No. _____

IN THE

Supreme Court of the United States

NIKKO A. JENKINS,

Petitioner,

—v.—

STATE OF NEBRASKA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEBRASKA

PETITION FOR A WRIT OF CERTIORARI

Brian W. Stull
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
201 W. Main Street, Suite 402
Durham, NC 27701

Amy A. Miller
ACLU OF NEBRASKA FOUNDATION
134 S. 13th St. #1010
Lincoln, NE 68508

Thomas C. Riley
DOUGLAS COUNTY PUBLIC DEFENDER
1819 Farnam Street
H05 Civic Center
Omaha, NE 68183

David D. Cole
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005
(212) 549-2500
dcole@aclu.org

Jennesa Calvo-Friedman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

****CAPITAL CASE****

QUESTIONS PRESENTED

Severely mentally ill since the age of eight, Nikko Jenkins was imprisoned in Nebraska for armed robbery at age seventeen. He was held in solitary confinement for nearly five years—including for more than two years immediately preceding his release. He exhibited severe mental illness and self-mutilation in solitary confinement, and repeatedly sought assistance, including requests that he be civilly committed as a danger to others rather than released. The State ignored his pleas, and released him directly from solitary confinement to the community, without any assistance or transition. Within three weeks of release, he killed four people. He was subsequently convicted and sentenced to death, under a Nebraska law that authorizes a panel of judges, rather than a jury, to make factual findings necessary to impose a sentence of death.

The questions presented are:

(1) Whether the sentencing court violated the requirement of the Eighth and Fourteenth Amendment that capital sentencers give meaningful consideration and effect to all mitigating evidence, when it categorically refused to consider the impact of prolonged solitary confinement and the State's inadequate response, because it concluded that the solitary confinement was warranted.

(2) Whether a capital sentencing scheme that requires a jury to find aggravating factors, but authorizes judges, rather than a jury, to make all further factual findings necessary to the imposition of a sentence of death, violates the Sixth and Fourteenth Amendments to the Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Nikko A. Jenkins respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nebraska in this case.

OPINIONS BELOW

The decision of the Nebraska Supreme Court affirming Jenkins' death sentence, *State v. Jenkins*, 931 N.W.2d 851 (Neb. 2019), is reprinted in the Appendix at 1a–69a. The Nebraska Supreme Court's order overruling Jenkins' motion for rehearing is not reported and is printed at 112a. The trial court's sentencing opinion is not reported, and is printed at 70a–111a.

JURISDICTION

The Supreme Court of Nebraska entered judgment on July 19, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

The Sixth Amendment, U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Eighth Amendment, U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment (in pertinent part)

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Nebraska Statutes

Neb. Rev. Stat. § 29-2519(1)

. . . . The Legislature therefore determines that the death penalty should be imposed only for crimes set forth in section 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29- 2520 to 29-2524.

Neb. Rev. Stat. § 29-2522

The panel of judges for the sentencing determination proceeding shall either unanimously fix the sentence at death or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment. Such sentence determination shall be based upon the following considerations:

> (1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case, the determination of the panel of judges shall be in writing and refer to the aggravating and mitigating circumstances weighed in the determination of the panel. . . .

INTRODUCTION

This case warrants certiorari for two independent reasons. First, the panel of judges who imposed a death sentence on Nikko Jenkins categorically refused to consider, as a mitigating circumstance, the fact that the State had held him in solitary confinement for nearly five years—despite abundant evidence that solitary confinement had severe consequences for his already troubled mental health—and then released him directly from solitary confinement to the community, notwithstanding his repeated requests to be civilly committed as a threat to others. The sentencing panel disregarded these facts because it concluded—without any fact-finding on this matter—that his own actions in prison warranted his solitary confinement. That decision runs directly contrary to this Court's clear and repeated dictate that the Eighth Amendment requires a sentencer to consider any evidence relating to the individual or the crime that might lead the sentencer to choose life over death. Here, the fact that the State's actions in imposing prolonged solitary confinement and ignoring the self-evident deleterious effects on Jenkins' mental state are surely relevant to his moral culpability for the crimes he committed virtually immediately upon release from solitary. Yet the panel refused to consider this mitigating evidence.

Second, the Court should grant certiorari to resolve a fully mature conflict among state courts of last resort as to whether a jury, rather than a judge, must make all factual findings necessary to impose a sentence of death, or must merely find the presence of an aggravating factor. The Nebraska Supreme Court and four other state supreme courts have

concluded that the jury need only find the presence of an aggravating factor, and that judges can make all further factual findings necessary to impose death, including whether mitigating circumstances exist and whether the aggravating factors outweigh them. The state supreme courts of Florida, Delaware, Colorado, and Arizona, by contrast, have ruled that the Sixth Amendment requires the jury to make all factual findings necessary to the imposition of death, including whether mitigating circumstances exist and whether the aggravating factors outweigh them. The conflict is fully mature because the high courts of every active death penalty state whose capital sentencing scheme involves judicial fact-finding have now ruled on whether the Sixth Amendment reserves such findings for the jury—with directly contradictory results. Only this Court can resolve the conflict.

STATEMENT OF THE CASE

A. Factual Background

As a child, Nikko Jenkins' family home was "ripe with violence, alcohol and drug abuse and devoid of the very structure and social/spiritual nourishments the child needs," according to a court ordered evaluation of Jenkins at age eleven.[1] He was sexually abused by his cousin. Pet. App. 96a. He suffered substantial physical and verbal abuse from his parents, sisters, uncles, and cousins. *Id.* As a result, he was placed in foster care at age seven. *Id.* By the age of thirteen, he had lived in *seventeen* different

[1] Ex. 117 at 71, *State v. Jenkins*, CR 13-2768, CR 13-2769 (Neb. Dist. Ct. May 31, 2017).

out-of-home placements ordered by the State.[2] His IQ is in the "high end of the Mentally Retarded range of intellectual functioning." Pet. App. 104a.

Nikko was first admitted to a psychiatric institution at age eight. On admission, Dr. Jane Dahlke, M.D., reported that he was suicidal, a danger to his mother and sister, was hearing voices and carrying on conversations with himself, reported audio and visual hallucinations, and suffered difficulty sleeping and bed wetting. Pet. App. 29a, 100a–01a. Dr. Dahlke testified that he had bipolar disorder as of age eight, and that "it is quite difficult for an 8 year old child to be malingering or faking it." Tr. at 160, *State v. Jenkins*, CR 13-2768, CR 13-2769 (Neb. Dist. Ct. May 31, 2017); Pet. App. 29a, 101a, 266a.[3]

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[2] *Id.*

[3] This case caused such a public outcry that both the Ombudsman of the Nebraska Department of Correctional Services (NDOC) and a committee of the Nebraska Legislature issued reports on Jenkins' life and prolonged solitary confinement, prompting significant reforms in Nebraska's use of solitary confinement, particularly with respect to persons with mental illness. *See* Neb. Leg. 424, 2014 Leg., 103rd Sess. (Neb. 2014); *infra* pp. 11–12. Both the Ombudsman and the committee heard from crucial witnesses and examined key documents regarding the treatment of Jenkins. Counsel for Jenkins submitted the Ombudsman's Report and repeatedly cited it and the legislative committee report as mitigating evidence at sentencing. Br. of Def. at 3–4, 12, 14, 19, *State v. Jenkins*, CR 13-2768, CR 13-2769 (Neb. Dist. Ct. May 31, 2017); *See* Pet. App. 113a–260a (Ombudsman Report); 261a–369a (Legislative Committee Report).

Six psychiatrists unanimously agreed that Jenkins experienced years of serious mental illness.[4] The most common diagnosis was schizoaffective disorder, bipolar type. Nebraska's state-employed clinicians reached different diagnoses, but they also all agreed that Jenkins had serious mental disorders.[5]

Nebraska imprisoned Jenkins in 2003, upon conviction for armed robbery. Pet. App. 118a. He was

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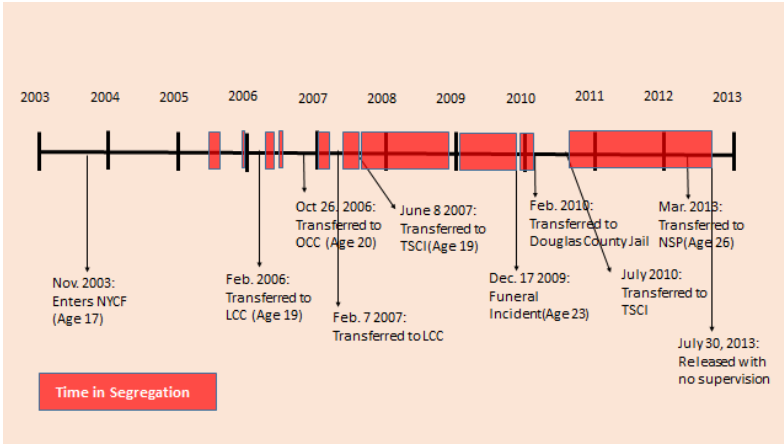
[4] Pet. App. 78a (**Dr. Bruce Gutnik) (**"schizioaffective disorder, bipolar type")); Pet. App. 142a, 224a-25a (**Dr. Eugene Oliveto)** ("Schizoaffective Disorder vs. Paranoid Schizophrenia" and "Anti-Social/Obsessive/Impulsively dangerous to others/ Explosive"); Pet. App. 152a, 271a, 277a **(Dr. Natalie Baker**) ("Psychosis NOS [not otherwise specified] , possible Bipolar Affective Disorder with psychotic features or Delusional Disorder, Grandiose Type, Probable PTSD, Relational Problems NOS, Polysubstance dependence (and) Antisocial and Narcissistic Traits."); Pet. App. 31a, 169a, 280a (**Dr. Martin Wetzel)** ("Bipolar Disorder NOS, Probable PTSD, Probable. Antisocial and Narcissistic PD Traits, Polysubstance Dependence in a Controlled Environment"); Ex. 103 at 1, *State v. Jenkins*, CR 13-2768, CR 13-2769 (Neb. Dist. Ct. May 31, 2017) (**Dr. Tayo Obatusin)** ("Schizoaffective Disorder, Bipolar type, as well as personality disorders"); Pet. App. 29a, 101a, 97, 266a (**Dr. Jane Dahlke)(**Bipolar Disorder). Dr. Oliveto advised that Jenkins "[n]eeds transfer to [Lincoln Regional Center] before his discharge to stabilize him so he is not dangerous to others." Pet. App. 143a, 245a.

[5] Pet App. 37a, 53a, 105a (**Dr. Cimpl Bohn)** ("personality disorder of narcissistic, antisocial, and borderline"); Pet. App. 153a. (**Dr. Mark Weilage)** ("Narcissistic and Antisocial Personality Disorder." Pet. App. 140a, 224a (**Dr. Y. Scott Moore**) ("there is the possibility that Mr. Jenkins does indeed have a psychotic illness, [but] I don't think this is a very good possibility"); Pet. App. 53a (**Dr. Cheryl Jack**) ("Antisocial Personality, with narcissistic features vs. Narcissistic Personal[i]ty with antisocial features").

seventeen at the time. Nebraska first placed him in solitary confinement, in July 2005, at age eighteen. Pet. App. 119a. At that point, and for varying periods of time thereafter, totaling nearly five years he "was locked up alone in a cell for 23 hours per day, and was, by definition, separated from most normal human contact with others." Pet. App. 116a. He was permitted one hour outside his cell a day for exercise, in a small fenced-in cage referred to as a "dog run" or "kennel." Pet. App. 300a. He received "no meaningful mental health treatment" while in solitary. Pet. App. 292a, 310a, 317a.

Of the 97 months Jenkins was in state prison, he spent 58 months or nearly 60% of his time in solitary confinement. Pet. App. 95a; 282a–70a (timeline of placement in solitary confinement). He was held in solitary confinement on nine separate occasions: for 40 days in July 2005; for 5 days in December 2005; for 15 days in April 2006; for 3 days in May 2006; for 22 days in January 2007; for 545 days from June 2007 to December 2008; for 383 days from January 2009 to February 2010; and for 742 days, or more than two years, from July 2011 to July 2013. Pet. App. 269a. From June 2007 until his release in 2013, he spent 77% of his time in solitary confinement. This graph from the Nebraska Legislature's Report illustrates Jenkins' time in solitary confinement:



Pet. App. 270a.

The investigation by Nebraska's Legislature concluded that "[i]t was Jenkins' long-term confinement in segregation which exacerbated his mental health problems, prevented him from receiving mental health treatment and any form of rehabilitative programing and, very simply, made him more angry and disturbed." Pet. App. 298a.

During his confinement, Jenkins' serious mental illness manifested in bizarre behavior, suicide attempts, and multiple facial, penile, and other self-mutilations, almost all related to delusions about an Egyptian God who commanded him to hurt himself and others. Dr. Gutnik "testified that Jenkins' multiple mutilations of his own penis would be an indication of severe mental illness . . . a person would have to be fairly out of touch and psychotic to be able to not react to that level of pain." Pet. App. 39a (internal quotation marks omitted). Among many other incidents, he "carved . . . wounds into [his] face with a piece of tile from the gallery floor," leading a correctional officer "to spray (him) with pepperspray to get (him) to stop carving into (his) face," and

requiring 11 stitches. Pet. App. 166a. Prison staff reported that Jenkins "will drink his own semen for neuro-stimulators to increase his serotonin levels and to decrease his emotional rage." Pet. App. 276a; *see also* Pet. App. 279a ("Patient reports he has been snorting his semen in his left nostril on a daily basis, and drinking his own urine daily for the last two weeks as his own method of nutritional supplementation."). In 2011, in sentencing Jenkins for assaulting a prison official in an attempted escape, the sentencing judge noted his "long and serious history of mental illness," and "recommended . . . that Defendant be assessed and treated for issues regarding his mental health." Pet. App. 147a.

Jenkins repeatedly predicted that he would commit violent acts after he was released from custody. Pet App. 226a–31a (providing twenty-three examples). He also repeatedly requested treatment for his mental condition. Pet. App. 231a. Six months before his release Jenkins "was requesting emergency psychiatric treatment on a daily basis" and "his pleas for mental health treatment [became] more desperate." Pet. App. 275a–76a, 298a; *see* Pet. App. 281a-91a (timeline of Jenkins' eighty-seven requests for mental health care and treatment and threats to harm others, which is "not exhaustive," only "illustrat[ive]").

Just a few months before his scheduled release, having been in solitary confinement for more than two years straight, Jenkins made the "extraordinary" request to be civilly committed upon release. Pet. App. 162a. He sent letters to the County Attorney of Johnson County and Board of Parole, talked to his prison social worker, and enlisted his mother and fiancé to help get him placed in emergency protective

custody for psychiatric hospitalization. Pet. App. 162a–67a, 159a; *see also* Pet. App. 234a (notes from January 16, 2013, "indicate that Jenkins had 'reported a belief that he should be hospitalized for psychiatric concerns (particularly being dangerous to others), as he will be released soon"). The NDOC took no actions to refer this case to "a county attorney for a possible mental health commitment proceeding." Pet. App. 245a.

The Legislative Committee found that when NDOC was contacted by the County Attorney regarding Jenkins' attempts to have himself civilly committed, "Dr. Weilage, a psychologist employed by NDOC," "deliberately" "withheld" a February 2013 report by Dr. Baker, Pet. App. 276a, 294a, 297a, which found Jenkins was "mentally ill as well as an imminent danger to others" and "will possibly require civil commitment prior to being released to ensure his safety as well as the safety of others." Pet. App. 278a. The committee concluded that "the decision by Dr. [] Weilage to withhold Dr. [] Baker's . . . report resulted directly in the failure of Jenkins to be civilly committed," and warranted his termination. Pet. App. 296a, 364a.

Nebraska released Jenkins "directly from an isolation cell to our streets" without "any form of transition" and with only a generic list of community resources. Pet. App. 209a; *see also* Pet. App. 174a–175a. Within three weeks of Jenkins' release, he had killed four people. Pet. App. 86a–88a, 175a.

