest that mentoring and reform is going to necessarily solve the prison overcrowding problem. But this is a component of a solution of looking at our criminal system and trying to fix it and trying to come up with different creative solutions to avoid unnecessary and lengthy incarceration. When Pat Condon testified earlier today on a different LR, he spoke in terms of the...what the prosecutors have and he spoke in first person. And I would submit that mandatory minimums are popular with prosecutors because it gives them significant leverage. It is the time and it is the opportunity

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where the prosecutors can determine what the sentence is because a judge has no option other than what the mandatory minimum requires. It doesn't matter if I as a defense attorney beg, plead, and ask for probation. If the judge simply wants to put that person on probation, it happens automatically--the mandatory minimum sentence applies. All the prosecutor has to do is just refuse to budge from that charge and that's all. It gives them significant leverage in negotiation. In Lancaster County at least, a mandatory minimum charge is ineligible for drug court. You can't apply. You can't be considered. Many times you'll be sitting in jail because everyone knows at the time they set your bond you're not going to...if you get found guilty you're not going to be on probation so you might as well start doing your time now. So you'll sit in Lancaster County jail for months before you're eventually found guilty of something. When Mr. Condon spoke earlier, the position that he has simply, well, the Legislature makes the laws; we simply apply them. But that's different when you talk about mandatory minimums. Then they say, well, don't change these laws. We need these to stay the same. I'd ask the committee to keep that point in mind. Again, one other suggestion I'd say is that a number of other states have and in the handout I gave you was a summary from Families Against Mandatory Minimums which is a right wing, sort of right on crime type organization that summarize recent changes that other states have done. They are primarily changes to other states' drug laws. But what other states have done that we've not really proposed in this state is to have a safety valve option where at the time of sentencing, even if a person is found guilty of the mandatory minimum the judge still has the option of somehow escaping from that mandatory minimum and can impose a regular probation type sentence. And maybe a scheme like that would be a different way of looking at this issue. [LR191]

SENATOR EBKE: Thank you. Senator Krist. [LR191]

SENATOR KRIST: In going back to when I first arrived here, one of the most disheartening things that I heard is just what you put in context most people don't understand. A judge really, once a prosecutor has entered that kind of charge, mandatory minimum, not even the judge can change that charge unless the prosecutor backs off. And I think that's important for us to understand in this process. And I think the discussion as we go forward, Senator Ebke, has to be to emphasize that we are limiting judicial discretion in probably the most abhorrent way because that's the judge's...the judge is there to make sure that all conditions are looked at and that justice

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is served. And if that infringes upon his judicial discretion and independence, then we've hurt the system I think, regardless of any of the other sundry things that we could throw into this (inaudible). So if you'd like to speak to that, go ahead. [LR191]

SPIKE EICKHOLT: I would think you're absolutely right. We ought to trust our judges to do sort of the right thing. And I think we've got to be realistic. I practice. And many of the judges, if not most if not almost all of the judges I appear in front of are former prosecutors. I mean those are the people who decide the fate of the people who are before them, not people like me, right? I mean they're our judges and we ought to trust them to do the right thing. [LR191]

SENATOR EBKE: Any other questions? Thanks for being here today. Does anybody else want to testify on LR191? [LR191]

SCOTT GRAY: Good morning. My name is Captain Scott Gray, S-c-o-t-t G-r-a-y. I'm the Captain of Northeast Precinct, Omaha Police Department. I'm here on behalf of Chief Todd Schmaderer and the Omaha Police Department to express support for continued use of mandatory minimum sentencing. We certainly trust judges to make decisions that are fair and just to all citizens. I don't want to minimize their important role in the criminal justice system. However, mandatory minimum sentencing remains an important part of our multifaceted violent crime reduction strategy. The Omaha Police Department works closely with community partners in the areas of violent crime prevention, intervention, prisoner reentry, and support services. Enforcement of laws remains to be one of our primary duties and mandatory minimum sentencing aids us by creating a deterrent effect. Violent crime offenders often represent a very small segment of any community. Deterring these individuals with firm, known punishments is likely to save citizens from injury or death, prevent further psychological damage to a community. Many criminals are well versed in the laws of our state. They understand that some crimes will result in a minimum sentence of imprisonment. That knowledge deters some from acting. To aid in the prevention of crimes, particularly gun crimes and violent assaults, we therefore declare our support for the continued use of mandatory minimum sentencing statutes. Thank you for your time and consideration, and I welcome any questions you have. [LR191]

SENATOR EBKE: Thank you for being here today, Captain. Senator Krist. [LR191]

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SENATOR KRIST: So the discussion that we just had, Captain, in terms of the prosecutor having the ultimate choice of whether or not there would be a (inaudible) mandatory minimum, does that bother you in terms of...I mean I think Mr. Eickholt referred to it as potentially a scheme where we can look at a different option there where the prosecutor absolutely said this is going to be a minimum. The judge then could change that in terms of what the penalty would be. And I give you that question as an open-ended question because you probably have one of the most challenging precincts in the Omaha area. You're dealing with gangs. You're dealing with drugs. You're dealing with things in more focus than probably any place else in the state and I get it. But at the same time I take that kid from Burke instead of North who has just fallen down his first time and he's going to have a mandatory minimum and that's the judicial discretion that I'm referring to. So please speak to that in terms of...and again, this is not a hearing. This is not... [LR191]

SCOTT GRAY: Sure. [LR191]

SENATOR KRIST: This is a discussion about how we go forward in the interim study and I think it's worth hearing your input on the issue. [LR191]

SCOTT GRAY: Well, I think our comments and our support for the mandatory minimum sentencing is more focused on violent crime instances. And oftentimes from my experience, that involves people who have multiple prior offenses or they have an underlying conviction such as in the case of a prohibited person in possession of a firearm. [LR191]

SENATOR KRIST: Sure. [LR191]

SCOTT GRAY: It's something that we deal with quite often. And those are the more likely scenarios where we feel that these have value in deterring individuals from committing further violent acts or possessing a gun when they know that they should not. It's more of those type situations that we're interested in preventing. [LR191]

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SENATOR KRIST: Okay. So it's not that you're trying to say that the current system is the only system that could work. You're saying that in some cases mandatory minimums are very effective to getting people off the street in public safety. [LR191]

SCOTT GRAY: Correct. [LR191]

SENATOR KRIST: Okay. Thank you very much thank you. Thank you for sharing with us. [LR191]

SENATOR EBKE: Any other questions? Thanks for being here, Captain. [LR191]

SCOTT GRAY: Thank you. [LR191]

COREY O'BRIEN: Good morning, Madam Chair, members of Judiciary Committee. My name is Corey O'Brien. That's C-o-r-e-y O'B-r-i-e-n, and I am the criminal bureau chief for the Nebraska Attorney General's Office. I appear here today on behalf of the Nebraska Attorney General's Office and General Peterson to give a glimpse into our continued objection to any modification of the mandatory minimum sentencing scheme. Our primary objection to any modification in that...in the current mandatory minimums is that it really does, in our opinion, compromise public safety and has the potential to promote disrespect for our laws. To illustrate my belief and my office's belief in this regard, I took the liberty of looking at all the offenders currently in our Nebraska penitentiary system that are currently doing mandatory minimum sentences. I want to give the members of this committee an idea of what these offenders look like because there is a lot of misconceptions or misinterpretations as to who these offenders are. As of Monday, there were 5,295 individuals in our prison system. There were 712 that were doing time for a Class IC or ID felony. That represents 13.44 percent of the total population. Having gone through all the records and files of these 712 individuals, I can tell the members of this committee that these are the people that the public demands to be in prison for a substantial period of time. It includes people like Nikko Jenkins, Roy Ellis, and Armon Dixon. So who are these 712 individuals? And I'm going to tell you that there's actually more mandatory minimum time when you consider that there's 182 offenders in doing habitual criminal time; there's another 106 people that are doing first-degree sexual assault prison time for mandatory minimums. And