In response to Jenkins' case, Nebraska strictly limited the use of solitary confinement, or "restrictive housing." Neb. Rev. Stat. Ann. § 83-170. Under the new rules, "[n]o inmate shall be held in restrictive

housing unless done in the least restrictive manner," and the "department shall adopt and promulgate rules and regulations" which "provide for individualized transition plans . . . for each confinement level back to the general population or to society." Neb. Rev. Stat. Ann. § 83-173.03. In addition, as of March 1, 2020, "no inmate who is a member of a vulnerable population—including diagnosed with a serious mental illness—shall be placed in restrictive housing. Neb. Rev. Stat. Ann. § 83-173.03(3). Nebraska has adopted detailed regulations to establish policies restricting the use of restrictive housing generally, as well as specifically for people with mental illness. *See* 72 Neb. Admin. Code Ch. 1–4.

B. Procedural History

Jenkins pleaded no contest to four counts of Murder in the First Degree and related charges, and the court found him guilty. Pet. App. 71a.

The Nebraska Supreme Court appointed a three-judge sentencing panel ("Panel"). *Id.* Under Nebraska law, at sentencing a capital defendant has a right to have a jury determine only the "existence of one or more aggravating circumstances." Neb. Rev. Stat. Ann. § 29-2521(1). Only the panel of judges, and not a jury, can "receive evidence of mitigation and sentence excessiveness or disproportionality." *Id.* § 29-2521(3). And only the Panel can "determine an appropriate sentence." *Id.* To reach this determination, the Panel considers "[w]hether the aggravating circumstances as determined to exist justify imposition of a sentence of death" and "[w]hether sufficient mitigating circumstances exist which approach or exceed the

weight given to the aggravating circumstances." Neb. Rev. Stat. § 29-2522.

With no dispute as to the existence of aggravating circumstances, Jenkins waived his right to have a jury assess aggravating circumstances. Pet. App. 71a. The Panel found six. Pet. App. 72a. It then received evidence of "mitigating circumstances," *id.*, and sentenced Jenkins to death.

The Panel acknowledged that Jenkins spent fifty-eight months in solitary confinement. Pet. App. 95a. But it declined to consider this fact or its effects on Jenkins as mitigation. Although it did not hold a hearing on the propriety of his solitary confinement, the Panel concluded that his "solitary confinement was as a result of his own actions and threats." *Id.* For that reason, the Panel categorically declined to consider his solitary confinement as mitigation. *Id.*

By contrast, the Panel considered and gave effect to other mitigating evidence, including Jenkins' plea of no contest, Pet. App. 94a–95a, his difficult childhood, Pet. App. 104a–105a, and his mental disorder. Pet. App. 105a. But the Panel declined to consider what was without doubt the most significant mitigating circumstance, namely his prolonged solitary confinement and release immediately to the community despite overwhelming evidence of severe mental health deterioration and explicit warnings that he posed a danger to others.

The Panel found that "there are mitigating circumstances, however, these mitigating circumstances do not approach or exceed the weight given to the six aggravating circumstances." Pet. App. 107a. And it concluded that,"[b]ased on the evidence presented" the death penalty was not

"excessive or disproportionate." *Id*.

Jenkins made several arguments on appeal, including that the Panel failed to consider as mitigation "the debilitating impact of solitary confinement," Pet. App. 62a, and that Nebraska's death penalty procedure, requiring judges—not a jury—to consider and weigh mitigating evidence against aggravating evidence, violated the Sixth and Fourteenth Amendments. Pet. App. 47a; *see, e.g.*, Appellate Br. at 45–46, 68, 87, *State v. Jenkins*, 931 N.W.2d 851 (Neb. 2019).

The Supreme Court of Nebraska affirmed. Pet. App. 69a. As to solitary confinement, the court concluded that the "sentencing [P]anel acted reasonably in not rewarding his behavior by considering the resulting confinement as a mitigating factor." *Id*. And it rejected Jenkins' argument that the Sixth Amendment required a jury to make all factual findings necessary to impose a death sentence. Pet. App. 47a–50a. The court reasoned that the Sixth Amendment does not "require the determination of a mitigating circumstance, the balancing function, or the proportionality review to be undertaken by a jury." Pet. App. 50a.

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S CATEGORICAL REFUSAL TO CONSIDER AS MITIGATING EVIDENCE JENKINS' FIFTY-EIGHT MONTHS OF SOLITARY CONFINEMENT AND THE DELETERIOUS EFFECTS ON HIS MENTAL STATE VIOLATED THE EIGHTH AMENDMENT.

The Panel's refusal even to consider the effects of nearly five years of solitary confinement on an obviously mentally ill prisoner released directly to the community runs contrary to this Court's clear dictate that the Eighth Amendment requires consideration of *any* evidence relevant to the decision whether to subject a defendant to life imprisonment or death. The State subjected Jenkins to prolonged solitary confinement, failed to provide meaningful treatment despite overwhelming evidence that Jenkins' mental health was precarious and deteriorating, and then released him directly to the community despite his pleas to be civilly committed. The Panel refused to consider this evidence because it concluded that the solitary confinement was deserved. In closing its eyes to the mitigation at the heart of this case, the Panel violated Jenkins' Eighth Amendment rights. The constitutional error is so blatant that it supports summary reversal. In the alternative, the Court should grant certiorari and set the case for full briefing and argument.

A. Refusing to Consider the Effects of Solitary Confinement as Mitigating Evidence Flouts This Court's Directives Regarding Mitigation.

This Court has repeatedly made clear that in

order to ensure individualized justice, the authority deciding whether to impose a death sentence must consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Accordingly, "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstance." *Payne v. Tennessee*, 501 U.S. 808, 822 (1991). "[T]he question is simply whether the evidence is of such a character that it 'might serve "as a basis for a sentence less than death."'" *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)).

The sentencer may not "refuse to consider, as a *matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982) (emphasis in original). While the sentencer may "determine the weight to be given relevant mitigating evidence," the sentencer "*may not give it no weight by excluding such evidence from their consideration*." *Id.* at 115 (emphasis added). A capital sentencer "must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future." *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007); *see also Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (sentencing authority "may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence"); *Parker v. Dugger*, 498 U.S. 308, 315

(1991) ("[T]he trial judge could not refuse to consider any mitigating evidence.").

Consideration of mitigating evidence ensures that punishment is "directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). "Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g].'" *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976)). For these reasons, it is not enough that a defendant can present evidence as to mitigating circumstances. "*Lockett* requires the sentencer to listen." *Eddings*, 455 U.S. at 115 n.10.

The Panel violated this unequivocal dictate when it refused to consider or give any effect to Jenkins' evidence that he had been subjected to nearly five years of solitary confinement, resulting in severe mental health deterioration, and then released him directly to the community despite his repeated requests to be civilly committed rather than released. As detailed above, Jenkins presented substantial evidence concerning his time in solitary confinement, the damage it caused, and the State's failure to respond. But the Panel categorically disregarded this evidence as mitigation because, in its view, "[d]efendant's solitary confinement was as a result of his own actions and threats." Pet. App. 95a. The Nebraska Supreme Court affirmed on the same rationale, concluding that "Jenkins' own actions led to his disciplinary segregation" and that it was therefore reasonable to not "reward[] such behavior by *considering* the resulting confinement as a mitigating factor." Pet. App. 69a (emphasis added).

In effect, the Nebraska courts imposed a rule that capital sentencers may wholly disregard the effects of prolonged solitary confinement, even when they are as extreme as here, unless the sentencer first finds that the solitary confinement was itself unwarranted. It did so even though a sentencing hearing is in no sense a forum for litigating the validity of administrative penal decisions. *Cf. Nevada v. Jackson*, 569 U.S. 505, 509–10 (2013) (upholding evidentiary rule meant to prevent "mini-trials" on collateral issues). This approach, if formulated as an instruction to a jury, would demonstrably violate *Eddings*, because it would tell the sentencer "that *as a matter of law* [it is] unable even to consider the evidence" if it finds the solitary confinement warranted. *Eddings*, 455 U.S. at 113. It is equally unconstitutional for the sentencer itself to disregard the evidence for this reason.

The Panel's rationale for disregarding Jenkins' years of solitary confinement cannot be squared with this Court's recognition that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, *or to emotional and mental problems*, may be less culpable than defendants who have no such excuse.'" *Penry,* 492 U.S. at 319 (emphasis added) (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).

Moreover, whether the solitary confinement was justified does not determine its relevance to whether a life sentence is appropriate. If a defendant had suffered head trauma as a result of driving while intoxicated, or undertaking some other inherently

dangerous activity, a sentencer could not categorically disregard the mental health effects of that trauma as mitigation with respect to a subsequent crime because the defendant's own acts caused the trauma. And the validity of Jenkins' solitary confinement has nothing to do with whether the State's decision to release him directly to the community over his pleas to be civilly committed as a danger to others. Even if every day of Jenkins' fifty-eight months of solitary confinement were warranted by disciplinary infractions, a finding neither the Panel nor the Nebraska Supreme Court was equipped to make, the fact of that confinement, its dramatic effects on Jenkins' mental state, and the State's wholly indifferent response, would still be relevant to assessing the extent of Jenkins' personal culpability and the case for life over death. As the Nebraska Legislative committee found, "[i]t was Jenkins' long-term confinement in segregation which exacerbated his mental health problems, prevented him from receiving mental health treatment and any form of rehabilitative programing and, very simply, made him more angry and disturbed." Pet. App. 298a.

The role of prolonged solitary confinement in Jenkins' decomposition does not make Jenkins innocent. It was not offered as a legal excuse. It was offered instead in *mitigation,* because it is certainly relevant to whether he should live or die for crimes committed almost immediately upon release from prolonged solitary confinement, and over his own requests to be civilly committed. The capital sentencer had a duty to consider the extent to which his prolonged solitary confinement and its effects reduced his *moral* culpability or warranted the

exercise of mercy.

B. The Nebraska Courts' Failure to Consider the Effects of Prolonged Solitary Confinement Defies the Widespread Consensus that Such Treatment Has Debilitating Effects on Mental Health.

In closing their eyes to the effects of prolonged solitary confinement on Jenkins, the Nebraska courts parted company with other courts, state and federal governments, and an overwhelming scientific consensus that prolonged solitary confinement has profoundly negative consequences for mental health.

This Court recognized the adverse mental health consequences of prolonged solitary confinement more than a century ago. According to the Court, "experience demonstrated" that, when placed in isolation,

> [a] considerable number of prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.

In re Medley, 134 U.S. 160, 168 (1890); *see Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) ("One hundred and twenty-five years ago, this Court recognized that, even for prisoners sentenced to death, solitary confinement bears 'a

further terror and peculiar mark of infamy.' . . . [R]esearch still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." (quoting *In re Medley*, 134 U.S. at 170)).

Courts outside Nebraska uniformly consider the effects of solitary confinement as mitigation in death penalty cases. *United States v. Fields*, 761 F.3d 443, 456 n.5 (5th Cir. 2014) (noting that jury considered as a mitigating factor that "[t]he Defendant's periods of incarceration have included significant time in solitary confinement"); *Rogers v. State*, No. SC18-150, 2019 WL 4197021, at *6 (Fla. Sept. 5, 2019) (noting that jury considered as a mitigating factor that the defendant "has spent years in solitary confinement."); *see Roberts v. Warden, San Quentin State Prison*, No. CIV S-93-0254 GEB, 2013 WL 416346, at *74, *77 (E.D. Cal. Jan. 31, 2013) (holding "petitioner has made a colorable showing that his trial counsel unreasonably failed to investigate and present mitigating evidence at the penalty phase of his trial," including defendant's "time in punitive segregation"); *cf. United States v. Jayyousi*, 657 F.3d 1085, 1131 (11th Cir. 2011) (considering "evidence about the impact on one's mental health of prolonged isolation and solitary confinement" in sentencing); *United States v. Lara*, 905 F.2d 599, 603 (2d Cir. 1990) (affirming downward departure from the Guidelines was appropriate, in part, because of defendant's "placement in solitary confinement").

A "robust body of legal and scientific authority recognize[s] the devastating mental health consequences caused by long-term isolation in solitary confinement." *Palakovic v. Wetzel,* 854 F.3d 209, 225 (3d Cir. 2017). There is "a growing

consensus" that solitary confinement "can cause severe and traumatic psychological damage, including anxiety, panic, paranoia, depression, post-traumatic stress disorder, psychosis, and even a disintegration of the basic sense of self identity." *Id.* (internal citations omitted). Courts have held that placing individuals with serious mental illness in solitary confinement can be cruel and unusual punishment under the Eighth Amendment.[6]

State legislatures, including Nebraska's in response to Jenkins' case, are increasingly limiting and regulating the use of solitary confinement because of its deleterious impact. *See* Statement, *supra* at p. 11–12.[7] A subcommittee of the Senate Judiciary Committee has held two hearings on

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[6] *See, e.g., Indiana Prot. & Advocacy Servs. Comm'n v. Comm'r, Indiana Dep't of Corr.,* No. 1:08-cv-01317-TWP-MJD, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012); *Jones'El v. Berge*, 164 F. Supp. 2d 1096, 1101–02 (W.D. Wis. 2001); *Coleman v. Wilson*, 912 F. Supp. 1282, 1320–21 (E. D. Cal. 1995); *Casey v. Lewis*, 834 F. Supp. 1477, 1549–50 (D. Ariz. 1993).

[7] *See, e.g.*, Conn. Gen. Stat. Ann. § 18-96b (enacted 2017); Mass. Gen. Laws Ann. ch. 127, § 39 (enacted 2018); Md. Code Ann., Corr. Servs. § 9-614 (enacted 2016); Minn. Stat. Ann. § 243.521 (enacted 2019); Mont. Code Ann. § 53-30-703 (enacted 2019); Nev. Rev. Stat. Ann. § 209.369 (enacted 2017); N.J. Stat. Ann. § 30:4-82.8 (enacted 2019); Tex. Gov't Code Ann. § 501.068 (enacted 2015); Va. Code Ann. § 53.1-39.1 (enacted 2019); *see also* 34 U.S.C. § 10132 NOTE (enacted 2018 and requiring the National Prisoner Statistics Program to report on "the number of prisoners who have been placed in solitary confinement at any time during the previous year"); Eli Hager & Gerald Rich, *Shifting Away from Solitary*, The Marshall Project (Dec. 23, 2014), https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary (cataloging state reforms between 1998 and 2014).

solitary confinement and its abuses.[8] At a 2014 hearing, Senator Dick Durbin predicted that "[t]he reality is that the vast majority of prisoners held in isolation will be released someday. The damaging impact of their time in solitary—or their release directly from solitary—can make them a danger to themselves and their neighbors."[9]

The United States Department of Justice has recognized that "the frequency, duration, and conditions of confinement of restrictive housing, even for short periods of time, can cause psychological harm and significant adverse effects on these inmates' mental health."[10] It noted that "isolation can be psychologically harmful to any prisoner—psychological effects can include anxiety, depression, anger, cognitive disturbances, perceptual disorders, obsessive thoughts, paranoia, and psychosis—some of which may be long lasting."[11]

"The effects of being housed in solitary confinement are now well understood and documented in the scientific literature." Craig

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[8] *Reassessing Solitary Confinement II: The Human Rights, Fiscal, & Public Safety Consequences*, *Hearing Before the Subcomm. on Const., Civ. Rights & Human Rights of the S. Comm. on the Judiciary*, S. Hrg. 113-882, 113th Cong. (2014); *Reassessing Solitary Confinement: The Human Rights, Fiscal, & Public Safety Consequences*, *Hearing Before the Subcomm. on Const., Civ. Rights & Human Rights of the S. Comm. on the Judiciary*, S. Hrg. 112-879, 112th Cong. (2012).

[9] S. Hrg. 113-882 at 3.

[10] Office of the Inspector Gen., U.S. Dep't of Justice, Review of the Fed. Bureau of Prisons' Use of Restrictive Hous. for Inmates With Mental Illness 1, 54, 63 (2017).