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so the total of those offenders doing mandatory minimum time is 1,015. That's still 19 percent of the entire population. And again, as I've gone through these records, I can tell you that those are precisely the people that need to be doing substantial prison time. So who are they? Nine hundred seventy-seven of them are men, thirty-eight are women. At least 84.2 percent of them have previously been convicted of a felony. Over 69 percent of them served a previous term of incarceration in the Nebraska Department of Corrections. This number is absolutely stunning and is something I throw to this committee as hopefully a way to figure a way out of this. And I empathize with the officers from Omaha police because they have to deal with this on a day in, day out basis. Four hundred and forty-three are previously convicted felons that possessed a firearm at the time of the commission of their offense. That's 43.6 percent possessed a firearm-- they either used it or possessed it--illegally at the time of their arrest. Felony possession of a firearm has become the most common crime for which people are incarcerated in our state: 99 of these individuals committed a homicide offense; 148 committed a violent felony assault; 110 committed a robbery; 147 committed a child molestation offense; 44 committed a child pornography offense; 62 committed forcible rape; 45 committed burglary; 4 committed kidnapping; 3 committed human trafficking offenses. We know from LB447 that 87 are currently incarcerated for a Class IC or ID drug trafficking offense; 27 are for Class IC felonies; and 60 are committed for ID felonies. Not a single one of these people are in for a marijuana-related offense. Heroin, cocaine, and methamphetamine--dealing in large amounts: of these 87, at least 86.3 percent of them have a prior felony conviction; 44 of 87 served a previous sentence in Nebraska Department of Corrections. In fact, four of them had over five previous stints in Nebraska Department of Corrections; 54 percent...I'm sorry, 54 out of 87 of these drug trafficking offenders had additional crimes in addition to their drug trafficking offense for which they were sentenced for. I offer these data for you because, again, these are not first-time, nonviolent offenders. These are repeat offenders who pose a danger to our society. And so I think it's important that this committee and the public know that these aren't the first-time, nonviolent offenders that some make them out to be. We ask this committee to consider these facts and figures going forward as we try to resolve the issue that we all know that we have in our Corrections system. Thank you. [LR191]

SENATOR EBKE: Thank you, Mr. O'Brien. Senator Baker. [LR191]



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SENATOR BAKER: Thank you, Chairwoman Ebke. Mr. O'Brien, I believe you say there's 712 people that society really wants off the streets. Are you believing--you talk about not wanting public safety compromised--are you believing that some of those might possibly be on the streets if there were no minimum sentencing? [LR191]

COREY O'BRIEN: Would I believe that they're on the streets? [LR191]

SENATOR BAKER: Yeah. Do you think without minimum sentencing some of these 712 would not be in prison? [LR191]

COREY O'BRIEN: I do believe that's possible. I also believe that it's possible that they wouldn't serve the terms necessary for them to fully gain the rehabilitative services that they need. [LR191]

SENATOR BAKER: So if I may put it in my own words, is it a little bit of lack of confidence in the judges who give the sentences? [LR191]

COREY O'BRIEN: I have absolute confidence in judges and judges have absolute confidence in prosecutors. When I hear people say that or accuse prosecutors for not having confidence in judges, it makes me cringe. I've not heard a single judge in 20 years of practice ever complain about a mandatory minimum sentence. And I appear before the vast majority of judges across the state, not just in Lancaster County and Douglas County. It just doesn't happen. There is...actually, most of the judges are relieved by the fact that they know that their sentences fit within a certain range because sentencing people is not easy. As Mr. Condon talked about, none of us wants to send people to prison. And so in a way, it enables the judge to do their job a lot more readily by relying upon the law and saying the law gives me no discretion in this regard and I have to sentence you to prison in this regard. And so, therefore, when people like Mr. Eickholt are arguing, you know, on the other side, give my guy a chance, it's hard for that judge to factor in all these competing interests and try to do the right thing because it is very difficult, we're human beings, not to give them that chance. But the fact of the matter is these guys deserve to go to prison for a substantial period of time. And it enables the judges to do their job a lot more readily when they're able to have that mandatory minimum to rely upon. [LR191]

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SENATOR BAKER: Thank you. [LR191]

SENATOR EBKE: Senator Pansing Brooks. [LR191]

SENATOR PANSING BROOKS: Thank you for coming, Mr. O'Brien. Well, I've heard of one judge, Judge Gerrard, has specifically spoken publicly against mandatory minimums. So I know that there are judges out there that do not think that it is appropriate in every case and that it does tie their hands in some cases. So... [LR191]

COREY O'BRIEN: And he does practice in the federal courts. [LR191]

SENATOR PANSING BROOKS: Pardon me? [LR191]

COREY O'BRIEN: He practices in federal court. [LR191]

SENATOR PANSING BROOKS: He did practice in the state courts though. [LR191]

COREY O'BRIEN: But I think he was referring to federal court's mandatory minimum, and I want to make sure that there's a known distinction between our system and the federal system. In the federal system, every crime is a mandatory minimum. In our system, it's only the select few where the worst of the worst crimes are committed. [LR191]

SENATOR PANSING BROOKS: Okay. Well, I thought that his comments related specifically to the state as well. [LR191]

COREY O'BRIEN: I will visit with Judge Gerrard. [LR191]

SENATOR PANSING BROOKS: But I think that you can take his comments and look at them and I would use them to understand state law and state mandatory minimums as well. The fact that judges haven't come out and complained about it, they don't really come out and complain about most things. But to say that this is necessary because otherwise the judges don't understand to put away Nikko Jenkins I think is insulting to the judiciary and insulting to our whole criminal

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justice system. There's no question that we are clear that the worst of the worst need to be put away for quite a while. And to suggest that without mandatory minimums we would not be able to do that, I just don't understand that theory of law enforcement. Yes, we want our communities safe. Yes, we want the worst of the worst put away and that our communities will be safe. But to hamper judges and to take away discretion and to make sure that judges don't have the ability...do you believe that there's no case that a mandatory minimum is not appropriate in the 712? [LR191]

COREY O'BRIEN: Do I believe there's none? [LR191]

SENATOR PANSING BROOKS: Yeah. There's not 1 case of those 712 that... [LR191]

COREY O'BRIEN: We've been arguing this point for five years, and I've been waiting for one person to show me the one guy out of this group that doesn't belong in prison. I've not heard it. [LR191]

SENATOR PANSING BROOKS: That isn't what's being argued about mandatory minimums. It's not that they shouldn't be in prison. [LR191]

COREY O'BRIEN: Or that they shouldn't be doing a mandatory minimum. [LR191]

SENATOR PANSING BROOKS: And you speak about rehabilitative purposes. By extending that date, all we're doing is extending the time that they're in prison. We aren't extend...if we had the money for programming, they would be getting programming and rehabilitation. They're not getting that. So all we're doing is extending the time, contributing to overcrowding, and not rehabilitating. We have complete proof of that from all the investigative studies that have gone on. [LR191]

COREY O'BRIEN: But from my standpoint, I'm preventing that person from continuing to terrorize our communities with the repeated crime that they're committing. [LR191]

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SENATOR PANSING BROOKS: Think of the extent that could go to, to prevent people. I mean, we could take that to a very unreasonable extreme. [LR191]