[11] *Id.* at 1.

Haney, *Restricting the Use of Solitary Confinement*, 1 Ann. Rev. Criminology 285, 286 (2018). Nearly all "of these studies [have] found that isolated prisoners experience negative psychological effects and are at a significant risk of serious harm." *Id.*

One such study documented prisoners in solitary confinement suffering multiple serious and debilitating mental effects, including hyper-responsitivity to external stimuli; perceptual distortions, illusions, and hallucinations; severe panic attacks; difficulty with thinking, concentration, and memory; intrusive obsessional (and often violent) thoughts that prisoners resist but cannot block out; overt paranoia; and problems with impulse control. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U.J.L. & Pol'y 325, 334–36 (2006). The long-term effects often include not only "post traumatic stress (such as flashbacks, chronic hypervigilance, and a pervasive sense of hopelessness), but also lasting personality changes—especially including a continuing pattern of intolerance of social interaction, leaving the individual socially impoverished and withdrawn, subtly angry and fearful when forced into social interaction." *Id.* at 353.

Solitary confinement particularly harms prisoners with preexisting mental illness, such as Jenkins. The American Psychiatric Association has found that "Prolonged segregation of adult inmates with serious mental illness, with rare exceptions, should be avoided due to the potential for harm to such inmates."[12] Prisoners with preexisting mental illness

[12] *Position Statement on Segregation of Prisoners with Mental Illness*, Am. Psychiatric Ass'n (2012), http://nrcat.org/storage/

"have more difficulty adapting to prison life" and are "less able to successfully negotiate the complexity of the prison environment, resulting in an increased number of rule infractions leading to more time in segregation and in prison."[13]

In short, the courts, the federal government, state legislatures, and the scientific community have all recognized what Justice Breyer noted in 2015: namely, that "it is well documented that such prolonged solitary confinement produces numerous deleterious harms." *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting). In light of this overwhelming consensus, the Panel's categorical refusal to consider Jenkins' solitary confinement as mitigation with any weight violated the Eighth Amendment. This Court should grant the petition and summarily reverse the decision of the court below. In the alternative, the Court should grant the petition and order full merits review of this constitutional claim.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A FULLY MATURE SPLIT AMONG STATE COURTS OF LAST RESORT AS TO WHETHER A JURY MUST FIND ALL FACTS NECESSARY FOR THE IMPOSITION OF A DEATH SENTENCE, OR NEED ONLY FIND AGGRAVATING CIRCUMSTANCES.

Certiorari is also warranted to resolve a fully

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documents/apa-statement-on-segregation-of-prisoners-with-mental-illness.pdf.

[13] *Id.*

mature split among state supreme courts over whether judges can find facts necessary to the imposition of the death penalty. The supreme courts of Missouri, Indiana, Alabama, and Illinois agree with Nebraska that a jury need only find the existence of an aggravating circumstance, and that a judge can find all other facts necessary to impose a death sentence. The supreme courts of Florida, Delaware, Colorado, and Arizona disagree, and have ruled that the Sixth Amendment requires a jury to make all findings necessary to the imposition of death, including the existence of mitigating circumstances and whether the aggravating factors outweigh the mitigating circumstances. The conflict is fully mature because every active death penalty state in which judges make factual findings needed for a death sentence has ruled on this question.

Even among those states that permit judges to make factual findings in capital sentencing, moreover, Nebraska is an outlier. Missouri and Indiana allow for judge fact-finding only in the rare circumstance of a jury deadlock. With the exception of Montana, every other state in the nation that has the death penalty now requires a jury to make all the necessary findings for its imposition.[14] And while

[14] These jurisdictions are: Arizona, Ariz. Rev. Stat. § 13-752; Arkansas, Ark. Code Ann. § 5-4-603; California, Cal. Penal Code § 190.4(b); Colorado, Colo. Rev. Stat. § 18-1.3-1201; Florida, Fla. Stat. § 921.141; Georgia, Ga. Code Ann. § 17-10-31; Idaho, Idaho Code Ann. § 19-2515; Kansas, Kan. Stat. Ann. § 21-6617(e); Kentucky, Ken. Rev. Stat. § 532.025; Louisiana, La. Code Cr. Proc. Ann. art. 905.8; Mississippi, Miss. Code Ann. §§ 99-19-101, 99-19-103; Nevada, Nev. Rev. Stat. § 175.556; New Hampshire, N.H. Rev. Stat. § 630:5; North Carolina, N.C. Gen. Stat. Ann. § 15A-2000(b); Ohio, Ohio Rev. Code Ann. § 2929.03; Oklahoma, 21 Okla. Stat. Ann. § 701.11; Oregon, Or. Rev. Stat.

Montana's capital statute in theory permits judicial fact-finding, it has not imposed a death sentence in over two decades, so its procedure has not been tested.[15]

The Court should grant certiorari to bring federal uniformity to this issue, and to make clear that juries must make *all* the necessary findings for imposition of a sentence of death.

A. The State Supreme Courts of Florida, Delaware, Colorado, and Arizona Hold that a Jury Must Find All Facts Necessary for the Imposition of a Sentence of Death.

In *Hurst v. Florida*, 136 S. Ct. 616, 619 (2016) this Court held that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." In so holding, the Court

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Ann. § 163.150; Pennsylvania, 42 Pa. Stat. and Cons. Stat. Ann. § 9711; South Carolina, S.C. Code 1976 § 16-3-20; South Dakota, S.D. Codified Laws § 23A-27A-4; Tennessee, Tenn. Code Ann. § 39-13-204; Texas, Tex. Code Cr. Proc. art. 37.071; Utah, Utah Code Ann. § 76-3-207; Virginia, Va. Code Ann. § 19.2-264.4; Washington, Wash. Rev. Code § 10.95.080; Wyoming, Wyo. Stat. Ann. § 6-2-102; and the federal government, 18 U.S.C. § 3593. Capital punishment is prohibited in twenty-two jurisdictions. *See* Death Penalty Info. Ctr., *State by State*, https://deathpenaltyinfo.org/states-and-without-death-penalty (last visited Oct. 16, 2019).

[15] *See* Mont. Code Ann. § 46-18-301 (requiring judicial sentencing, including finding and considering aggravating and mitigating circumstances). No defendant has been sentenced to death in Montana since 1996. *See* Death Penalty Info. Ctr., *Montana*, https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/montana (last visited Oct. 16, 2019).

noted that, under the Florida statute, a defendant was not eligible for death until the trial judge made findings regarding the existence of aggravating and mitigating circumstances, and the relative weight of each:

> [T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." The trial court *alone* must find "the facts . . . [t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances."

Id. at 622 (emphasis in original) (quoting Fla. Stat. §§ 775.082(1), 921.141(3)). On remand, the Florida Supreme Court applied that principle to hold that juries must find all the facts necessary under Florida law to impose a death sentence. The court held that:

> [B]efore the trial judge may consider imposing a sentence of death, the jury in a capital case must unanimously and expressly find all the aggravating factors that were proven beyond a reasonable doubt, unanimously find that the aggravating factors are sufficient to impose death, unanimously find that the aggravating factors outweigh the mitigating circumstances, and unanimously recommend a sentence of death.

Hurst v. State, 202 So. 3d 40, 57 (Fla. 2016).

In the wake of *Hurst*, the Delaware Supreme Court similarly held unconstitutional its capital sentencing scheme, because it allowed death sentences upon judicial findings of facts that the Sixth Amendment reserves for juries. Like Nebraska's, the Delaware statute provided that if the jury finds "at least 1 statutory aggravating circumstance," the judge "shall impose a sentence of death if the Court finds by a preponderance of the evidence . . . that the aggravating circumstances found by the Court to exist outweigh the mitigating circumstances found by the Court to exist." Del. Code Ann. tit. 11, § 4209.

The Delaware Supreme Court held it unconstitutional to sentence a defendant to death upon a judge, not a jury, finding "that the aggravating circumstances found to exist outweigh the mitigating circumstances found to exist." *Rauf v. State*, 145 A.3d 430, 434 (Del. 2016) (per curium). A majority of the court explained, "'[a] judge cannot sentence a defendant to death without finding that the aggravating factors outweigh the mitigating factors. . . .' and therefore "[t]he relevant 'maximum' sentence, for Sixth Amendment purposes, that can be imposed under Delaware law, in the absence of any judge-made findings on the relative weights of the aggravating and mitigating factors, is life imprisonment. *Rauf*, 145 A.3d at 485 (Holland, J., concurring).

Similarly, the Colorado Supreme Court held unconstitutional its capital sentencing statute, under which a "three-judge panel could not sentence a defendant to death unless it found unanimously that (A) At least one aggravating factor has been proved; and (B) There are insufficient mitigating factors to

outweigh the aggravating factor or factors that were proved." *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003) (en banc) (internal quotation marks omitted). The court concluded that this "statute required the judges to make factual findings as a prerequisite to imposition of the death penalty, in violation of defendants' Sixth Amendment right to have a jury make such findings." *Id.* at 259.

The Arizona Supreme Court has also ruled that the Sixth Amendment requires a jury to find both the aggravating and mitigating facts in order to impose a death sentence. On remand from this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), the Arizona Supreme Court expressly rejected the state's argument that nothing in this Court's precedent prevented a judge from "finding mitigating factors and balancing them against the aggravator." *State v. Ring*, 65 P.3d 915, 942 (Ariz. 2003) (en banc). The Arizona court reasoned that "[n]either a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency." *Id.* at 943; *see State v. Lamar*, 115 P.3d 611, 616 (Ariz. 2005) (requiring resentencing where judge imposed the death penalty because "[a] different finding of mitigating circumstances could affect a factfinder's determination whether the mitigating circumstances are sufficiently substantial to call for leniency" (internal quotation mark omitted)); s*ee also Johnson v. State*, 59 P.3d 450, 460 (Nev. 2002) (striking down state capital sentencing scheme, and holding that "finding regarding mitigating circumstances" is a factual finding that must be made by a jury because it "is necessary to authorize the death penalty in

Nevada"), *overruled on other grounds by Nunnery v. State*, 263 P.3d 235 (Nev. 2011).

Thus, four state supreme courts interpret the Sixth Amendment to require a jury to find—not merely the existence of an aggravating factor, but—all facts necessary to impose a death sentence.

B. The Court Below and Four Other State Supreme Courts Have Ruled that the Sixth Amendment Requires That a Jury Find Only the Presence of Aggravating Factors, and Permits Judges to Make Other Factual Findings Necessary to Impose a Death Sentence.

In direct conflict with the supreme courts of Florida, Delaware, Colorado, and Arizona, the supreme courts of Nebraska, Missouri, Indiana, Alabama, and Illinois have held that the Sixth Amendment allows a judge to make some factual findings necessary to the imposition of a death sentence.

The Nebraska Supreme Court rejected Jenkins' Sixth Amendment argument that the jury must find all facts necessary to the imposition of death. In its view, the Sixth Amendment requires only that the jury find the existence of an aggravating circumstance. Once a jury makes that determination, judges may make all further factual findings. Relying on its prior decision in *State v. Lotter*, 917 N.W.2d 850 (Neb. 2018)*, cert. denied*, 139 S. Ct. 2716 (2019), it reasoned that the Sixth Amendment does not "require the determination of mitigating circumstances, the balancing function, or the proportionality review." Pet. App. 50a. The court

believed that "earlier U.S. Supreme Court precedent—upon which *Hurst* was based—did not require the determination" of these facts to be "undertaken by a jury" and "[n]othing in *Hurst* requires a reexamination of that conclusion." *Id.* But it "acknowledged that [its] view was not universal." *Id.*

Missouri's death penalty statute provides that if "the jury deadlocked on punishment, the circuit court determine[s] the appropriate sentence." *State v. Wood*, 580 S.W.3d 566, 574 (Mo. 2019) (en banc) (citing Mo. Ann. Stat. § 565.030.4). The Missouri Supreme Court recently upheld this scheme, concluding that "the weighing step is *not* a factual finding that must be found by the jury beyond a reasonable doubt." *Id.* at 585 (emphasis in original). In the court's view, *Hurst* "stands *only* for the proposition that, in a jury tried case, aggravating circumstances are facts that must be found by the jury beyond a reasonable doubt." *Id.* at 584 (emphasis added). The court acknowledged that its conclusion conflicts with the supreme courts of Delaware and Florida. *Id.* at 585 n.12 (noting the conflict but asserting that "both [*Rauf* and *Hurst*] are wrongly decided").

Indiana law similarly provides that "[i]f a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone." Ind. Code Ann. § 35-50-2-9(f). Indiana's highest court has upheld the constitutionality of this provision, explaining "as to occasions when a jury finds that one or more aggravators are proven beyond a reasonable doubt but is unable to reach unanimous agreement on whether any mitigating

circumstances are outweighed by the aggravating circumstances, such weighing is not a 'fact' and thus does not require jury determination." *State v. Barker*, 826 N.E.2d 648, 649 (Ind. 2005).

The Supreme Court of Alabama also upheld the constitutionality of a death penalty scheme that permitted the trial judge to make factual findings regarding mitigation and the relative weight of aggravating and mitigating factors. In *Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016), *cert. denied*, 137 S. Ct. 831 (2017), the court held that "*Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty. . . . Moreover, *Hurst* does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment." In 2017, the Alabama legislature changed its death penalty statute to eliminate this provision, *see* 2017 Ala. Laws Act 2017-131 (S.B. 16), but the Alabama Supreme Court decision stands. Using this reasoning, the Supreme Court of Alabama upheld the constitutionality of death sentences that this Court had remanded in light of *Hurst*.[16]

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[16] *See Johnson v. State*, 256 So. 3d 684, 762 (Ala. Crim. App. 2017), *on remand from* 136 S. Ct. 1837 (2016) (mem.), *cert. denied*, 139 S. Ct. 173 (2018) (Mem); *Russell v. State*, 261 So. 3d 454, 456 (Ala. Crim. App. 2016), *on remand from* 137 S. Ct. 158 (2016) (mem.), *cert. denied*, 138 S. Ct. 1449 (2018) (mem.); *Kirksey v. State*, 243 So. 3d 849, 853 (Ala. Crim. App. 2017), *on remand from* 136 S. Ct. 2409 (2016) (mem.), *cert. denied*, 138 S. Ct. 430 (2017) (Mem); *Wimbley v. State*, 238 So. 3d 1268, 1276 (Ala. Crim. App. 2017), *on remand from* 136 S. Ct. 2387 (2016) (mem.), *cert. denied*, 138 S. Ct. 385 (2017) (Mem).

The Illinois Supreme Court has similarly held that "the rule announced in *Apprendi [v. New Jersey*, 530 U.S. 466 (2000)] is not applicable in the mitigation phase of a death penalty sentencing hearing." *People v. Davis*, 793 N.E.2d 552, 568 (Ill. 2002); *People v. Banks*, 934 N.E.2d 435, 469–70 (Ill. 2010) (declining to reconsider *People v. Davis*).

This sharply defined conflict is as mature as it will ever get. No other death penalty state permits a judge to participate in any fact-finding necessary to impose the death penalty. Thus, the supreme courts of all relevant states have spoken, and are in direct disagreement.[17] This Court should step in to resolve this important question and ensure that all capital defendants are afforded their full Sixth Amendment rights.

C. The Decision Below is Incorrect Because the Sixth Amendment Requires a Jury to Find All Facts Necessary to the Imposition of a Death Sentence.

The decision below is wrong. This Court's decision in *Hurst* requires that a jury, not a judge, decide *all* the factual predicates for the imposition of death under state law. 136 S. Ct. at 619. Thus, where, as here (and in nearly every state with a death penalty),

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[17] Petitioner notes that Delaware has not reinstated the death penalty since its supreme court invalidated the statute, and Illinois abolished the death penalty in 2011. *See generally* Death Penalty Info. Ctr., *State by State*, https://deathpenalty info.org/states-and-without-death-penalty (last visited Oct. 16, 2019). With the constitutional decisions on this issue in these states still on the books, however, any reinstatement of the death penalty would need to honor them.

a death sentence requires the assessment of aggravating and mitigating factors, and the weighing of each, the jury must make these findings. *Cf. Ring*, 536 U.S. 613–14 (Breyer, J., concurring) ("I concur in the judgment . . . because I believe that jury sentencing in capital cases is mandated by the Eighth Amendment.").