COREY O'BRIEN: Agreed. [LR191]

SENATOR PANSING BROOKS: And so now we're talking about what is the reasonable time period and what is reasonable? If it's reasonable to throw the book at them and put them away for 50 years, the judges can do that. They can do that without the mandatory minimum on there. Do you agree to that? [LR191]

COREY O'BRIEN: Do they...can they? [LR191]

SENATOR PANSING BROOKS: Yes. [LR191]

COREY O'BRIEN: Yes. [LR191]

SENATOR PANSING BROOKS: If they want somebody in prison for 25 years, they sentence them to 50. If they want somebody in prison for... [LR191]

COREY O'BRIEN: And they do. [LR191]

SENATOR PANSING BROOKS: Yes. So why is the mandatory minimum necessary if the judges do have tools to be able to do exactly what you're saying, get people off the streets that are a danger to the community? [LR191]

COREY O'BRIEN: Because...I mean, there are other crimes where there is a minimum penalty for it. DUI has a minimum penalty. You have to do seven days in jail if you get jail time. So basically what the Legislature has said is that if you pick up a gun and you're a convicted felon, you should at least serve a minimum of three years. Now there may be factors that lessen your sentence so you don't go all the way up to 50, so the judges do have discretion. But public policy has dictated that there are certain crimes for which jail should be an absolute certainty. And so that's what mandatory minimums have done. [LR191]

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SENATOR PANSING BROOKS: And so you think the judges will not see that and that it requires our imposition of a policy of a mandatory minimum for them to be able to understand that there are certain people that need to be in prison? [LR191]

COREY O'BRIEN: Yes. But the problem is, is that in certain cases that time might be six months. In other cases, that might be ten years. This actually provides some level of uniformity from a bottom level as to what that particular crime is worth. And so as a mandatory minimum, it's worth at least three calendar years that you have to do in a facility. The other effect that mandatory minimums have--and I know others behind me will talk about and what the officer before me talked about--is that this does, in fact, provide a deterrent effect. I've been doing this for 20 years and I can tell you that there's one absolute certainty with a lot of these guys. They are scared of mandatory minimums. And so there's a great number of them that deter their criminal behavior. And Officer Hansen is going to come behind me and he's going to talk a little bit about that. But they actually changed their behavior and modify their behavior in response to not having to face a mandatory minimum sentence. [LR191]

SENATOR PANSING BROOKS: I would love to see that research and that information. Because if you look at the death penalty, it shows that the death penalty is not a deterrent to the crime. [LR191]

COREY O'BRIEN: And there are certain studies that say that it is. [LR191]

SENATOR PANSING BROOKS: So I would really like to see your information and research on that, please. [LR191]

COREY O'BRIEN: Well, this isn't research. This is an officer who is on the street that's going to tell you. [LR191]

SENATOR PANSING BROOKS: Okay. Okay. So I thank you for this. I do hope that you understand that we're all fighting for the safety of our communities. And now what we're doing is quibbling about where that stands, whether we trust the judges and want to go forward and

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give them the authority to set the standard or whether we want to just mandatorily say every case is like this and have a broad brush painting what happens. [LR191]

COREY O'BRIEN: Senator, I just might throw out one thing is that we are all on the same page that we want the same goal and that is to see our correctional system and justice system work effectively. What I'm asking this committee to do is to seriously pause and consider who these offenders are, the needless risk they present if you modify their sentences. There are a great many other areas where we can make modifications to our correctional system. But I caution you that these are not these individuals that we should be letting out. And that's why I presented the data I did on who these individuals are. [LR191]

SENATOR PANSING BROOKS: Thank you. And can we get a copy of your data? It's really good. Thank you very much. [LR191]

COREY O'BRIEN: Sure. [LR191]

SENATOR PANSING BROOKS: I appreciate it. Thank you. [LR191]

SENATOR EBKE: Senator Krist. [LR191]

SENATOR KRIST: Thanks for coming. One of the things that I've learned in my time in the Legislature is that when you make absolute statements you better have absolute factual statements that you're making. I want you to go back--you know, I'm not putting you on the spot right now--but I want you to tell me what happened to Kayla Wagner as it applied to forgeries, because I believe that you're in error in saying that not one of those people who's been sentenced to a mandatory minimum should not have been sentenced to a mandatory minimum and that they're all dangerous criminals. I do know that there is a young man from, mentioned it earlier, from Burke who was there for the first time with that amount of narcotics and he's doing mandatory three. Right? This is a kid who, first time, the judge had no discretion and he apologized to him and to his family, but his hands were tied because the prosecutor put it forward. So I go back to the discussion that I had with the captain. I mean, there are times when judicial discretion and independence needs to be trusted. And it's a critical part of the justice

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system, not just putting bad people away, the justice system. And that's what these discussions are for in an interim study period. But I think absolutely there's at least one or two people that I have knowledge of in the time that I've been doing this that probably didn't need to mandatorily go sit in a prison cell for three years. Because if our purpose was to reduce recidivism, not create criminals but to rehabilitate people and put them back to paying taxes, then I think we failed in a couple of cases. Anyway, that's my two cents' worth. [LR191]

COREY O'BRIEN: Well, Senator, I have an open mind and so if you want to point those cases out to me, I'd certainly like to look at those and make my own decision on whether or not they're justified in being there because I'm not aware of those two cases. But I would absolutely look at them. [LR191]

SENATOR KRIST: Kayla Wagner is a good study. I mean just as we started studying the criminal justice system and the Corrections system with Nikko Jenkins, that became a focal point. And then going from there, Kayla would be a good focal point in studying this particular issue. [LR191]

COREY O'BRIEN: I will take a look at it. [LR191]

SENATOR KRIST: Thanks. [LR191]

COREY O'BRIEN: Thank you. [LR191]

SENATOR EBKE: Thank you. Next up. [LR191]

AARON HANSEN: Hello. My name is Sergeant Aaron Hansen. I'm here today representing the men and women of the Omaha Police Officers Association. We work very closely with the Omaha Police Department on issues such as this. Especially given that within my 21-year career I've experienced two of my coworkers, both friends of mine, one that I was hired with initially, who were murdered on the job by violent felons with firearms, it is an issue that is on the minds of the rank and file of the police department. I think there was much buildup to my testimony. I don't know if I'm going to be able to give any facts and figures or research. I'm not a researcher.

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I'm not an academic. I'm a street-level police sergeant. A little bit about me, currently assigned to the north gang suppression unit on the evening shift. And as I mentioned, I've been employed by the police department for 21 years. I hope to give some insight today, at least into the day-to-day street-level view and application of crimes that fall under the mandatory minimum section. I did not come with written statements. If you see some bags under my eyes, it's because for the last seven days I've been working late nights trying to disrupt a crack and meth ring in a particularly challenged part of Omaha. But that was timely because I think it gives me some good, fresh, recent point of reference to discuss with you today. What I can tell you is that on the street, that the application on the street is interacting with law-abiding citizens and with criminal violators. The laws that carry with them a mandatory sentence, whether they be the gun laws, the sexual assault laws, the drug distribution laws, they are having an impact on the decision-making process of the criminal element. For example, I can tell you on this latest investigation that we're working on, which unfortunately I can't cite specifics on but I can talk in generalities, we're talking an organization that ultimately we took pounds of crack cocaine off of. These particular leaders of this organization were very careful to only try to be in possession of amounts that were below the mandatory minimum threshold. And I know we've had some conversations about ten grams of meth or ten grams of crack. I can tell you that given that the typical user dosage of crack or meth is two-tenths of a gram, if I were to look, hearing the words "ten grams of meth or crack" doesn't sound like a lot, but looking at it, that would be 50 individually packaged two-tenths packages of crack or meth. I can tell you that would be a big day for us seizing that much. The offenders that are running these criminal enterprises, they do try to avoid the mandatory minimums. In this latest case we worked on, we seized multiple firearms. They were utilizing elaborate concealment methods in vehicles and in homes in order for us to avoid detection of their firearms, given that they're felons and distributing controlled substance with firearms, knowing they face a mandatory minimum. And they're also using intermediaries. They're trying to use intermediaries, addicts, to sell the smaller amount, to be the middleman to sell their smaller amounts of crack cocaine or methamphetamine. Finally, once we did arrest multiple people involved in this organization, we do have substantial charges against them with substantial leverage. Many of these individuals were in possession of firearms during the distribution and, in addition to that, possessed over the minimum threshold of distribution quantity in order to achieve at least the ID mandatory minimum. And in one case we'll even hit the higher thresholds because we had over a pound of substance. I can tell you that there's also a