The Nebraska death penalty statute violates the Sixth Amendment by requiring a judge, not a jury, to find facts necessary under the statute to impose a death sentence. Under Nebraska law, a "panel of judges" determines whether to "fix the sentence at death" "based upon the following considerations:" "[w]hether the aggravating circumstances as determined to exist justify imposition of a sentence of death" and "[w]hether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances." Neb. Rev. Stat. § 29-2522; *Lotter*, 917 N.W.2d at 855–56 (same); *State v. Mata*, 745 N.W.2d 229, 249 (Neb. 2008) (same).

Under Nebraska law, then, a death sentence may issue only after factual findings regarding the existence and weight of mitigating circumstances, whether they are outweighed by aggravating factors, and whether the aggravating factors are sufficient for death. Absent these findings, a defendant must be given a life sentence. The findings are therefore "necessary to impose a sentence of death." *Hurst*, 136 S. Ct. at 619.[18]

[18] It does not matter that the Nebraska statute refers to these findings as "considerations" and not explicitly as "facts" because "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment

Nebraska's highest court has incorrectly limited *Hurst* to requiring only that the jury "fin[d] an aggravating circumstance." *Lotter*, 917 N.W.2d at 863; *see also* Pet. App. 50a. In fact, *Hurst* expressly rested on the principle that "*each fact* necessary to impose a sentence of death" must be found by a jury. 136 S. Ct. at 619 (emphasis added). And under Nebraska law, as under Florida law, commission of a murder and the presence of an aggravating factor are *not* sufficient to impose death. Rather, the sentencer must also make factual findings that the aggravating factors are sufficient for death, and whether they outweigh those in mitigation. Accordingly, the Sixth Amendment requires a jury to make those determinations. *See Hurst*, 202 So. 3d at 57 (holding that nearly-identical factual findings required for a death sentence under Florida law must be made by the jury).

This Sixth Amendment right is buttressed by Eighth Amendment considerations in the capital context. That a jury, not a judge, must find each fact necessary to impose a sentence of death ensures that its imposition is linked to contemporary community values, and is essential to public confidence in the fairness and reliability of capital sentencing. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("Community participation in the administration of

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than that authorized by the jury's guilty verdict?" *Apprendi*, 530 U.S. at 494. As Justice Scalia explained, "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by the jury beyond a reasonable doubt." *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."). Only a jury can ensure that death sentences are consistent with the moral views of the community and evolving standards of decency. *See Gregg v. Georgia*, 428 U.S. 153, 173 (1976) ("[A]n assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment."); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (same); *see also Ring*, 536 U.S. at 615 (Breyer, J., concurring) (Juries are "more attuned to the community's moral sensibility, because they reflect more accurately the composition and experiences of the community as a whole." (internal quotation marks and citation omitted)).

III. THIS CASE IS AN EXCELLENT VEHICLE FOR ADDRESSING TWO IMPORTANT DEATH PENALTY QUESTIONS.

This case provides an ideal vehicle for this Court to resolve both questions presented. Both were raised, preserved, and resolved on the merits below. As this case is on direct appeal, no question regarding whether the relief would be available retroactively arises.

Jenkins expressly argued to the sentencing panel that it should consider as a mitigating circumstance his prolonged solitary confinement and its effects on his mental health. The Panel unequivocally declined to consider that fact. Jenkins raised the issue on appeal, and the Nebraska Supreme Court unequivocally affirmed the Panel's decision to decline to consider his solitary confinement. Thus, this claim

was raised, preserved, and directly addressed by the courts below.

Jenkins also directly presented and obtained a ruling below on the question of whether the Constitution requires a jury to find all facts necessary for the imposition of a death sentence. Pet. App. 47a–50a.[19] Because this case is on direct appeal, it poses none of the procedural obstacles that may have militated against review of this issue in prior cases. For example, this Court denied certiorari in *Lotter*, 139 S. Ct. 2716 (2019), but that case involved a successor post-conviction petition, filed long after *Ring* had become final, and so rested on non-retroactivity grounds. *Lotter*, 917 N.W.2d at 862–63. This case, by contrast, presents a clean opportunity for this Court to resolve a recurring issue on which all relevant state supreme courts have already ruled.

[19] In dicta, the Nebraska Supreme Court expressed "doubt" as to whether Jenkins had "standing" to challenge the Nebraska sentencing procedure because he waived his right to have a jury find aggravating factors. Pet. App. 49a. But the court went on to rule on the claim on the merits. Pet. App. 49a–50a. In any event, Jenkins could not have waived the right he asserts here, namely, to have a jury determine mitigating circumstances and whether they outweigh aggravating factors, as that right is simply unavailable under Nebraska law. One cannot waive a right that does not exist.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

David D. Cole
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street, NW
Washington, D.C. 20005
(212) 549-2500
dcole@aclu.org

Brian W. Stull
Cassandra Stubbs
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
201 W. Main Street,
Suite 402
Durham, NC 27701

Amy A. Miller
ACLU OF NEBRASKA FOUNDATION
134 S. 13th St .#1010
Lincoln, NE 68508

Jennesa Calvo-Friedman
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004

Thomas C. Riley
DOUGLAS COUNTY PUBLIC DEFENDER
1819 Farnam Street
H05 Civic Center
Omaha, NE 68183

Date: October 17, 2019

APPENDIX

SUPREME COURT OF NEBRASKA

State of Nebraska, Appellee,

v.

Nikko A. Jenkins, Appellant.

OPINION

Filed July 19, 2019.

Nos. S-17-577. S-17-657.

Appeals from the District Court for Douglas County: PETER C. BATAILLON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, for appellant.

Nikko A. Jenkins, pro se.

Douglas J. Peterson, Attorney General, and James D. Smith for appellee.

Brian William Stull and Amy Fettig, of American Civil Liberties Union Foundation, and Amy A. Miller, of American Civil Liberties Union of Nebraska Foundation, for amici curiae National Alliance on Mental Illness et al.

1. **Courts: Trial: Mental Competency: Appeal and Error.** The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.

2. **Pleas: Appeal and Error.** A trial court is given discretion as to whether to accept a guilty or no contest plea, and an appellate court will overturn that decision only where there is an abuse of discretion.

3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.

4. **Trial: Pleas: Mental Competency.** A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.

5. **Trial: Mental Competency.** The competency standard includes both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him or her and (2) whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding.

6. **Pleas.** To support a finding that a plea of guilty or no contest has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.

7. _____**.** To support a plea of guilty or no contest, the record must establish that (1) there is a

factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.

8. _____. A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.

9. _____. A plea of no contest means that the defendant is not contesting the charge.

10. **Courts: Trial: Mental Competency.** The question of competency to represent oneself at trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.

11. **Right to Counsel: Waiver: Appeal and Error.** In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.

12. **Constitutional Law: Right to Counsel: Waiver.** A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the Sixth Amendment and Neb. Const. art. I, § 11.

13. **Trial: Right to Counsel: Waiver.** The standard for determining whether a defendant is competent to waive counsel is the same as the standard for determining whether a defendant is competent to stand trial.

14. **Right to Counsel: Waiver.** The competence that is required of a defendant seeking to

waive his or her right to counsel is the competence to waive the right, not the competence to represent himself or herself.

15. **Constitutional Law: Right to Counsel: Waiver.** In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently.

16. **Right to Counsel: Waiver: Appeal and Error.** When a criminal defendant has waived the right to counsel, an appellate court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel.

17. **Criminal Law: Right to Counsel: Waiver.** A knowing and intelligent waiver of the right to counsel can be inferred from conduct, and consideration may be given to a defendant's familiarity with the criminal justice system.

18. **Constitutional Law: Statutes: Appeal and Error.** The constitutionality of a statute presents a question of law, which an appellate court independently reviews.

19. **Constitutional Law: Statutes: Sentences.** An ex post facto law is a law which purports to apply to events that occurred before the law's enactment and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed.

20. _____:____:_____. There are four types of ex post facto laws: those which (1) punish as a crime an act previously committed which was innocent

when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.

21. _____:_____:_____. The Ex Post Facto Clause bars only application of a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.

22. **Criminal Law: Statutes: Legislature: Sentences.** Generally, when the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.

23. **Constitutional Law: Initiative and Referendum.** The constitutional provisions with respect to the right of referendum reserved to the people should be construed to make effective the powers reserved.

24. **Statutes: Initiative and Referendum.** Upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures.

25. **Constitutional Law: Sentences: Death Penalty: Mental Competency.** The Eighth Amendment forbids executing a prisoner whose mental illness makes him or her unable to reach a

rational understanding of the reason for his or her execution.

26. **Constitutional Law: Sentences: Death Penalty.** U.S. Supreme Court precedent forecloses any argument that the death penalty violates the Constitution under all circumstances.

27. **Sentences: Death Penalty: Appeal and Error.** In a capital sentencing proceeding, the Nebraska Supreme Court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.

28. **Rules of Evidence: Sentences: Death Penalty.** In a capital sentencing proceeding, the Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances.

29. **Pleas: Sentences.** A no contest plea constitutes an admission of all the elements of the offenses, but not an admission to any aggravating circumstance for sentencing purposes.

30. **Sentences: Aggravating and Mitigating Circumstances: Appeal and Error.** A sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by the Nebraska Supreme Court.

31. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.

32. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** In a capital sentencing proceeding, a sentencer may consider as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

33. **Sentences: Aggravating and Mitigating Circumstances: Proof.** In a capital sentencing proceeding, the risk of nonproduction and nonpersuasion as to mitigating circumstances is on the defendant.

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, and FUNKE, JJ., and BISHOP and WELCH, Judges.

CASSEL, J.

I. INTRODUCTION

In consolidated appeals, one of which involved the death penalty, Nikko A. Jenkins challenges his competency to represent himself, enter no contest pleas, proceed to sentencing, and receive the death penalty. He also makes several challenges to the death penalty. Finding no abuse of discretion by the district court and no constitutional infirmity regarding the death penalty, we affirm.

II. BACKGROUND

We begin by setting forth a brief background. Additional facts will be discussed, as necessary, in the analysis section.

In August 2013, Jenkins shot and killed four individuals in three separate incidents in Omaha, Nebraska. In October, the State filed two criminal

cases against him. In case No. CR 13-2768, the State charged Jenkins with four counts each of murder in the first degree, use of a deadly weapon (firearm) to commit a felony, and possession of a deadly weapon by a prohibited person. The information contained a "Notice of Aggravators" for each count of murder. In case No. CR 13-2769, the State charged Jenkins with two counts of possession of a deadly weapon by a prohibited person. The cases were eventually consolidated. Because Jenkins remained mute at the arraignment, the court entered pleas of not guilty to all counts.

Jenkins' competency was an issue throughout the proceedings. The court held a number of hearings and received extensive evidence. In February 2014, the court found Jenkins competent to stand trial. Although psychiatrists disagreed regarding whether Jenkins was competent to stand trial and whether he was mentally ill, the court acknowledged the psychiatrists' testimony that a person can be mentally ill and still be competent to stand trial.

In March 2014, the court held a hearing during which it found that Jenkins voluntarily, knowingly, and intelligently waived his right to counsel. It granted Jenkins' motion to represent himself and appointed the public defender's office to provide an attorney to advise Jenkins. After a hearing 11 days later, the court accepted Jenkins' waiver of his right to a jury trial.

In April 2014, Jenkins ultimately entered a plea of no contest to every count. He did not agree with the factual basis provided by the State and stated that "even though [his] physical person may have been in the act of these things [he] was not in

that moment because of [his] psychosis condition of psychotic mania." The court accepted Jenkins' pleas of no contest and found him guilty of the charges. Jenkins waived his right to have a jury determine whether the aggravating circumstances alleged by the State were true, stating that he would rather have a three-judge panel make that determination. The court accepted the waiver after ascertaining that it was made freely, voluntarily, and knowingly.

Approximately 1 week later, the court appointed the public defender's office to represent Jenkins in the death penalty phase. Because counsel believed Jenkins was not competent to proceed with the sentencing phase, the court held a hearing on the matter. In July 2014—approximately 4 months after finding Jenkins to be competent—the court entered an order finding that Jenkins was not competent to proceed with the sentencing phase. The court expressed concern that the two psychiatrists who believed Jenkins was competent to proceed did not believe that he had a major mental illness. The court worried that if the psychiatrists were wrong as to whether Jenkins had a major mental illness, "it places doubt as to their other opinion that [Jenkins] is competent."

After lengthy evaluation and rehabilitation efforts, the court held a status hearing in February 2015 regarding Jenkins' competency. It received a report authored by two clinical psychologists and a psychiatrist, who opined that Jenkins was competent to proceed with sentencing. In March, the court found that Jenkins was competent to proceed with the death penalty phase.

The court set the sentencing hearing before a three-judge panel to commence on July 7, 2015. However, the court postponed the hearing after the Nebraska Legislature passed a law repealing the death penalty. Through a referendum process, enough votes were gathered to stay the repeal of the death penalty until the issue was placed on the ballot for the general election in November 2016.

Meanwhile, a psychiatrist opined in December 2015 that Jenkins was not competent. The court allowed further evaluation of Jenkins and received evidence during a June 2016 competency hearing. In September, the court found that Jenkins was competent to proceed with the sentencing phase. It subsequently rejected Jenkins' challenges to the death penalty.

In November 2016, the death penalty sentencing phase began. The three-judge panel unanimously found beyond a reasonable doubt the existence of six aggravating circumstances. It then proceeded with a hearing on mitigating circumstances. The panel received comprehensive evidence regarding, among other things, Jenkins' mental health and his time in solitary confinement.

In May 2017, the three-judge panel entered a 30-page sentencing order. The panel found no statutory mitigators existed. The panel found two nonstatutory mitigators to be considered in the weighing process: Jenkins' bad childhood and his mental health—that he had "a personality disorder of narcissistic, antisocial, and borderline."

The panel unanimously determined that the mitigating circumstances did not approach or exceed the weight given to the aggravating circumstances.

With regard to proportionality in comparison with other cases around the state, the panel stated that Jenkins' "commission of these four murders over a ten day period is one of the worst killing sprees in the history of this state." Thus, the panel found that sentences of death were not excessive or disproportionate to the penalty imposed in similar cases.

The panel imposed a sentence of death for each of the four counts of murder in the first degree. It imposed consecutive sentences of 45 to 50 years' imprisonment on all other counts. Because the sentences involved capital punishment, this automatic appeal followed.[1]

III. ASSIGNMENTS OF ERROR

Jenkins claims that the district court erred in accepting his pleas of no contest for two primary reasons: (1) He was not competent to enter them and (2) they lacked a factual basis or affirmative evidence of a valid waiver of trial rights.

He assigns that the court erred in finding him to be competent to proceed pro se and that his convictions and his sentences are constitutionally infirm, because they were the product of the trial court's erroneous determination that he was competent to proceed to trial and sentencing.

Jenkins makes several challenges concerning the death penalty. He assigns that the court erred in denying his motion to preclude the death penalty as a violation of the ex post facto prohibitions and in denying his motion to find Nebraska's statutory

[1] See Neb. Rev. Stat. § 29-2525 (Cum. Supp. 2018).

death penalty sentencing procedure is unconstitutional. Jenkins claims that the death penalty is cruel and unusual punishment when imposed upon seriously mentally ill offenders and individuals with intellectual disability. He further assigns that the death penalty in all cases violates the Eighth Amendment to the U.S. Constitution and Neb. Const. art. I, § 9.

Jenkins also alleges that the sentencing panel committed error. He assigns that the panel erred by sentencing him to death based on facts alleged during the plea proceeding. He also assigns that the panel erred by failing to give meaningful consideration to his mental illness, his unfulfilled requests for commitment before the crime, and the debilitating impact of solitary confinement.

Additionally, Jenkins filed a pro se brief. He argued that his counsel was ineffective by failing to bring Jenkins' attempted suicide to the attention of the court when it was contemplating Jenkins' competency. However, Jenkins failed to assign any error. An alleged error must be both specifically assigned and specifically argued in the brief of the party asserting the error to be considered by an appellate court[2]. Although we decline to resolve this alleged error, we note that during a hearing on competency, Jenkins' counsel asked one of the State's experts about Jenkins' suicide attempts and one of Jenkins' experts also discussed those attempts.

[2] *State v. Dill,* 300 Neb. 344, 913 N.W.2d 470 (2018).

IV. ANALYSIS

1. ACCEPTANCE OF PLEAS

Jenkins contends that the court abused its discretion in accepting his no contest pleas for a variety of reasons. He claims that he was not competent to enter pleas. In the same vein, he alleges that there was no affirmative evidence of a knowing, voluntary, and intelligent waiver of trial rights. Jenkins also argues that no factual basis existed for the pleas.

(a) Standard of Review

[1] The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[3]

[2, 3] A trial court is given discretion as to whether to accept a guilty or no contest plea, and an appellate court will overturn that decision only where there is an abuse of discretion.[4] A judicial abuse of discretion exists when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition.[5]

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[3] *Slate v. Fox,* 282 Neb. 957, 806 N.W.2d 883 (2011).

[4] See *State v. Clemens,* 300 Neb. 601, 915 N.W.2d 550 (2018).

[5] *Id.*

(b) Additional Background

(i) Competency

During a November 2013 hearing, the court received Dr. Bruce D. Gutnik's November 8 psychiatric diagnostic competence evaluation. Gutnik opined that Jenkins suffered from "Schizophrenia, Continuous, Severe." Gutnik noted that Jenkins had hallucinations and delusions and "blunted affect." Gutnik could not rule out "Schizoaffective or Other Specified Personality Disorder." Gutnik opined that Jenkins was not competent to stand trial, but that Jenkins' competence could be restored with appropriate treatment, including antipsychotic medications. The court ordered that Jenkins be evaluated for competence to stand trial by staff at the Lincoln Regional Center.

In February 2014, the court held a competency hearing. Psychiatrist Y. Scott Moore opined that Jenkins was competent for trial. He based that detennination on Jenkins' ability to understand three prongs: (1) awareness of the charges against him, (2) understanding of legal procedures and the functions of the people in the courtroom, and (3) ability to make a rational defense. Moore believed that Jenkins' primary diagnosis was antisocial personality disorder, that there was a "very slim" likelihood of Jenkins' having any other psychotic illness, and that Jenkins was mostly malingering.

Other evidence pointed to the contrary. Dr. Eugnene C. Oliveto performed a mental health evaluation on Jenkins 2 days prior to the hearing and arrived at an "Axis I" diagnosis of schizophrenia and posttraumatic stress disorder. In 2009, Dr. Natalie Baker had opined that Jenkins had psychosis

not otherwise specified and bipolar disorder—an opinion which Gutnik noted during the 2014 competency hearing. According to Gutnik, hallucinations and delusions are the two primary signs of psychosis and a review of Jenkins' records showed a history of hallucinations dating back to age 8. Thus, Gutnik testified that if Jenkins was malingering, he had been doing so since he was 8.

On February 20, 2014, the court found Jenkins competent to stand trial.

(ii) Plea Hearing

In April 2014, the court held a hearing on Jenkins' pro se motion to plead guilty to all felony counts. Several times during the hearing, Jenkins changed how he wished to plead. He ultimately entered no contest pleas to all charges.

Initially, Jenkins entered a guilty plea to each charge in case No. CR 13-2768 and a not guilty plea to both charges in case No. CR 13-2769. The court then advised Jenkins of the litany of constitutional rights he was giving up by entering guilty pleas. Jenkins interjected to ask whether the not guilty pleas would hinder anything, because he did not want "to be sitting in, you know, Douglas County, you know, eight months, 23-hour-a-day confinement, when I ain't did nothing." The court advised that a trial would be held on those charges. Jenkins stated that he understood the constitutional rights he would be waiving. He followed that by stating he had already filed a habeas corpus action in federal court.

The court recited the elements for all of the charges and advised Jenkins as to the penalties. Upon Jenkins' request, the court allowed him to plead no contest to the weapons charges in both

cases. Before the court accepted those pleas, Jenkins stated that he wished to submit crime scene photographs for the record.

When the court asked if the pleas of guilty and no contest were Jenkins' free and voluntary acts, Jenkins answered that they were voluntary but not free. He believed that judicial officers had been unethical and had violated his rights and that he saw "no other choice but to take these matters to another jurisdiction." The court then asked, "Are you freely, knowingly and voluntarily entering these pleas of guilty and no contest?" Jenkins answered, "Yes." Jenkins also stated that he understood he was giving up constitutional rights and waiving any motions pending now or in the future.

The court asked for a factual basis for all charges, and the prosecutor supplied a lengthy recitation. The prosecutor stated that on August 11, 2013, police were called to a location in Omaha, Nebraska, and found the bodies of Jorge Cajiga-Ruiz and Juan Uribe-Pena deceased in a pickup truck with their pockets "kind of turned inside out in their pants." The investigation revealed that the victims were lured by Jenkins' sister and cousin under the premise of performing acts of prostitution. Jenkins interjected, "I know you were gonna lie like this." The prosecutor stated that Jenkins shot the victims in the head with a shotgun loaded with a "deer slug." The victims were robbed with their billfolds taken. An autopsy showed that Cajiga-Ruiz died of a single gunshot wound to the head, which first passed through his right hand, and that Uribe-Pena died of a single gunshot wound to the head or face.

The prosecutor stated that on August 19, 2013, the police were called to "18th and Clark Streets" and observed Curtis Bradford with "obvious gunshot wounds to the head." Police found a deer slug, consistent with the deer slug used at the earlier homicides. The autopsy showed that Bradford had two gunshot wounds to the head and that the entrance was the back of the head. The prosecutor continued:

> In the course of the investigation by the Omaha Police Department, there were witnesses. A witness who was in a vehicle with . . . Jenkins[] and his sister . . . who had -- was upset with . . . Bradford, apparently.
>
> MR. JENKINS: He's lying. Liar.
>
> [Prosecutor]: They set up that they were going to do -- perform some sort of another act of either a robbery or a burglary, some kind of a jacking. They picked up . . . Bradford. He had gloves on, was dressed in a dark outfit. They let him hold a .9 millimeter Hi-Point Carbine rifle as they went to this location. Once they got to a location where he was murdered, at 1804 North 18th Street, [Jenkins' sister] shot him once in the head. And then . . . Jenkins said, this is how you do it, and -- and proceeded to use a shotgun with a deer slug --
>
> MR. JENKINS: Liar.
>
> [Prosecutor]: -- and shot . . . Bradford in the head also.

MR. JENKINS: Fucking liar.

The prosecutor stated that on August 21, 2013, as Andrea Kruger was driving home from work at approximately 1:30 or 2 a.m., she was stopped at "168th and Fort Street" by a vehicle occupied by Jenkins, his uncle, his sister, and his cousin. Jenkins got out of his vehicle and pulled Kruger from her vehicle, because he wanted her sport utility vehicle to "rob or jack other people." After Jenkins shot Kruger several times, he and his uncle took her vehicle. An autopsy showed that Kruger's cause of death was gunshot wounds to the head, neck, and back.

According to the prosecutor, police obtained a search warrant for a bag that Jenkins carried into an apartment. The bag contained a "Remington Model Express Magnum Pump 12-gauge shotgun with a cut barrel and butt stock and a Hi-Point Carbine Model 995 rifle." Spent shell casings recovered from the Kruger murder scene were determined to have been fired by the Hi-Point carbine that was found in the bag. That same carbine had Bradford's DNA on it. Ballistics evidence showed that the spent rifle slug from the Bradford crime scene was fired from the shotgun recovered from the bag. During an interview with Omaha police officers, Jenkins said he fired the weapons and killed the four victims. Police also obtained video from businesses located at 168th and Fort Streets which showed Jenkins and his uncle in the area around the time of Kruger's murder. Further corroboration came from Jenkins' cousin, who was present at the first and last murders, and from one of Jenkins' sisters concerning Bradford's murder. For purposes of the factual basis, the court received a certified copy of a felony conviction for Jenkins.

Jenkins disputed the accuracy of the factual basis. He explained that while his "physical person may have been in the act of these things [he] was not in that moment because of [his] psychosis condition of psychotic mania . . . and manic episode that [he] was within." Jenkins stated that he heard the voice of "Apophis" prior to the crimes. The court inquired whether Jenkins understood that entry of a guilty plea waived the right to enter a plea of not guilty by reason of insanity. Jenkins responded that he understood. He asserted that Apophis ordered him to sacrifice the victims. The court asked if Jenkins purposely and with deliberate and premeditated malice killed Cajiga-Ruiz. Jenkins answered: "[T]he last thing I could remember was I'm in a car. The next thing I know I'm in front of this truck and I'm in front of these individuals. It wasn't premeditated. The demonic force led me to them just like to the other victims." He stated, "I don't recall in the moment of shooting them." Similarly, when asked if he remembered killing Bradford, Jenkins answered that he remembered being with Bradford and hearing Apophis. With regard to Kruger's murder, Jenkins recalled seeing a vehicle pull up behind his, hearing Apophis, and getting out of his vehicle.

The court expressed concern about accepting the guilty pleas due to Jenkins' disagreement with the factual basis. The court stated that it would accept a no contest plea to all of the charges, to which Jenkins agreed. After Jenkins entered pleas of no contest to all counts, he then asked if the court was going to accept crime scene photographs for purpose of his appeals. The court advised that it did not need to receive any evidence at that time. It then accepted the factual basis by the State and found Jenkins

guilty of the charges.

(c) Discussion

(i) Competency

[4, 5] The first hurdle is whether Jenkins was competent to plead no contest. A person is competent to plead or stand trial if he or she has the capacity to understand the nature and object of the proceedings against him or her, to comprehend his or her own condition in reference to such proceedings, and to make a rational defense.[6] The competency standard includes both (1) whether the defendant has a rational as well as factual understanding of the proceedings against him or her and (2) whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding.[7]

In finding Jenkins competent, the court considered the evidence received at the competency hearing along with its colloquy with Jenkins during that hearing. Although the experts disagreed, there was expert testimony that Jenkins was competent. The court reasoned that its colloquy with Jenkins showed that he could "comprehend his rights, convey his reasons why he believed his rights had and were being violated, and to follow the request of the Court as to the timeliness of submitting his grievances."

The court's interactions with Jenkins are important. At the time of the court's competency determination, it had observed Jenkins on a number

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[6] *State v. Haynes*, 299 Neb. 249, 908 N.W.2d 40 (20I 8), *disapproved on other grounds, State v. Allen*, 301 Neb. 560, 919 N.W.2d 500.

[7] See *State v. Fox, supra* note 3.

of occasions. The U.S. Supreme Court has recognized that "the trial judge, particularly one . . .who presided over [a defendant's] competency hearings . . . , will often prove best able to make more fine-tuned mental capacity decisions, tailored to the individualized circumstances of a particular defendant."[8]

Here, the court based its competency determination on expert testimony and its own discussion with Jenkins. Sufficient evidence supports the court's determination of competency; therefore, we will not disturb it.

(ii) Validity of Pleas

[6, 7] In considering the validity of Jenkins' pleas, we recall well-known principles. A plea of no contest is equivalent to a plea of guilty.[9] To support a finding that a plea of guilty or no contest has been entered freely, intelligently, voluntarily, and understandingly, a court must inform a defendant concerning (1) the nature of the charge, (2) the right to assistance of counsel, (3) the right to confront witnesses against the defendant, (4) the right to a jury trial, and (5) the privilege against self-incrimination.[10] To support a plea of guilty or no contest, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime with which he or she is charged.[11]

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[8] *Indiana v. Edwards*, 554 U.S. 164, 177, 128 S. Ct. 2379, 171 L. Ed. 2d 345 (2008).

[9] *State v. Wilkonson*, 293 Neb. 876, 881 N.W.2d 850 (2016).

[10] See *State v. Ortega*, 290 Neb. 172, 859 N.W.2d 305 (2015).

[11] *State v. Wilkinson, supra* note 9.

[8, 9] A sufficient factual basis is a requirement for finding that a plea was entered into understandingly and voluntarily.[12] Jenkins contends that his pleas lacked a factual basis, because he disagreed with the prosecutor's version of the facts. But a plea of no contest does not admit the allegations of the charge; instead, it merely declares that the defendant does not choose to defend.[13] Such a plea means that the defendant is not contesting the *charge*.[14] We find no requirement that a defendant agree with the factual basis. If the State presents sufficient facts to support the elements of the crime charged and the defendant chooses not to defend the charge, no more is required. We conclude that the State supplied a sufficient factual basis.

Jenkins' other challenges to his pleas are likewise unpersuasive .He argues that the record demonstrated he did not make a knowing, voluntary, and intelligent waiver of his rights. He further contends that his pleas were the product of psychologically coercive conditions of solitary confinement.

The record supports a finding that Jenkins entered valid pleas. The bill of exceptions shows that the court informed Jenkins of the rights he would be waiving by entering a guilty or no contest plea and that Jenkins responded he understood. We agree that some of Jenkins' statements can be read to show confusion. But the court, having interacted with

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[12] *Id.*

[13] See 21 Am. Jur. 2d *Criminal Law* § 645 (2016).

[14] See *In re Interest of Verle O.*, 13 Neb. App. 256, 691 N.W .2d 177 (2005).

Jenkins on numerous occasions by the time of the plea hearing, was in the best position to assess the validity of his waiver of trial rights. Further, the court held a competency hearing before accepting Jenkins' pleas and, with the benefit of expert evidence, found Jenkins competent. We cannot say that the court abused its discretion in accepting Jenkins' pleas of no contest.

2. WAIVER OF COUNSEL

Jenkins claims that the court committed reversible error when it allowed him to proceed pro se. He contends that the court failed to adequately advise him of the pitfalls of pro se representation.

(a) Standard of Review

[10] The question of competency to represent oneself at trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[15]

[11] In determining whether a defendant's waiver of counsel was voluntary, knowing, and intelligent, an appellate court applies a "clearly erroneous" standard of review.[16]

(b) Additional Background

Less than 1 month after the court found Jenkins competent to stand trial, it held a hearing on Jenkins' request to dismiss his counsel and to

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[15] *State v. Lewis*, 280 Neb.246, 785 N.W.2d 834 (2010).

[16] *State v. Hessler*, 274 Neb. 478, 741 N.W.2d 406 (2007).

proceed pro se. The court told Jenkins that the charges he faced were "extremely serious," that representing himself would be "extremely difficult," that Jenkins' counsel was "probably one of the best defense attorneys in this entire area," and that Jenkins was "placing [his] defense at risk" if he did not want counsel to represent him.

The court found that Jenkins voluntarily, knowingly, and intelligently waived his right to counsel. It granted Jenkins' motion to represent himself and appointed the public defender's office to provide an attorney to advise Jenkins.

(c) Discussion

[12] A criminal defendant has a constitutional right to waive the assistance of counsel and conduct his or her own defense under the Sixth Amendment and Neb. Const. art. I, § 11.[17] However, a criminal defendant's right to conduct his or her own defense is not violated when the court determines that a defendant competent to stand trial nevertheless suffers from severe mental illness to the point where he or she is not competent to conduct trial proceedings without counsel.[18] The two-part inquiry into whether a court should accept a defendant's waiver of counsel is, first, a determination that the defendant is competent to waive counsel and, second, a determination that the waiver is knowing, intelligent, and voluntary.[19]

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[17] *State v. Ely*, 295 Neb. 607, 889 N.W.2d 377 (2017).