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backstop effect to these mandatory minimums. The reason why we disrupted this organization was because we were receiving complaints from law-abiding neighbors, young parents with children, grandparents, the elderly living in the neighborhoods. Luckily, all of these individuals that we took off the streets in this most recent example we're not going to need one single person's testimony. And that's crucial. I think you can probably speak with some of the prosecutors and they'll tell you the frustration that we have over having to drop a murder case because someone is afraid to testify, having to drop a shooting or a drive-by because the victim is afraid to prosecute. With the mandatory minimums, we may not be able to get the shooter on a 30-year sentence for shooting someone or, even worse, for murdering someone or robbing someone, but we can sure convict them potentially on the drive-by shooting and at least get them in prison for five years or get them in three years at least for being a felon in possession of a firearm. I can tell you these things are being discussed on the streets. The citizens know it, they'll help us try to direct us to those offenders that have guns or have committed those mandatory minimum crimes so they don't have to be the witness, they don't have to be the victim, that we can do the work and disrupt those most dangerous of the offenders. I'll take any questions that you might have. [LR191]

SENATOR EBKE: Senator Krist. [LR191]

SENATOR KRIST: Just really quick, thank you for your service and you've been here in front of us many, many times. I don't want to be misquoted at all in terms of not supporting mandatory minimums for the kinds of things that you see. I do want to be quoted as saying that I don't think removing judicial discretion and also independence in other cases is something that we need to enforce across the board. So it's that discretion that they would have. And every situation that you're talking about, I understand it's a tool that you need and that you can use. But I'm hoping that within the discussion that we're having that we're either going to look at that bill that's coming up on Select File and support or not support or add or subtract from that bill as needs to happen to either defeat it or pass it. And that's important to this discussion as well. Go ahead. [LR191]

AARON HANSEN: I could tell you anecdotally that when we get into an active investigation of an offender we will routinely look back at their record. And I can tell you again anecdotally I

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don't...I'm not a researcher, I've seen prior to the mandatory minimum offense being attached to...the mandatory minimum sentence being attached to felony possession of a firearm, it was quite routine to see a one-year sentence for being a felon in possession of a firearm. I saw that quite often. And then with good time applied, you're talking six months and that probably takes care of the time as they're waiting for their trial. That is concerning looking back, especially given the violence disruption tools that we have now of three years. But I think it's also important, if we're going to have this discussion, I agree with the judicial discretion. That moves up and down. That goes two directions. We know the judges have...in Douglas County, there's been a few that have been handed Class IV felonies, Class IIIA felonies, and they were frustrated that they could not give more of a sentence... [LR191]

SENATOR KRIST: Right. [LR191]

AARON HANSEN: ...based on recent changes in the law. So I think it's a good point, but I think we have to understand if we're going to have that discussion that that discretion goes both directions. [LR191]

SENATOR KRIST: Both ways, right. Okay, good point. And also to clarify that that--if I'm saying this wrong, please correct me, Madam Chair--but that bill that's currently sitting on Select would only affect drug cases... [LR191]

SENATOR EBKE: Just drug cases, yeah. [LR191]

SENATOR KRIST: ...not firearms or others. [LR191]

AARON HANSEN: I do believe, though--correct me if I'm wrong--that the drug distributor in possession of a firearm was also contained within that bill. I don't think that portion was amended out, but. [LR191]

SENATOR KRIST: I didn't...we'll check on that, but I didn't read it that way. [LR191]

AARON HANSEN: That would be great, because that was concerning. [LR191]

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SENATOR KRIST: I thought it was strictly... [LR191]

AARON HANSEN: That was concerning to us. [LR191]

SENATOR KRIST: Yeah. Okay, thank you. Thanks for coming here. [LR191]

SENATOR EBKE: Any other questions? Okay, thanks. Who else do we have up on LR191? One, two, three, okay. We're going to move to three minutes here because we really do have one more and we'd like to be done by 12:30. [LR191]

JOE NIGRO: Senator Ebke, members of the committee, I'm Joe Nigro and I'm the Lancaster County Public Defender. And I appear on behalf of the office and on behalf of the Nebraska Criminal Defense Attorneys Association. We are opposed to mandatory minimums. We aren't saying these offenses aren't serious. We oppose mandatory minimums conceptually. They limit judicial discretion. They make people ineligible for parole for a longer period of time. They make people ineligible for probation and problem-solving courts, like drug courts. The difference in how good time is calculated result in errors which led to early release for some inmates. These penalties coerce pleas to lesser charges to avoid mandatory minimums. And the numbers that Mr. O'Brien refers to include those people who wound up pleading to maybe a Class II felony because if they went to trial it was going to be on something more serious. We especially oppose mandatory minimums for drug offenses. My experience has shown that we don't have drug kingpins like Don Barzini in The Godfather around here. We have serious addicts who get involved with larger and larger quantities because they can get the increasing quantity they need at a cheaper price when they're handling larger quantity. The feds take over prosecution of the largest cases and that still occurs. Class II felonies carry a 50-year maximum. I've never seen anybody receive the maximum for a Class II felony drug offense. I don't think I've ever seen anybody receive the maximum of 20 years for what was a Class III and is now a Class IIA drug offense. We don't need mandatory minimums for drug offenses. I urge you to eliminate mandatory minimums for drug offenses and to take a hard look at what we're accomplishing with mandatory minimums on any other offenses other than adding to the prison population. If the goal is community safety, it's the maximum sentence that does that. Mandatory minimums only prevent the Parole Board from releasing offenders who would otherwise qualify

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for supervised release. I mean, if you're talking about locking people up in prison and all this concern about community safety, it's the maximum. And that's where somebody...a judge is going to give somebody a long sentence. And if you think the Parole Board is going to just release these people on the kinds of offenses we're talking about, sexual assaults or violent offenses, I can tell you that they don't take that very lightly and people frequently never get paroled or serve long periods of time. But if you have somebody, particularly on a drug offense, and they come up before the Parole...let's say you didn't have the mandatory minimum and that person comes up before the Parole Board and it appears that parole is a good option, why not give the Parole Board that flexibility? We don't need that person in prison any longer. I mean, given all the problems of long mandatory minimums and what they cause, they simply aren't worth it. But again, I think that the argument gets twisted because basically it's not that if we don't have mandatory minimums these serious criminals aren't going to be in prison. They're still going to be in prison because the maximum is going to get them to prison. And what we're talking about with drug offenses, you know, I do our drug court. I've been involved in our office for almost 34 years. The people I see, I've never seen some big-time dealer who doesn't have a drug problem themselves. They're handling quantity because they get a cheaper price themselves and they need help. And it doesn't mean that they shouldn't pay a price, but...to society, but I think we also need to figure out ways to rehabilitate them and not get the argument twisted into being scared of other people, because those people are going to get long sentences on the top. And that's what will keep them there if they need to be there. Any questions? [LR191]

SENATOR EBKE: Thank you, Mr. Nigro. Questions? Do you have a question? [LR191]

SENATOR PANSING BROOKS: I was going to say one thing. Well, I appreciate it and I'm just going to address it to you. Clearly, when you think about what we've done just recently on human trafficking, we were able to increase those penalties significantly against purchasers and traffickers without doing mandatory minimums. And when I first brought that bill, we had attached some mandatory minimums. And we worked with law enforcement, the AG's Office, with other senators and found a way to do it to increase those penalties significantly without attaching mandatory minimums to it. So if we increase the penalties, we can then maintain judicial discretion and the ability of the courts, of prosecutors, of everybody to be able to put away the worst of the worst who are a danger to our society. And again, to say that, oh, well, this

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particular case happened or this particular case didn't happen, that's the problem. There's no...not every case is exactly the same the whole way along. We have cases where people cannot be all treated in exactly the same manner because they are not the same person. They are not the same hideous criminal. They are not the same, you know, they're not going to be rehabilitated in the same manner. Some will be rehabilitated immediately if they're given the programming and the chance to rehabilitate. Others we have to really be concerned about and I get it. [LR191]

JOE NIGRO: Well, and the other point I thought of, you know, to say that all the mandatory minimums are the worst of the worst is not accurate. Because I would submit that if you ask people in the community if somebody on a IC or ID drug offense is more serious than somebody on a first-degree sexual assault or a robbery or sexual contact with a child or kidnapping,... [LR191]

SENATOR PANSING BROOKS: Or the human trafficking of a child. [LR191]

JOE NIGRO: ...all of which could carry lower penalties,... [LR191]

SENATOR PANSING BROOKS: Yes. [LR191]

JOE NIGRO: ...I think that people are going to pick those other offenses as more serious. And so, I, you know...any other questions? [LR191]

SENATOR EBKE: No? Okay. [LR191]

JOE NIGRO: Thank you. [LR191]

SENATOR EBKE: Who else on LR191? [LR191]

JIM MASTELLER: Good morning. My name is Jim Masteller. I'm a Deputy Douglas County Attorney. I'm also on the executive board for the Nebraska County Attorneys Association. I've had the pleasure of talking with this committee previously on mandatory minimums so thank you again for giving me that opportunity. I'd like to focus on Douglas County. We file about

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4,000 felony cases a year. A very small percentage of those are going to be mandatory minimum felonies. We try to divert as many cases out of the system as possible through our diversion program, young adult court, drug court. We have, between young adult court and drug court, we got 200 people in there right now. We just started a veterans treatment court. It's almost kind of hard to be convicted of a mandatory minimum in Douglas County. If we see a person who has no previous felony convictions, who has ten grams of meth, that person would actually in Douglas County be screened by our drug court. If they were not available or if they were not allowed to be in our drug court, that person every single time is going to be getting a Class II felony with the opportunity for probation. The people in our office who are being convicted of mandatory minimums, the IDs and ICs, it's primarily four groups: It's going to be the felon in possession of firearms; the child sexual assault cases; those persons using firearms to commit crimes of violence; and then the higher level drug dealers, as Sergeant Hansen talked about. That kid who's possessing ten grams of cocaine or methamphetamine, if he's possessing it just for his own personal use, that's not a mandatory minimum. You have to be able to possess it and we have to prove it beyond a reasonable doubt that he was possessing that ten grams with the intent of distributing it. And ten grams, as you heard earlier, our typical street-level dealers, we're seeing them selling drugs--methamphetamine, crack, cocaine--at the 0.2 gram level. When you're dealing with individuals who are dealing in half ounces of these controlled substances, that tells us that they're higher up on the food chain. In terms of...we're not talking about marijuana offenses. We always hear about the nonviolent drug offender. The amount of violence surrounding drug offenses is extraordinary, at least in our community. I think every single year I've tried a murder case which started out as...which ended up being a felony murder case because it was a drug (inaudible). In terms of the Kayla Wagner case, I'm not familiar with that. What was the offense she was...? [LR191]

SENATOR KRIST: Forgery. [LR191]

JIM MASTELLER: Forgeries are not eligible for mandatory minimums unless she was convicted under the habitual criminal statute. [LR191]

SENATOR PANSING BROOKS: That was it. [LR191]

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JIM MASTELLER: So I don't know if we're talking about habitual criminals today, but in terms of the mandatory minimums, a forgery would not be eligible for a IC or ID felony. She would only be eligible for a mandatory minimum should she have been to prison two times previously. [LR191]

SENATOR KRIST: Can I respond to him? [LR191]

SENATOR EBKE: Sure. [LR191]

SENATOR KRIST: I bring it up as one of those cases that, you know, you say, no, no one will ever...absolute statement, no one who ever goes mandatory minimum shouldn't be there because they're a danger to society. They need to be taken off the street. That's one of those situations. And it is a combination of things that happened. But again, that judge I don't think would have given mandatory minimums unless he was forced into that situation, which was a factor of the way the law is written, which is, as you guys would say, that's your fault because that's what you gave us to do. So that's why I made the comment in terms of that particular case. And I think if you...you can find an anomaly to argue almost any point. And so in making the absolute, I think that's what we try to stay away from is making the absolute when we know that there are situations out there. I would just make one comment about the individual counties. I introduced a bill which had to do with sealing records. And it's been interpreted different ways by different counties and different judges have interpreted. And I'm going to come back this year and clarify so that across the board. And I think it's important for us when we hear these things, particularly in an interim study, to hear what's happening in the individual counties and jurisdictions. And the point I made earlier, I'm pretty proud of what you guys are doing in Douglas County. [LR191]

JIM MASTELLER: Thank you. [LR191]

SENATOR KRIST: You're my county. Okay, I have to just say that. But I don't have to say it. You're doing a great job. I'm not so enamored with things that are happening in other counties, but sometimes it's not their fault. Sometimes it's justice by geography. They don't have the resources. They don't have the capability of diverting on the front end as you do. So it's important that we see the outliers as well as the status quo. So thank you for coming. [LR191]

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JIM MASTELLER: Thank you. Any other questions? [LR191]

SENATOR EBKE: Any questions? Thanks for being here today. [LR191]

JIM MASTELLER: Thank you. [LR191]

KENNETH ACKERMAN: Good morning, Chairman Ebke. My name is Kenneth Ackerman, appreciate the opportunity to be here. I spent over five years in prison so I think I can give you a little bit of a different perspective. I have an opportunity to pay back to society. I've opened up my home to people getting out of prison. I've had three veterans so far and I'm a veteran myself. Currently I have a gentleman who is doing home confinement from federal prison. He's spending his last year in our home instead of being in prison. So I know that we are all interested in community safety. I'd like to suggest that we need to be smart on crime, not soft on crime. In order to do that, we need to look and see that the mandatory minimums only overcrowd our prisons. The deterrent, I've never met a single person in prison that told me that he didn't expect to get away with what he was doing. I don't believe that there are deterrents that make a difference on people committing crimes. Offenders trying to avoid mandatory minimum, well, the offenders that I met were trying to avoid any kind of prison term, especially the longest kind of prison term. So again, mandatory minimum I don't think is the issue. I'd like to suggest that people who are running these gangs, people who are doing this kind of thing are doing everything they can to avoid prison no matter what they do. The biggest problem I'm sure you're well aware of is that prisons are overcrowded. We either have to spend three or four times as much money to build more prisons and yet America is a country that has a higher percentage of people in prison than any other country in the free world. So we really need to think of something that makes a difference in prison. I think the less number of people in prison the better off we will be because then we can have programs to rehabilitate. We don't have a turnstile that makes a prison, go in, don't learn anything except your fellow gang members, turn around, come back out, and recommit a crime. I'd be open to questions. [LR191]