[18] *State v. Lewis, supra* note 15.

[19] See *State v. Hessler, supra* note 16.

(i) Competency

[13] The standard for determining whether a defendant is competent to waive counsel is the same as the standard for determining whether a defendant is competent to stand trial.[20] Here, the court accepted Jenkins' waiver of counsel less than 1 month after finding that Jenkins was competent to stand trial—a determination that we have concluded was supported by sufficient evidence. And unlike in *State v. Lewis*,[21] where the record showed that the defendant suffered from severe mental illness, the court here did not find that Jenkins was impaired by a serious mental illness or lacked mental competency to conduct trial proceedings by himself.

[14] We are mindful that the competency question is not whether a defendant can ably represent himself or herself. "(T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself."[22] Indeed, "a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation."[23] The court recognized during the hearing that it had declared Jenkins competent to stand trial, and sufficient evidence supports that finding. Thus, Jenkins was also competent to waive his right to counsel.

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[20] *Id.*

[21] *State v. Lewis, supra* note 15.

[22] *Godinez v. Moran*, 509 U.S. 389, 399, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (emphasis in original).

[23] *Id.*, 509 U.S. at 400 (emphasis in original).

(ii) Validity of Waiver

[15, 16] In order to waive the constitutional right to counsel, the waiver must be made knowingly, voluntarily, and intelligently.[24] When a criminal defendant has waived the right to counsel, this court reviews the record to determine whether under the totality of the circumstances, the defendant was sufficiently aware of his or her right to counsel and the possible consequences of his or her decision to forgo the aid of counsel.[25] Formal warnings do not have to be given by the trial court to establish a knowing, voluntary, and intelligent waiver of the right to counsel.[26] In other words, a formalistic litany is not required to show such a waiver was knowingly and intelligently made.[27]

Jenkins' waiver of counsel was voluntary. Like in *State v. Dunster*,[28] no promises or threats were made to encourage the waiver of the right to counsel and the defendant prepared his own written motion to discharge counsel. Moreover, the decision to discharge counsel and proceed pro se was not forced upon Jenkins; rather, Jenkins wished to handle matters in a particular way and was dissatisfied with his counsel's failure to file certain motions that counsel believed to be frivolous.

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[24] *Stale v. Ely, supra* note 17.

[25] *Stale v. Hessler, supra* note 16.

[26] *Stale v. Figeroa*, 278 Neb. 98, 767 N.W.2d 775 (2009), *overruled in part on other grounds, State v. Thalken*, 299 Neb.857, 911 N.W.2d 562 (2018).

[27] *Id.*

[28] *State v. Dunster*, 262 Neb. 329, 631 N.W.2d 879 (2001).

[17] The record shows that Jenkins knowingly and intelligently waived his right to counsel. A knowing and intelligent waiver can be inferred from conduct, and consideration may be given to a defendant's familiarity with the criminal justice system.[29] Jenkins, as a convicted felon at the time of the instant charges, had prior involvement with the criminal justice system. And counsel represented Jenkins in proceedings leading up to the hearing on Jenkins' motion to discharge counsel. The fact that Jenkins was represented during earlier proceedings indicates that he was aware of his right to counsel and that he knew what he would forgo if he waived counsel.[30] The court warned Jenkins that it would be difficult to represent himself. But a waiver of counsel need not be prudent, just knowing and intelligent.[31]

The court's determination that Jenkins' waiver of counsel was voluntary, knowing, and intelligent was not clearly erroneous. Jenkins knew that he had the right to legal counsel and that he faced potential sentences of death. Further, the court appointed Jenkins' prior counsel to provide advice.

3. COMPETENCY TO PROCEED TO SENTENCING

Jenkins claims that his convictions and sentences are constitutionally infirm as the product of the trial court's erroneous determination that he was competent to proceed to trial and sentencing.

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[29] See *State v. Wilson*, 252 Neb. 637, 564 N.W.2d 241 (1997).

[30] See *Stale v. Hessler, supra* note 16.

[31] *State v. Ely, supra* note 17.

(a) Standard of Review

The question of competency to stand trial is one of fact to be determined by the court, and the means employed in resolving the question are discretionary with the court. The trial court's determination of competency will not be disturbed unless there is insufficient evidence to support the finding.[32]

(b) Additional Background

Above, we summarized evidence as to Jenkins' competency prior to entry of his pleas.

The court also held several postplea competency hearings, which we discuss next.

(i) July 2014

In July 2014, the court held a hearing on Jenkins' competency to proceed with the death penalty phase. Gutnik, who evaluated Jenkins on four occasions over a number of years, testified that he looks at consistency over time in determining whether a person is accurately relating auditory and visual hallucinations. Gutnik testified that Jenkins consistently spoke about seeing various Egyptian gods and about hearing the voice of an Egyptian god. Gutnik stated that records from psychiatrists when Jenkins was 8 years old mentioned auditory and visual hallucinations. Gutnik noted that symptoms had been reported on multiple occasions unrelated to legal issues, and he questioned what a person's motivation would be to say he or she was hearing things when there was no secondary gain involved. Gutnik observed that Jenkins had a long history of

[32] *State v. Fox, supra* note 3.

self-mutilation, some of it having to do with delusional beliefs about emissaries from Egyptian folklore and some of it coming from his mood swings.

Gutnik opined that Jenkins was incompetent to "stand trial." Although Jenkins understood that he had an attorney and that a judge would be present during the death penalty phase, Gutnik testified that Jenkins did not understand that he had been convicted. Gutnik did not believe that Jenkins had "the ability to meet the stress of a real trial without his rationality or judgment breaking down." Gutnik testified that Jenkins could "probably" be restored to competency, but that he would need to be in a hospital and treated with medications.

Dr. Jane Dahlke, a psychiatrist who evaluated Jenkins when he was 8 years old, testified that he was hospitalized for 11 days. Jenkins' mother brought him to the hospital due to statements of self-harm and increasing aggression toward others. Dahlke diagnosed him with oppositional defiant disorder and attention deficit hyperactive disorder. At that time, the field of psychiatry was not diagnosing 8-year-old children with bipolar disorder. But based on the records of her observations, Dahlke now would have diagnosed Jenkins with some form of childhood bipolar disorder. She noted in her records that Jenkins talked about hearing voices that would tell him to steal and had nightmares about his father shooting his mother. He reported auditory hallucinations and seeing "black spirits." Because Dahlke did not see any reason for Jenkins to feign mental illness or to have any secondary gain for doing so, she felt that Jenkins was experiencing what he reported.

Moore differed, testifying that he believed Jenkins was competent to proceed to sentencing. He had evaluated Jenkins three times, most recently a month earlier. In Moore's experience with schizophrenics, those hearing voices "block off" and/or "look to the side" and are unable to continue giving attention to Moore. But Jenkins differed; he said he heard voices all of the time, and at no point during the evaluation was Jenkins distracted. Moore thought that all the symptoms Jenkins reported were fabricated. Moore believed that Jenkins had been malingering all along, including when he was 8 years old, and using fanciful stories to try to explain his behavior and not be held accountable for it. Moore opined that a person can be psychotic and competent at the same time. He explained: "A person who is psychotic can understand all of the procedures against him. He may disagree with them, but he understands them and can work up a defense with his attorney."

Baker first encountered Jenkins in 2009 and last saw him in February 2013. She did not examine Jenkins for the purpose of determining whether he was competent. She noted psychotic symptoms, such as Jenkins' reports of being paranoid and of auditory hallucinations where he heard a voice that he called Apophis. In a December 2009 note, Baker stated that Jenkins appeared to be attempting to use mental health symptoms for secondary gain, including to avoid legal consequences in court for recent behaviors. Baker opined in February 2013 that Jenkins appeared to be mentally ill and was an imminent danger to others.

Dr. Klaus Hartmann, a forensic psychiatrist, first met Jenkins during a June 2014 evaluation. He

opined that Jenkins was competent to proceed to sentencing. Hartmann did not believe that Jenkins had a major mental disorder; rather, Hartmann felt that Jenkins had a personality disorder which accounted for his symptoms.

Hartmann also thought that many of Jenkins' symptoms appeared contrived. He testified that they were "a caricature of mental illness rather than a real mental illness," that Jenkins overelaborated, and that Jenkins "produces additional symptoms that just simply are not in keeping with my experience." Hartmann found it unusual that Jenkins "parades his mental illness," when most people with mental illness do not come forward to say they are sick. According to Hartmann, most people who are psychotic do not understand that they are psychotic, which is part of having lost touch with reality. He remarked that although Jenkins would say he had no memory of events, in further questioning, Jenkins understood and remembered clearly some of the matters.

Dr. Martin W. Wetzel saw Jenkins for a psychiatric consultation in March 2013. According to his report, Jenkins expressed bizarre auditory hallucinations that "did not appear to be consistent with typical symptoms of a psychotic disorder." Wetzel's assessment was "Bipolar Disorder NOS, Probable"; "PTSD, Probable"; "Antisocial and Narcissistic PD Traits"; and "Polysubstance Dependence in a Controlled Environment." The report stated: "The patient has an unusual list of demands, the first of which has been placement in a psychiatric hospital. This could be related to a singular motive or a combination of motives, including malingering and/or a sense of disease."

Following the July 2014 hearing, the court found that Jenkins was not competent to proceed with sentencing.

(ii) February and March 2015

In February 2015, the court held a status hearing regarding Jenkins' competency. Jenkins informed the court that he had been stable the past 6 months and was competent to proceed.

The court received a 31-page report submitted by Jennifer Cimpl Bohn, a clinical psychologist; Rajeev Chaturvedi, a psychiatrist; and Mario J. Scalora, a consulting clinical psychologist. The report detailed observations from Lincoln Regional Center sessions and a discussion of current competency-related abilities. They opined that Jenkins was competent to proceed with sentencing, that he demonstrated an adequate factual understanding of the proceedings, and that he demonstrated the ability to rationally apply such knowledge to his own case. Their diagnosis was "Other Specified Personality Disorder (e.g., Mixed Personality Features-Antisocial, Narcissistic, and Borderline)," malingering, polysubstance dependence, and a history of posttraumatic stress disorder.

The report contained extensive background information. It included a discussion that Jenkins' hearing voices at a young age may have actually been the voices of children with Jenkins and that his sleeping difficulties and nightmares related to violent events he had witnessed. The report noted that a February 2012 record from a "Mental Illness Review Team" indicated that Jenkins "referred to his presentation of symptoms as a 'skit' in conversations with his mother and girlfriend." A record 2 months

later revealed that after Jenkins broke a fire suppression sprinkler and flooded a section of the unit, staff reported that Jenkins said "'he would continue to act insane until he got the mental health treatment he was entitled to" and that actions such as breaking sprinkler heads and smearing feces "'would get immediate response[s] from mental health. He stated he was a smart man and knew how to get the responses from mental health so he could get the treatment he needed.'" The report contrasted letters written by Jenkins on the same day in 2012: Several of the letters were written in a pyramid design, with comments about schizophrenia and Egyptian gods and goddesses, and the need for emergency hearings; whereas a different letter was written in typical form with a clear request for a copy of Jenkins' records.

The report documented instances in which Jenkins appeared to use symptoms of mental illness for secondary gain. In January 2013, Jenkins obtained access to restricted property after he stated that Apophis wanted him to harm himself. After cutting himself, Jenkins refused to have sutures removed if his restrictive status was not decreased. According to a mental health contact note, Jenkins said he "could ignore Apophis if allowed access to ear buds or paper in his room." In February, Jenkins broke another fire suppression sprinkler in his room and staff reported that Jenkins said he was hearing voices and would break another sprinkler head if put back in the same cell.

According to the report, a psychiatrist indicated in April 2013 that Jenkins "appeared to be 'performing.'" The psychiatrist mentioned that Jenkins told his mother he "was 'going to try to get a

psychiatric diagnosis so he could get paid,' seemingly in reference to obtaining disability benefits." That psychiatrist diagnosed Jenkins with "'Antisocial Personality with narcissistic features vs. Narcissistic Personality with antisocial features.'"

The report noted that Jenkins had requested on numerous occasions to be diagnosed with schizoaffective disorder. When challenged that such requests suggested that Jenkins was "more interested in the prescription and diagnosis being documented, as opposed to actually receiving treatment for mental health problems," Jenkins "generally changed the topic or grinned and remained silent." According to the report, Jenkins had remarked that asking for certain medications in the past "resulted in him obtaining diagnoses that he perceives as favorable for his legal strategies."

The report stated that Jenkins had an "inflated view of himself consistent with narcissistic traits." It elaborated:

> Jenkins repeatedly made statements about being a "mastermind," "strategist," "chess player," and engaging in "psychological warfare," in reference to the legal proceedings and his assertions that he will be able to have governmental agencies held liable for his actions by stating certain things (e.g., that he needs treatment in a different placement), obtaining a documentation trail, and then exhibiting certain behaviors (e.g., self-harm). When describing his actions to have others held liable for his actions,

> he demonstrated significant forethought, outlining how he strategizes to achieve his goals, and that the fruits of his labor have been realized by [the Department of Correctional Services'] being criticized for their actions.

Jenkins also made repeated comments about not wanting to be found competent. The report explained:

> He described how it was his intent to be found competent for trial because he wanted to enter a guilty plea so he would have grounds to appeal later on, but wanted to be found incompetent after the conviction, and as a result, behaved in such a way to achieve that goal. In a similar manner, . . . Jenkins repeatedly highlighted how being diagnosed with a mental illness by Drs. Baker, Oliveto, and Gutnik has benefitted him, and sought to pressure [Lincoln Regional Center] personnel into providing a similar diagnosis by stating that those were "medical doctors" with many years of experience. While he repeatedly asserted suffering from "severe" mental illness . . . Jenkins never appeared bothered by the symptoms. At times, [he] became confrontational and intimidating. There was no indication of psychotic process throughout these discussions, and he sporadically, almost as an afterthought, would assert that he heard auditory

> hallucinations and suffered from delusions (e.g., reference to returning to his cell to "bask in [his] insanities," or that he would go to his cell to converse with "the spiritual realm").

In August 2014, Jenkins was administered a test to assess his self-report of symptoms. The results showed "a pattern of markedly elevated sub-scores that is strongly characteristic of an individual feigning a mental disorder." The test contained eight primary scales, and Jenkins' scores were in the "definite feigning range" on four scales, in the "probable feigning range" on three scales, and in the "indeterminate range" on one scale.

The report stated that Jenkins had been inconsistent in his report of psychotic symptoms. Although records suggested that Jenkins reported hallucinatory experiences as a child, providers at the facility where Jenkins was hospitalized "characterized those symptoms as reactions to traumatic experiences (i.e., nightmares) or real experiences (i.e., older boys who instructed him to steal)." According to the report, "The lack of further report of such symptoms until over a decade later provides credence to that initial conceptualization of those symptoms." The report stated that Jenkins' self-report as an adult "has been inconsistent over time, with the exception of a common theme of hearing the voices of Apophis and other gods/demons in the last few years." The report provided several reasons, which we do not detail here, why Jenkins' assertions that he "always" heard those voices since childhood lacked credibility.

In March 2015, the court found that Jenkins was competent to proceed with the death penalty phase.

(iii) December 2015

In December 2015, shortly after Gutnik evaluated Jenkins and opined that he was not competent, the court held a hearing. Gutnik believed that Jenkins was deteriorating over time due to being kept in isolation. Upon the State's motion, the court stated that it would allow doctors from the Lincoln Regional Center to evaluate Jenkins.

(iv) June 2016

The court next held a competency hearing in June 2016. By that time, Cimpl Bohn, Chaturvedi, and Scalora had jointly evaluated Jenkins beginning in January 2016 and continuing until their report was authored on May 10. The team saw Jenkins once in January, March, and April.