SENATOR EBKE: Thank you, Mr. Ackerman. Any questions? Thank you for being here today. [LR191]



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KENNETH ACKERMAN: Thank you. [LR191]

PATRICK CONDON: Good morning again. [LR191]

SENATOR EBKE: Welcome back. [LR191]

PATRICK CONDON: My name is Patrick Condon, P-a-t-r-i-c-k C-o-n-d-o-n. I am the Lancaster County Chief Deputy and also a member of the Nebraska County Attorneys Association Executive Board. Just real quick, since our time is limited and you've heard from a lot of people already, one, I just want to remind everybody and I think it was...CSG did not say that minimum mandatory was a reason behind the overcrowding in the prison. I agree it's part of the population and we need to look at it, but CSG did not say that minimum mandatory was part of the problem of the overcrowding. We talked a little bit about judicial discretion, and I think Senator Krist acknowledged it when he said, you know, this works on both ends. You know, we've now...there are Class IV felonies that are zero to two years. I think there are some judges that would say we need more than two years for these individuals. So, you know, we talk about discretion. It does work both ways, and it's hard to say, well, we're going to give the discretion to the judges on certain crimes but not on other crimes. I think that...I don't know how to address that issue. I agree there are certain crimes that would seem to be worse, your sexual assaults and things of that nature. But again, then we're dealing with the discretion of the court. I believe it was Detective Hansen that talked about the possession with intent, and that's a thing. On these 10 grams, 10 to 29 grams, the 29 to 140 grams, it's possession with intent to deliver. It's not just possession. If you were charged...if you were picked up and you have ten grams of cocaine or ten grams of methamphetamine, if you don't have anything more in Lancaster County, you're probably not going to get charged with possession with intent to deliver. You're going to get charged with possession. Because going forward on a jury, I have to show that you had the intent to deliver those controlled substances. If you have \$1,400, \$1,500 in cash, if you have a scale, if you have baggies, those are things that maybe we look at and say, okay, we can present that to a jury and say you were intending to deliver. Senator Pansing Brooks, I wanted to get back to you on your question, and not to answer your one question that you gave, but when you were talking about what the prosecutors do; well, what I do when I see a case like that, if I see somebody had 29 to 140 grams, one of the first things I do is, who are you getting it from. That's who I want. I

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don't want necessarily you, a user. I want to know who you're getting it from. So I will use those discretionary tools that you gave us as prosecutors and I will say, you know what? If you agree to cooperate, if you agree to sit down to testify truthfully against somebody, I will give you a Class II felony. I will give the judge that opportunity to give you that discretion. And that is extremely helpful to us as prosecutors to solve the cases I think everybody here wants to get to and that is where are the big deliverers. We want to get to these people that are selling large quantities of drugs to our community and are supplying it to our community. And that is an important tool. And I thank you, and I know the prosecutors thank you, for giving us these minimum mandatories because that does give us that tool. And Mr. Nigro and Mr. Eickholt, you can ask them. They've had cases with me where we have done that. We have said, you cooperate and we will give you a lesser charge. Senator, I think...and again, I'm talking from my point as a prosecutor in Lancaster County. We got Kayla Wagner. That was a habitual criminal, so a little bit different than what we're talking about. But there are times when I see somebody here, if I see a young individual or an individual that's been brought in and they have ten grams and I think, you know what, I think I can prove this and I think they were delivering. But you know, if they don't have the extensive record that others have, I may say, I'll give you a chance, I'll give you a chance to let you stand in front of the judge and explain to the judge why a 1 to 50 is a good range for you. And we've done that. And you can ask Mr. Nigro and Mr. Eickholt. They can agree with you that that has been done, not just by me but by other prosecutors in our office. Thank you. [LR191]

SENATOR EBKE: Any questions? Thank you for being here again. [LR191]

PATRICK CONDON: Thank you. [LR191]

SENATOR EBKE: Next up. Anybody else on LR191? Seeing nobody making a move to the front, that closes the hearing on LR191. LR114 is a Judiciary Committee interim study and so I've asked our legal counsel, Tim Hruza, to introduce it for us. We're letting people fade away. Go ahead. [LR191 LR114]

TIM HRUZA: (Exhibit 1) Chairwoman Ebke, members of the Judiciary Committee, my name is Tim Hruza, last name is H-r-u-z-a, legal counsel for the Judiciary Committee, to introduce

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LR114. The eight members of the Judiciary Committee of the One Hundred Fifth Nebraska Legislature introduced LR114 with the aim of furthering discussion about how we might improve outcomes for Nebraska's criminal justice system. LR114 opens up a discussion about one possible way to do that by considering options for the care, management, and potential release of inmates suffering the effects of old age, requiring care for serious or terminal illness. According to a report published by Fordham University, most all states have some sort of option or pathway for inmates to seek early release for advanced age or health. According to the same report, as of 2012 there are approximately 200,000 adults age 55 or older in prisons in the United States. Nebraska's own prison population continues to age. As inmates age, for a variety of reasons, the health challenges they face put a strain on not only them individually but also on the greater prison system. While Nebraska does offer medical parole pursuant to statute, the application of it is limited. Under Nebraska statute, an inmate is eligible for medical parole if they are not serving a sentence of life imprisonment or a sentence of death and if because of an existing medical or physical condition they are determined to be terminally ill or permanently incapacitated. The decision to grant such medical parole is left to the sole discretion of the Board of Parole. Although this option is available to certain inmates, further conversation about adjusting the circumstances which might warrant medical parole or other release options to better address the impact of old age on incarcerated individuals and on the prison system is worthwhile. It is the hope of the Judiciary Committee that LR114 helps spur a positive conversation about the political, social, and economic impacts of the implementation or expansion of geriatric or compassionate release laws and the ways such policies might help improve outcomes in our criminal justice system. Thank you. [LR114]

SENATOR EBKE: Okay. So we won't ask you questions. [LR114]

TIM HRUZA: Sure. [LR114]

SENATOR EBKE: No, no, we won't. [LR114]

TIM HRUZA: Oh, okay. (Laughter) It's like I'll do my best. [LR114]

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SENATOR EBKE: Okay. So do we have some folks wanting to testify on this particular LR114? If so, move your way up, sooner rather than later. Don't be afraid. [LR114]