Cimpl Bohn opined that Jenkins had "a significant severe personality disorder marked by antisocial, narcissistic and borderline traits." She believed that Jenkins was malingering other psychiatric symptoms. Cimpl Bohn testified that Jenkins' presentation of psychotic symptoms and his self-report of such symptoms was not validated by behavioral observations or record review. With regard to malingering, Cimpl Bohn testified that Jenkins' self-harming clearly had a secondary gain component. And psychological testing helped confirm the malingering diagnosis. Cimpl Bohn testified that a person can have a mental illness and still be malingering, but she felt that Jenkins suffered from a severe personality disorder and not from a psychotic disorder or a major affective mood disorder.

Cimpl Bohn testified that in "short bursts," Gutnik could have mistaken Jenkins' bizarre and dramatic behavior for a type of mental illness. She felt that the psychiatrist who offered a diagnosis of schizoaffective disorder in July 2015 "seemed to be struck by some of the dramatic nature of . . . Jenkins' statements about auditory hallucinations." She noted that the psychiatrist's record reflected that Jenkins' thought process was organized and logical, that his speech was generally normal and understandable, and that he was coherent. Cimpl Bohn testified that if the diagnosis was schizoaffective disorder or schizophrenia, one would expect to see some disorganization of the thought process and not just reported hallucinations or delusions. She noted that the psychiatrist's notes raised concerns about malingering or secondary gain and suspicion that Jenkins was self-harming to get out of segregation.

Cimpl Bohn opined that Jenkins was competent to proceed. In making that determination, she considered whether Jenkins possessed a factual understanding of the legal system and legal proceedings, an ability to apply that to the individual's own case, and a rational ability to consult with counsel. Cimpl Bohn felt that Jenkins would struggle with developing rapport with counsel, because his narcissism was a significant barrier. She opined that Jenkins' difficulties in working with counsel stemmed from a personality disorder. She explained that Jenkins believed he was "smarter than anybody in the room" and that any strategy was going to be flawed if it was not Jenkins' own.

Gutnik recounted his interactions with Jenkins. He first saw Jenkins in March 2011. When he next saw Jenkins in November 2013, Gutnik

concluded that Jenkins was not competent and diagnosed him with "schizophrenia versus schizoaffective disorder, depressed type, and rule out personality disorder otherwise not specified." When Gutnik saw Jenkins in May 2014 and April and December 2015, Gutnik concluded that Jenkins remained psychotic with the same diagnoses. Gutnik saw Jenkins in June 2016 and found that Jenkins continued to have schizoaffective disorder.

Gutnik testified that Jenkins' multiple mutilations of his own penis would be an indication of severe mental illness. He thought a person would "have to be fairly out of touch and psychotic to be able to not react to that level of pain." Gutnik noted that four other psychiatrists thought Jenkins was psychotic and that Jenkins' delusions about Egyptian gods dated back to 2009—before the crimes at issue. Gutnik did not believe that Jenkins was malingering, because "he has been consistently psychotic every time that I've seen him."

On September 20, 2016, the court entered an order on Jenkins' motion to determine whether he was competent to proceed with the sentencing phase. The court recognized the competing opinions of Gutnik and Cimpl Bohn. It stated that Gutnik saw Jenkins on a limited basis, whereas Cimpl Bohn and her staff had regular communication with Jenkins. The court also found it significant that during Jenkins' testimony at the May 2016 competency hearing, Jenkins ably followed the questions of his attorney and supplied appropriate answers. The court accepted the opinion of Cimpl Bohn and found that Jenkins was competent to proceed with the sentencing phase.

(c) Discussion

We begin by addressing what would at first blush appear to be inconsistent decisions regarding Jenkins' competence. In February 2014, the court found Jenkins competent to stand trial. Subsequently, it allowed Jenkins to waive his right to counsel, to enter pleas of no contest, and to waive his right to have a jury determine whether aggravating circumstances existed. Then, in July, the court found that Jenkins was not competent to proceed with sentencing. From the timing of events, it would appear that the court's reversal was precipitated by its reappointment of counsel and counsel's motion to determine whether Jenkins was competent.

The court's order reflects that it found Jenkins to be not competent only out of an abundance of caution. Its order contained the following quote: "'If at any time while criminal proceedings are pending facts are brought to the attention of the court, either from its own observation or from suggestion of counsel, which raise a doubt as to the sanity of the defendant, the question should be settled before further steps are taken.'"[33] The court explained: "This Court must be satisfied that [Jenkins] is competent to proceed with the sentencing phase of a death penalty case. The fact that this is a death penalty case heightens the concern and consideration of this Court." The court prudently allowed a lengthy evaluation process to occur, and in September 2016, the court found that Jenkins was competent to proceed with sentencing.

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[33] *State v. Campbell*, 192 Neb. 629, 631, 223 N.W .2d 662, 663 (1974).

The record shows that the court received conflicting expert evidence throughout the proceedings as to Jenkins' competency. The court also had abundant opportunities to interact with and observe Jenkins. Ultimately, the court accepted Cimpl Bohn's opinion that Jenkins was competent. Sufficient evidence in the record supports the court's determination; therefore, we will not disturb the court's finding of competency.

4. EX POST FACTO CHALLENGE

Jenkins contends that the court erred by denying his motion to preclude the death penalty as a violation of the Ex Post Facto Clauses of the U.S. and Nebraska Constitutions.[34] We disagree.

(a) Standard of Review

[18] The constitutionality of a statute presents a question of law, which an appellate court independently reviews.[35]

(b) Additional Background

In May 2015, the Nebraska Legislature passed 2015 Neb. Laws, L.B. 268,-which abolished the death penalty in Nebraska--and then overrode the Governor's veto of the bill. The Legislature adjourned sine die on May 29. Because L.B. 268 did not contain an emergency clause, it was to take effect on August 30.[36]

Following the passage of L.B. 268, opponents of the bill sponsored a referendum petition to repeal

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[34] U.S. Const. art. I, § I 0, and Neb. Const. art. I, § 16.

[35] *State v. Stone*, 298 Neb. 53, 902 N.W.2d 197 (2017).

[36] See Neb. Const. art. Ill, § 27.

it. On August 26, 2015, the opponents filed with the Nebraska Secretary of State signatures of approximately 166,000 Nebraskans in support of the referendum. On October 16, the Secretary of State certified the validity of sufficient signatures. Enough signatures were verified to suspend the operation of L.B. 268 until the referendum was approved or rejected by the electors at the upcoming election. During the November 2016 election, the referendum passed and L.B. 268 was repealed, that is, in the language of the constitution, the act of the Legislature was "reject[ed]."[37]

(c) Discussion

Jenkins' ex post facto argument focuses on his uncertainty as to whether the repeal of the death penalty was in effect for a period of time. We first explain that there is technically no ex post facto violation for Jenkins, then we resolve the issue presented by Jenkins under what we sometimes refer to as the "*Randolph* doctrine."[38]

[19-21] An ex post facto law is a law which purports to apply to events that occurred before the law's enactment and which disadvantages a defendant by creating or enhancing penalties that did not exist when the offense was committed.[39] There are four types of ex post facto laws: those which (1) punish as a crime an act previously committed which was innocent when done; (2) aggravate a crime, or make it greater than it was, when committed; (3) change the punishment and

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[37] See Neb. Const. art. III, § 3.

[38] See *State v. Randolph*, 186 Neb. 297, 183 N.W .2d 225 (1971).

[39] See *State v. Amaya*, 298 Neb. 70, 902 N.W.2d 675 (2017).

inflict a greater punishment than was imposed when the crime was committed; and (4) alter the legal rules of evidence such that less or different evidence is needed in order to convict the offender.[40] The Ex Post Facto Clause "bars only application of a Jaw that "'changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'"'[41] The clause's underlying purpose is to "assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[42]

Here, the death penalty was in effect at the time of Jenkins' crimes in 2013. It was also in effect at the time that Jenkins was sentenced. Because the repeal of the repeal of the death penalty did not inflict a greater punishment than that available when Jenkins committed the crimes, there is no ex post facto law.

[22] But Jenkins also claims that under *State v. Randolph*,[43] a defendant is entitled to take advantage of any reduction in penalties before final disposition. Under the *Randolph* doctrine, generally, when the Legislature amends a criminal statute by mitigating the punishment after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature specifically provided otherwise.[44]

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[40] *Id.*

[41] *State v. Kantaras*, 294 Neb. 960, 972, 885 N.W.2d 558, 567 (2016).

[42] *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[43] *State v. Randolph. supra* note 38.

[44] *State v. Chacon*, 296 Neb.203, 894 N .W.2d 238 (2017).

This contention presupposes that L.B. 268 became operative. Jenkins contends that it took effect on August 30, 2015, and remained in effect until October 16, when the Secretary of State confirmed the validity and number of signatures. On the other hand, the State argues that the bill never went into effect, because its operation was suspended by the referendum petition until approved by Nebraska voters. We agree with the State.

We pause to discuss the referendum process provided for in the Nebraska Constitution.[45] As pertinent here, petitions invoking the referendum must be signed by not less than 5 percent of Nebraska's registered voters and filed in the Secretary of State's office within 90 days after the Legislature which passed the bill adjourned sine die.[46] "Upon the receipt of the petitions, the Secretary of State, with the aid and assistance of the election commissioner or county clerk, shall determine the validity and sufficiency of signatures on the pages of the filed petition."[47] The Secretary of State must total the valid signatures and determine whether constitutional and statutory requirements have been met.[48] With two exceptions not applicable here, an act is suspended from taking effect prior to a referendum election when the referendum petition is signed by at least 10 percent of the state's registered voters.[49]

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[45] See Neb. Const. art. III, § 3.

[46] See *id.*

[47] Neb. Rev. Stat. § 32 1409(1) (Reissue 2016).

[48] § 32 1409(3).

[49] See, Neb. Const. art. III, § 3; *Pony Lake Sch. Dist. v. State*

We reject the notion that signatures must be verified and certified before the act's operation will be suspended. An earlier case implicitly determined that this notion is not correct.[50] That case presented the following pertinent timeline of events in 1965:

- July l: The legislative bill at issue became law.
- August 17: The Legislature adjourned sine dine.
- September 29: A referendum petition and affidavit as to persons contributing things of value in connection with the petition were filed.
- November 15: Additional certificates and a supplemental statement were filed in connection with the petition.
- December 13: The Secretary of State certified that valid signatures of more than 10 percent of electors had been filed.

Our decision noted that there were sufficient signatures to suspend the act from taking effect; there was no suggestion that the act went into effect on November 17 (3 calendar months after adjournment) and remained in effect until December 13 (when the Secretary of State certified that the petition contained signatures of more than the 10-percent requirement).

Committee for Reorg., 271 Neb. 173, 710 N.W.2d 609 (2006).

[50] *Klosterman v. Marsh*, 180 Neb. 506, 143 N.W.2d 744 (1966).

[23] Jenkins' notion conflicts with several fundamental principles. The power of referendum must be liberally construed to promote the democratic process.[51] The power is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter.[52] The constitutional provisions with respect to the right of referendum reserved to the people should be construed to make effective the powers reserved.[53] Stated another way, the provisions authorizing the referendum should be construed in such a manner that the legislative power reserved in the people is effectual.[54] The right of referendum should not be circumscribed by narrow and strict interpretation of the statutes pertaining to its exercise.[55]

Jenkins' contention—that suspension cannot occur until a sufficient number of signatures are certified—would make ineffectual the people's power to suspend an act's operation. Whether an act went into effect, and for how long, would depend upon how quickly the Secretary of State and election officials counted and verified signatures. Jenkins' argument demonstrates the absurdity of such a view. Because the Secretary of State was unable to confirm that a sufficient number of voters signed the petitions until October 16, 2015, Jenkins contends that L.B. 268

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[51] See *Hargesheimer v. Gale*, 294 Neb. 123, 881 N.W .2d 589 (2016).

[52] See *id.*

[53] See *Pony Lake Sch. Dist. v. State Committee for Reorg., supra* note 49.

[54] See *id.*

[55] See *Hargesheimer v. Gale, supra* note 51.

went into effect on August 30, thereby changing all death sentences to life imprisonment and changing the status of any defendant facing a potential death sentence to a defendant facing a maximum sentence of life imprisonment. Such an interpretation would defeat the purpose of this referendum--to preserve the death penalty. Our constitution demands that the power of referendum not be impaired by ministerial tasks appurtenant to the process. Having produced the signatures necessary to suspend the act's operation, the people were entitled to implementation of their will.

[24] We conclude that upon the filing of a referendum petition appearing to have a sufficient number of signatures, operation of the legislative act is suspended so long as the verification and certification process ultimately determines that the petition had the required number of valid signatures. And Jenkins did not dispute either the sufficiency of the signatures or the outcome of the referendum election. Accordingly, the filing of petitions on August 26, 2015—prior to the effective date of L.B. 268—suspended its operation until Nebraskans effectively rejected the bill by voting to repeal it. Because L.B. 268 never went into effect, the Randolph doctrine has no application.

5. CONSTITUTIONALITY OF DEATH PENALTY PROCEDURE

Jenkins argues that Nebraska's death penalty scheme violates the 6th and 14th Amendments to the U.S. Constitution and Neb. Const. art. I, §§ 3 and 6. He contends that Nebraska's statutory procedure is unconstitutional because, he asserts, it does not require a jury to find each fact necessary to impose a

sentence of death.

(a) Standard of Review

The constitutionality of a statute presents a question of law, which an appellate court independently reviews.[56]

(b) Additional Background

Under Nebraska law, a jury's participation in the death penalty sentencing phase, if not waived,[57] ceases after the determination of aggravating circumstances.[58] If no aggravating circumstance is found to exist, the court enters a sentence of life imprisonment without parole.[59] But if the jury finds that one or more aggravating circumstances exist, the court convenes a panel of three judges to receive evidence of mitigation and sentence excessiveness or disproportionality.[60] In determining an appropriate sentence, the panel considers whether the aggravating circumstances as determined to exist justified imposition of a death sentence, whether mitigating circumstances existed which approached or exceeded the weight given to the aggravating circumstances, or whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases.[61]

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[56] *State v. Stone, supra* note 35.

[57] See Neb. Rev. Stat. § 29-2520(3) (Cum. Supp. 2018).

[58] § 29-2520(4)(g).

[59] § 29-2520(4)(h).

[60] *Id.*

[61] Neb. Rev. Stat. § 29-2522 (Cum. Supp. 2018).

(c) Discussion

Jenkins argues that Nebraska's scheme violates the Sixth Amendment, relying upon the U.S. Supreme Court's decision in *Hurst v. Florida*.[62] In that decision, the opinion includes a statement that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."[63] According to Jenkins, Nebraska's law is contrary to *Hurst* because judges determine the existence or nonexistence of mitigating circumstances and perform the weighing process. He takes the position that the determination of the existence of mitigating factors, the weighing process of the aggravating and mitigating circumstances, and the proportionality review must be performed by a jury. Because Jenkins waived a jury and expressly stated he would "rather have the judges" for sentencing, we doubt he has standing to attack the constitutionality of Nebraska's procedure on the grounds he asserts.[64] But, in any event, he is wrong.

We recently discussed *Hurst* in detail in *State v. Lotter*.[65] We rejected an argument that *Hurst* held a jury must find beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances. In doing so, we cited a number of federal and state courts reaching the same conclusion, but

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[62] *Hurst v. Florida*, __ U.S. __, 136 S.Ct. 616, 193 L. Ed. 2d 504 (2016).

[63] *Id.*, 136 S. Ct. at 619.

[64] See *US. v. Skinner*, 25 F.3d 1314 (6th Cir. 1994).

[65] See *State v. Lotter*, 301 Neb. 125, 917 N.W.2d 850 (2018), cert. denied No. 18-8415, 2019 WL 1229787 (U.S. June 17, 2019).

acknowledged that the view was not universal.[66]

Further, we recognized our previous decision[67] that earlier U.S. Supreme Court precedent—upon which *Hurst* was based—did not require the determination of a mitigating circumstance, the balancing function, or the proportionality review to be undertaken by a jury. Nothing in *Hurst* requires a reexamination of that conclusion. This assignment of error lacks merit.