GABRIELLA HEZEL: (Exhibit 2) Good morning, Senators. My name is Gabriella Hezel, G-a-b-r-i-e-l-l-a H-e-z-e-l, and I'm a law student at Creighton University and a law clerk with the ACLU of Nebraska. The subject of this hearing was my research for the summer at the ACLU. Older prisoners have attendant higher needs. While in society in general we tend to consider the age 65 as the beginning of the "older" population, most studies reveal that incarcerated people have an accelerated aging process which advances their chronological age and, accordingly, they have higher medical needs. For that reason, most experts suggest considering an "older" person to be anyone who is 50 years of age or older. The risk of an older person reoffending is less than 2 percent, in comparison to younger people who have a 43 percent recidivism rate. According to the last available data from the Nebraska Department of Correctional Services, 51 women prisoners were 50 years or older, and 891 male prisoners were 50 years or older. The imprisonment of the elderly has been found to be a contributing factor in the overcrowding of prisons, not only in Nebraska but across the nation. Overcrowding in Nebraska's prison system causes financial burden on taxpayers since the care of older prisoners costs between three times to nine times higher than younger prisoners. Overcrowding also causes increased misconduct and disciplinary problems in the prison itself. Given the low public safety risk and the heightened need of the aging prison population, release programs make good fiscal and humanitarian sense. While laws vary, states that incorporate a furlough law have varying requirements that a prisoner must meet in order to qualify for the program. Some states look at the threat of the individual to society, the individual's incapacitation, the cost to treat the individual's incapacitation, and the general healthcare of the individual. Nebraska's current program requires incarcerated elderly or ill persons to serve part of their sentence prior to their release at a facility that has been approved by the Nebraska Department of Corrections. They may apply for medical parole by demonstrating they are terminally ill or permanently incapacitated. The program is not available to a prisoner with a life sentence or a death sentence. Nebraska's economy and prison system would greatly benefit from expanding the current statute. Many sister states have broader standards beyond simply terminally ill or permanently incapacitated. For example, some permit medical release for an illness from which the inmate will not recover or having a psychological infirmity that might render the person incapable of

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caring for his or her activities or cognitive impairment associated with brain injury or disease such as Alzheimer's. For example, Texas specifically permits mental retardation as a potential category for early release. One of the primary benefits of implementing a more robust, compassionate release furlough program in Nebraska would be the economic benefit of the reduction of persons held in prison. When the prison population is reduced, both taxpayers and prisoners benefit. According to a national ACLU report on the elderly prison population, states would save about \$66,000 per elderly prisoner by releasing them from prison through a compassionate furlough program. Therefore, a furlough program not only saves a substantial amount of money by releasing an elderly prisoner, but it also alleviates the overcrowding conditions in the prison system. While there are various reasons causing the massive overcrowding in Nebraskan prisons, one thing is clear: the systematic problem of prison overcrowding in Nebraskan prisons can be eased by implementing a compassionate release furlough program for elderly prisoners. No one tool will immediately remedy the serious overcrowding of Nebraska prisons, but each strategy will go a long way to bringing about long-term change. We look forward to working with the Judiciary Committee on any compassionate furlough or humane release efforts in the upcoming session as a smart public policy to address the state's overcrowded prisons. [LR114]

SENATOR EBKE: Thank you. Senator Krist. [LR114]

SENATOR KRIST: In the present system, who evaluates the request and how are they paroled or put into a probationary status? [LR114]

GABRIELLA HEZEL: So thank you for the question, Senator. I am not exactly sure, but our legal director, Amy Miller, could answer your question in more detail. [LR114]

SENATOR KRIST: Is she coming up here? Okay. I'd like to discuss that if we can. In your research, what's the percentage did you say that we have above? You're saying above 50, which I'm taking exception to. [LR114]

GABRIELLA HEZEL: So... [LR114]

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SENATOR EBKE: I was going to say that's a little bit concerning for some of us. [LR114]

SENATOR KRIST: But that's a different subject. [LR114]

GABRIELLA HEZEL: So we have 51 women prisoners over 50 years of age, so that's about 12.9 percent. And we have 891 male prisoners who are over 50 years of age, which is about 18.9 percent. [LR114]

SENATOR KRIST: So if we use...what I'm interested in I think is the top end so if we use 65 or even 70, what percentage, because I don't think there's any question about that. Another question in your research is, how do we define mental delay, retardation, whatever word we want to apply to it? Is it an IQ level? Is it a diagnosis? And if so, why are they in an institution to begin with I guess? [LR114]

GABRIELLA HEZEL: So thank you for the question. I think that there are multiple ways that we could define mental retardation. For example, we could use evidence received from doctors or other means. I'm not exactly sure of any other means that we could use, but Amy Miller could expand on that. [LR114]

SENATOR KRIST: Boy, you're just unloading on Amy, aren't you? (Laughter) Thank you. [LR114]

SENATOR EBKE: Is she the one that defined over 50? [LR114]

GABRIELLA HEZEL: (Inaudible). [LR114]

SENATOR KRIST: Who is going to take blame for that one? [LR114]

SENATOR EBKE: Who is going to take blame for calling us all old? Okay, thank you. Anybody else have any other questions? Except for Senator Hansen. He's not old. Okay, thanks. I think we're good. Sorry. [LR114]

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GABRIELLA HEZEL: Thank you. [LR114]

SENATOR PANSING BROOKS: We're not old. [LR114]

SENATOR EBKE: You were gone when she was explaining this. [LR114]

SENATOR PANSING BROOKS: Oh, okay. [LR114]

SENATOR EBKE: Anybody over 50. [LR114]

GABRIELLA HEZEL: Just in the prison system here, older age is considered over 50 because of the conditions that are in the prison and past histories. [LR114]

SENATOR PANSING BROOKS: I can understand that. [LR114]

GABRIELLA HEZEL: I'm not saying everyone over 50... [LR114]

SENATOR EBKE: It's okay. We're just giving you a rough time. We're kind of at that point in the day. [LR114]

SENATOR PANSING BROOKS: We are. [LR114]

SENATOR EBKE: Thank you. [LR114]

GABRIELLA HEZEL: Thank you. [LR114]

SENATOR EBKE: Okay, next, the infamous Amy Miller. [LR114]

AMY MILLER: I will have to fill out my yellow sheet momentarily. Senators, my name is Amy Miller. It's A-m-y M-i-l-l-e-r. I'm legal director for the ACLU of Nebraska. To answer a couple of the quick questions, the reason that 50, which I stand, if you round up slightly, that's where I get. The reason 50 is where we trigger for older prisoners definition is because only within the

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Department of Corrections are you looking at people who disproportionately have prior histories of violence, substance abuse, alcohol use, a poor history of prior healthcare. And so scholars and medical experts say that the average 50-year-old prisoner really has the body of a 60- or 65-year-old prisoner. And so that is why when we looked at the Nebraska data we went all the way down to 50 rather than starting at 60 or 65. Then to answer Senator Krist's question about how is it currently determined, I have to say that there is a little opaqueness for those of us on the outside. By state statute, which is cited at the end of our law clerk's testimony, Nebraska Revised Statute 83-1,110.03, it talks about the fact that the Parole Board has the power to make the final decision, but that's supposed to come with a referral from the department. And we're not clear from the outside looking in whether or not someone within the Department of Corrections is actively making referrals, if they wait for somebody to make a petition or to request that. We also note that although the Department of Corrections on their Web site has very substantial amount of information about the number of people who are currently on parole, none of that's broken down in a way to indicate whether we currently have anyone on medical parole or whether we currently have zero people on medical parole. So I think those are some data points that would be very useful as we decide whether or not we want to go forward--getting a better picture of who actually initiates these questions and then how the Board of Parole finally makes a decision. It would be interesting to determine whether there have been applications that were denied or if there haven't been any applications. But it has to come from the department and then the Board of Parole has to give it their blessing. Did I miss any other hard questions? [LR114]

SENATOR KRIST: If they still belong to the department, which I understand they do but they're just outside, who pays the bill? [LR114]

AMY MILLER: It's still going to be borne then by the taxpayers because they're still considered to be within the custody. So that's one of those interesting options that other states actually can...you can either make the decision we want to hold on to them for public safety and for more services and actually call it parole or we can go ahead and release the person and then the costs would be borne by that person and their family. So some states have both options available. And some people they finally decide this person has served a lengthy sentence and is older and has a very low recidivism risk. They cut them loose entirely. They're considered to serve their sentence then. Given the fact that there might be a concern, depending on the person's underlying charge,



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whether or not we want to retain some control on parole, hold them on parole for a while and then ultimately decide they have successfully completed parole are multiple options that we could look at. [LR114]

SENATOR KRIST: Thank you. [LR114]

SENATOR EBKE: Have we looked at, probably not, but any sort of a cost-benefit analysis? As we visited some of the prisons this summer, Tecumseh has a long-term care--is it Tecumseh--has a long-term care facility. And, you know, I was taken by the fact the number of folks there who are very...needing very intensive care. And I'm wondering so if they were given compassionate release, parole, whatever, they would probably end up in a long-term care facility of some sort. So you would suggest then that that would still be borne, the cost would still be borne by the department or? [LR114]

AMY MILLER : If they are on parole, they still are considered technically under the state's custody. Even though they're no longer behind state walls, they are still considered within the state's custody, which is why there is a potential merit to simply then considering them to have completed their sentence and releasing them. I know that anecdotally we've had some very heartrending intakes from prisoners who themselves are physically fit but are aware of very elderly or very infirm prisoners who write to us and say, I know he's coming up for release, so not even talking about medical parole but someone who is finishing their sentence, and there's nowhere that he can go. What is the plan? And we've seen some great efforts by the Inspector General of Corrections and the state Ombudsman's Office to try to help do some planning. Those could be heartrending visits when you walk through the medical units. And I know Tecumseh was one where there's some folks there that are struggling with Alzheimer's or dementia. They don't know where they are. And in the same way that when you visit an Alzheimer's unit at a long-care facility, they're crying out for help and they're in a little cell, which can be very distressing for the inmate who's just in the room next to him who's just recovering from like knee surgery. We've got folks that are no longer public threats that don't need to be behind bars in a maximum security facility. Even if we switch to a long-care facility on state taxpayer money, incarceration is the most expensive way to take care of people. And so even transitioning them to

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some other form of public assistance is likely to result in both tax savings for the community and better care for that person. [LR114]

SENATOR EBKE: Any other questions? Thanks. [LR114]

AMY MILLER : I'll go fill out my yellow sheet now. [LR114]

SENATOR EBKE: Anybody else on LR114? How many are thinking of testifying on this one? Anybody else? One? Okay. We got one more behind you it looks like so. [LR114]

JOHN KREJCI: Good afternoon,... [LR114]

SENATOR EBKE: That's right. [LR114]

JOHN KREJCI: ...Senator Ebke. I'm John Krejci, K-r-e-j-c-i. I really didn't plan to testify but since I'm 80 years old, this is an area...and most people believe because old people are usually kind of neglected or left alone. Compassionate release is really very important. I can't even get the AARP to deal with prisons because they're interested in other things. But it has...it's like a no-brainer. It has so many advantages. First, prisons are understaffed. Old people that are ill take more resources. You know, the cost is greater. And actually I think this is true: People in prison die ten years earlier than average, so it's not a healthy place to be. So UNO has, you know, a geriatric, a gerontology program and they could be of great help to, you know, give us more knowledge. But the recidivism rate of I think even over 35 or 40 is...recidivism rate and crime rate, you just don't...my friend Mondo went 45 years. He did wonderful things and, of course, nobody would let him out, David Rice. And Ed Poindexter is very ill, in a wheelchair, you know, he's not doing...I mean, he's written books, he's done marvelous things. So I would hope the Legislature would study this more, get involved. And all the things that we've been talking about today, talking about lower the number of people in prison, I appealed to the Governor the other day saying, you know, let's have a state of emergency and get those people out. I don't think he...I noticed that you mentioned that, Senator Krist. So anyway, everybody wants to go home, but this is a no-brainer. And I would just encourage you to work on it and keep going on it and do it. [LR114]

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SENATOR EBKE: Thank you, Mr. Krejci. Any questions? Okay, we have one more. I saw somebody. [LR114]

JOHN KREJCI: There's a man that's an example of why we need to be (inaudible). [LR114]

SHAKUR ABDULLAH: Good morning, Senator Ebke and committee. My name is Shakur Abdullah, S-h-a-k-u-r A-b-d-u-l-l-a-h. I actually did not plan on testifying on this LR, but after listening I thought that there was one thing that was in need of mentioning. I come to this particular committee today as a person who has been recently released from the Department of Corrections about a year and a half ago. So I went into prison as a juvenile and ended up leaving, I guess I would be able to qualify for the AARP qualification, so I will put it that way. But I think the one thing that is important to keep in mind on this particular issue of compassionate release is this: is that there are not long-term care facilities at every institution. So what begins to happen is you will have individuals that get sentenced. They may end up with a very small sentence, get sent to a facility where there is appropriate custody level for their custody. If they are elderly and they have medical conditions that extend beyond the medical facilities of that facility, they are going to be transferred to a more secure facility with a higher custody level, which may oftentimes put them either at risk or put them in a situation where it just begins to be more difficult for them to receive adequate care in terms of the needs that they have. So I would just ask the committee to keep that in mind in terms of looking at this situation is that if long-term medical care cannot be provided at every institution, that you're going to have people that get transferred to other institutions where their custody level will be changed and it will put them in a situation that they probably should not be, just based on their sentence. [LR114]

SENATOR EBKE: Thank you. Questions? Thanks for coming up and talking to us, appreciate it. [LR114]

SHAKUR ABDULLAH: Thank you. [LR114]

SENATOR EBKE: I don't see anybody else moving. Oh, there we go, one more. [LR114]

JOHN MEZGER: I'm sorry. [LR114]

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SENATOR EBKE: That's okay. [LR114]

JOHN MEZGER: I didn't get my sheet all filled out. My name is John Mezger, M-e-z-g-e-r. I want to talk about a person that was in prison with me. And this was in federal prison, which they have compassionate release, but which wardens are reluctant to use. His name was Les. He was 82 years old. And he was there when I first got there so I didn't get to know him very well. But he had some illness, congestive heart trouble and kidney trouble. His legs were swollen twice their size and he was actually urinating through his legs. His pants were always wet. Nobody wanted to room with him because he moaned. He couldn't lay down. He couldn't breathe if he laid down. He had to sit up all the time. He vomited. And so he slept in a chair out in the television room. The CO would allow him to do that. Finally, because a bunch of prisoners kept complaining about him, the warden did move him to a care facility, a special prison set aside for hospital care, but not compassionate release. So my suggestion is if you're going to have a bill, include in the wording of the bill the system in which a person can get that release. If it's left up to the warden, he or she may not make that decision for whatever reason. Leaving it up to the medical department may or may not be the answer either because they may feel that the warden may not go along with their request anyway. So I suggest that there be some...that the committee decide what the criterion is, how...what's the process in which somebody can apply and get early release for medical purposes. This person died in prison when he didn't need to be because the federal law does allow compassionate release, but nobody would release him. And so in memory of him, that's why I'm appealing to you. Don't just leave it up to one person or, you know, have something in place where it becomes almost automatic--if this person qualifies they get that release. Otherwise, it really is not effective. Thank you. Any questions? [LR114]

SENATOR EBKE: Any questions? Okay, thank you for being here. [LR114]

JOHN MEZGER: Thank you. [LR114]

SENATOR EBKE: Okay. Don't see anybody else moving so that will close the hearing on LR114. Want to thank everybody for being here today and listening and testifying and we will see you next time. [LR114]