6. WHETHER DEATH PENALTY [S CRUEL AND UNUSUAL PUNISHMENT WHEN IMPOSED ON SERIOUSLY MENTALLY ILL OFFENDERS AND INDIVIDUALS WITH INTELLECTUAL DISABILITY

Jenkins begins his argument that the death penalty is cruel and unusual punishment when imposed on certain offenders by pointing to U.S. Supreme Court precedent[68] declaring that the Eighth Amendment prohibits the execution of individuals with mental retardation. And he correctly observes that the Nebraska Legislature responded by precluding the imposition of the death penalty on any person with an intellectual disability.[69] We agree with Jenkins' general assertions that a person with an intellectual disability may not be executed. However, Jenkins does not assert or argue that he suffers from an intellectual disability. Therefore, whether Jenkins should be ineligible for the death

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[66] See *id.*

[67] See *State v. Gales*, 265 Neb. 598, 658 N.W .2d 604 (2003).

[68] See *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002).

[69] See Neb. Rev. Stat. § 28-105.01 (2) (Cum. Supp. 2018).

penalty on that basis is not before us.

[25] Unlike situations of intellectual disability, neither the U.S. Supreme Court nor the Nebraska Legislature has explicitly precluded the death penalty for an individual with a severe mental illness. Rather, the Supreme Court has held that the Eighth Amendment forbids executing a prisoner whose mental illness makes him or her unable to "reach a rational understanding of the reason for [his or her] execution."[70] Whether a prisoner has any particular mental illness is not determinative; rather, what matters is whether a prisoner has a rational understanding of why he or she is to be executed.[71] The Supreme Court explained:

> [The] standard [of *Panetti v. Quarterman*[72]] focuses on whether a mental disorder has had a particular *effect*: an inability to rationally understand why the State is seeking execution. . . . Conversely, that standard has no interest in establishing any precise *cause*: Psychosis or dementia, delusions or overall cognitive decline are all the same under *Panetti*, so long as they produce the requisite lack of comprehension.[73]

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[70] *Panelli v. Quarterman*, 55 l U.S. 930, 958, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007).

[71] See *Madison v. Alabama*, __ U.S. __, 139 S. Ct. 718, 203 L. Ed. 2d 103 (2019).

[72] *Panelli v. Quarterman*, *supra* note 70.

[73] *Madison v. Alabama, supra* note 71, 139 S. Ct. at 728.

We observe that other courts have determined a diagnosis of schizophrenia or paranoid schizophrenia[74] does not preclude a death sentence where the defendant is competent to be executed.

Jenkins does not argue that he lacks the requisite understanding of the reason for his execution. Rather, he argues that the same rationale for exempting the intellectually disabled from the death penalty should apply to exempt defendants who are seriously mentally ill from that punishment. We decline to vary from the principle articulated in *Panetti*.

Moreover, we are not persuaded that, even if we were to stray beyond *Panetti*, Jenkins would qualify for relief. The record reveals a conflict in expert opinion as to whether Jenkins suffered from a serious or severe mental illness.

Some professionals had no doubt that Jenkins was severely mentally ill. Oliveto and Gutnik diagnosed Jenkins with schizophrenia. A different psychiatrist diagnosed Jenkins with schizoaffective disorder, bipolar type. Psychiatrists Baker and Wetzel expressed that Jenkins could have a severe mental illness or that he could be malingering.

Other professionals opined that Jenkins was not severely mentally ill. Dr. Mark Weilage, who met with Jenkins in 2012, concluded that Jenkins had no major mental illness. Hartmann did not believe Jenkins had a major mental disorder. Moore believed

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[74] See, *Lindsay v. State*, No. CR-15-1061, 2019 WL 1105024 (Ala. App. Mar. 8, 2019); *Ferguson v. State*, 112 So. 3d 1154 (Fla. 2012); *Corcoran v. State*, 774 N.E.2d 495 (Ind. 2002); *Com. v. Jermyn*, 551 Pa.96, 709 A.2d 849 (1998); *Berry v. State*, 703 So. 2d 269 (Miss. 1997).

that Jenkins' main diagnosis was antisocial personality disorder. Cimpl Bohn, Chaturvedi, and Scalora opined that Jenkins suffered from a significant severe personality disorder marked by antisocial, narcissistic, and borderline traits and that he malingered other symptoms. Psychiatrist Dr. Cheryl Jack met with Jenkins in April 2013, and her impression was "'Axis I: No diagnosis; and Axis II: Antisocial Personality, with narcissistic features vs. Narcissistic Personal[i]ty with antisocial features.'" And in December 2009, Baker concluded that Jenkins' symptoms were "'more behavioral/Axis II in nature.'"

There is no doubt that Jenkins exhibited abnormal behaviors. But a number of experts believed that he was malingering. A test revealed scores indicative of feigning a mental disorder. In support of the view that Jenkins was not malingering, some—Gutnik, in particular—pointed to Jenkins' having hallucinations dating back to age 8. But Dahlke's 1995 psychological report revealed a misunderstanding as to the reported hallucinations:

> A previous report had said [Jenkins] heard voices telling him to do bad things. On further inquiry, [Jenkins] said these are real voices of these older boys, and he only hears them when the boys are there with him. There was no evidence of psychosis or auditory hallucination in this interview. It may be that [Jenkins] misunderstood the question in the previous interview.

A December 1997 medical report—when Jenkins was age 11—stated that Jenkins denied auditory and/or visual hallucinations. A psychiatric assessment from July 1999 likewise stated that Jenkins denied any auditory or visual hallucinations.

The record contains credible expert testimony that Jenkins has been feigning mental illness. We are not persuaded that Jenkins suffers from a serious mental illness. Thus, we need not determine in this case whether either the U.S. Constitution or the Nebraska Constitution would prohibit imposing capital punishment on an offender who actually suffers from a serious mental illness. A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting.[75]

7. WHETHER DEATH PENALTY VIOLATES EIGHTH AMENDMENT AND NEB. CONST. ART. I, § 9, IN ALL CASES

Jenkins asserts that the death penalty in all cases violates both the federal and state Constitutions. He contends this is so "[f]or all of the reasons set forth by Justice Breyer in *Glossip v. Gross* [76] . . . ."[77] In *Glossip*, Justice Breyer authored a dissenting opinion explaining why he "believe[d] it highly likely that the death penalty violates the Eighth Amendment"[78] and Justice Scalia offered a

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[75] *Stewart v. Heineman*, 296 Neb.262, 892 N.W.2d 542 (2017).

[76] See *Glossip v. Gross*, __ U.S. __, 135 S. Ct. 2726, 192 L. Ed. 2d 761 (2015) (Breyer, J., dissenting; Ginsburg, J., joins).

[77] Brief for appellant at 139.

[78] *Glossip v. Gross, supra* note 76, 135 S. Ct. at 2776-77.

persuasive rebuttal in a concurring opinion.[79] But more importantly, the majority of the U.S. Supreme Court expressly recognized "it is settled that capital punishment is constitutional."[80]

Justice Breyer believed that the death penalty was unreliable. In *Glossip*, he pointed to evidence that innocent people have been convicted, sentenced to death, and executed. But Justice Scalia reasoned that "it is convictions, not punishments, that are unreliable."[81] He asserted, "That same pressure [to secure a conviction] would exist, and the same risk of wrongful convictions, if horrendous death-penalty cases were converted into equally horrendous life-without-parole cases."[82]

Justice Breyer viewed the death penalty as being imposed arbitrarily. He cited studies indicating that comparative egregiousness of the crime often did not affect application of the death penalty and other studies showing that circumstances such as race, gender, or geography often do affect its application. But "[a]pparent disparities in sentencing are an inevitable part of our criminal justice system."[83] Justice Scalia described variance in judgments as a consequence of trial by jury and reasoned that "the

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[79] See *Glossip v. Gross, supra* note 76 (Scalia, J., concurring; Thomas, J., joins).

[80] *Id.*, 135 S. Ct. at 2732. See *Bucklew v. Precythe*, __U.S. __, 139 S. Ct. 1112, 203 L. Ed. 2d 521 (2019).

[81] *Glossip v. Gross, supra* note 76, 135 S.Ct. at 2747 (Scalia, J., concurring; Thomas, J., joins) (emphasis in original).

[82] *Id.*

[83] *McCleskey v. Kemp*, 481 U.S. 279, 312, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987).

fact that some defendants receive mercy from their jury no more renders the underlying punishment 'cruel' than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned."[84]

Justice Breyer also felt that the death penalty was cruel due to excessively long delays before execution. But a majority of the U.S. Supreme Court stated that "[t]he answer is not . . .to reward those who interpose delay with a decree ending capital punishment by judicial fiat."[85]

Justice Breyer believed that lengthy delays undermined the penological justification. A punishment is unconstitutional if it "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."[86] The two punishment goals that the death penalty is said to serve are deterrence of capital crimes by prospective offenders and retribution.[87] This record does not refute the existence of these goals, and the people's judgment speaks in support of their continued vitality. Jenkins also asserted that the death penalty runs against evolving standards of decency.

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[84] *Glossip v. Gross, supra* note 76, 135 S. Ct. at 2748 (Scalia, J., concurring; Thomas, J., joins).

[85] *Bucklew v. Precythe, supra* note 80, 139 S. Ct. at 1134.

[86] *Coker v. Georgia*, 433 U.S. 584, 592, 97 S. Ct. 2861, 53 L. Ed. 2d 982 (1977).

[87] See *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976).

He pointed out that it is prohibited by 19 (now 21)[88] states and that at least 4 states have governor-imposed moratoria. But as Justice Scalia observed:

> Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have "changed radically," . . . and has sought to replace the judgments of the People with their own standards of decency.[89]

Less than 3 years ago, Nebraskans had the opportunity to eliminate the death penalty and 61 percent voted to retain capital punishment.[90] This vote demonstrates that the people of Nebraska do not view the death penalty as being contrary to standards of decency. As the majority of the U.S. Supreme Court recently explained: That the Constitution allows capital punishment "doesn't mean the American people must continue to use the death penalty. The same Constitution that permits States to authorize capital punishment also allows

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[88] See, *State v. Gregory*, 192 Wash. 2d 1, 427 P.3d 621 (2018) (holding that death penalty, as administered in State of Washington, violated state constitution); N.H. Rev. Stat. Ann. § 630:1 (2019).

[89] *Glossip v. Gross, supra* note 76, 135 S. Ct. at 2749 (Scalia, J., concurring; Thomas, J., joins).

[90] See Legislative Journal, 150th Leg., 1st Sess. 18 (Jan. 4, 2017) (showing 320,719 votes to retain legislation eliminating death penalty and 494,151 votes to repeal such legislation).

them to outlaw it. But it does mean that the judiciary bears no license to end a debate reserved for the people and their representatives."[91] In Nebraska, the people have spoken.

[26] The U.S. Supreme Court has not found the death penalty to be unconstitutional in all cases. As the Fifth Circuit determined, "We are bound by Supreme Court precedent which forecloses any argument that the death penalty violates the Constitution under all circumstance[s]."[92] Similarly, we do not find the death penalty to be a violation of the Nebraska Constitution.[93]

8. SENTENCE OF DEATH—FACTS FROM PLEA

Jenkins assigns that the sentencing panel erred in sentencing him to death based on facts alleged during the proceeding on his no contest plea. We disagree.

(a) Standard of Review

[27] In a capital sentencing proceeding, this court conducts an independent review of the record to determine if the evidence is sufficient to support imposition of the death penalty.[94]

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[91] *Bucklew v. Precythe, supra* note 80, 139 S. Ct. at 1122-23.

[92] *U.S. v. Jones*, 132 F.3d 232, 242 (5th Cir. 1998). See, also, *U.S. v. Quinones*, 313 F.3d 49 (2d Cir. 2002) (noting that argument relying upon Eighth Amendment is foreclosed by Supreme Court's decision).

[93] See *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (2008).

[94] *State v. Ellis*, 281 Neb. 571, 799 N.W.2d 267 (2011).

(b) Additional Background

During the death penalty sentencing phase, the State offered exhibit 81, the transcript from the plea hearing. Jenkins' counsel objected to the use of the transcript of the plea for any purpose and stated that the statements of the prosecutor were unsworn and were hearsay. The State represented that the purpose of the exhibit was to show that Jenkins was convicted of those particular crimes. The sentencing panel received the exhibit for any statements made by Jenkins against interests and for findings of the court. The panel stated that it would receive the statements by the prosecutor, but not for the truth of the matter asserted.

The sentencing panel's order specifically states that the "factual descriptions come from [the] factual basis given by the State at the time of [Jenkins'] pleas of no contest to all counts on April 16, 2014, Exhibit 81." The order then set forth the same facts from the plea hearing regarding each murder that we included in the portion of our analysis addressing the acceptance of Jenkins' pleas.

(c) Discussion

Jenkins' argument is premised upon a rule of evidence. He points to the rule stating:

> Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who

> made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers when offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.[95]

We have stated that this evidentiary rule does not apply to the sentencing stage.[96]

For practical purposes, a plea of no contest has the same effect as a plea of guilty with regard to the case in which it is entered.[97] The difference between a plea of no contest and a plea of guilty appears simply to be that while the latter is a confession or admission of guilt binding the accused in other proceedings, the former has no effect beyond the particular case.[98] But the facts admitted via a no contest plea can be used in the proceeding involving the no contest plea.[99] We have recognized that strict rules of evidence do not apply at the sentencing phase.

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[95] Neb. Evid. R. 410, Neb. Rev. Stat. § 27-410 (Reissue 2016).

[96] See *State v. Klappal*, 218 Neb. 374, 355 N.W.2d 221 (1984).

[97] See *State v. Wiemer*, 15 Neb. App. 260, 725 N.W .2d 416 (2006).

[98] See *id.*

[99] See *State v. Simnick*, 17 Neb. App. 766, 771 N.W.2d 196 (2009), *reversed in part on other grounds* 279 Neb. 499, 779 N.W.2d 335 (2010).

The sentencing phase is separate and apart from the trial phase, and the traditional rules of evidence may be relaxed following conviction so that the sentencing authority can receive all information pertinent to the imposition of sentence.[100] A sentencing court has broad discretion as to the source and type of evidence and information which may be used in determining the kind and extent of the punishment to be imposed, and evidence may be presented as to any matter that the court deems relevant to the sentence.[101]

[28, 29] But there is a caveat to this general rule, which Jenkins recognizes. A capital sentencing statute dictates: "The Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances."[102] And there is authority for the proposition that a no contest plea constitutes an admission of all the elements of the offenses, but not an admission to any aggravating circumstance for sentencing purposes.[103] So while the sentencing panel could consider Jenkins' no contest plea and the factual basis underlying it, it could not use it as an admission to aggravating circumstances.

Upon our independent review, we conclude that the sentencing panel's "Finding as to Aggravators" is supported by evidence adduced

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[100] *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other grounds*, *State v. Mata, supra* note 93.

[101] *Id.*

[102] Neb. Rev. Stat. § 29-2521 (2) (Cum. Supp. 2018).

[103] See *People v. French*, 43 Cal. 4th 36, 178 P.3d 1100, 73 Cal. Rptr. 3d 605 (2008). See, also, 21 Am. Jur. 2d, *supra* note 13; 22 C.J.S. Criminal Procedure and Rights of Accused § 238 (2016).

during the death penalty sentencing phase. Testimony of a police officer who investigated the homicide scenes of all the murder victims and who interviewed Jenkins in connection with the murders established that Jenkins murdered Uribe-Pena and Cajiga-Ruiz at the same time and that based on those murders, Jenkins had a substantial prior history of serious assaultive or terrorizing criminal activity by the time of the murders of Bradford and Kruger. Additionally, based on certified copies of convictions and the testimony of two armed robbery victims of Jenkins, the sentencing panel found that Jenkins, at the time of all the murders, had previously been convicted of crimes involving the use of threats of violence. Although the sentencing panel stated that it used the factual basis from the no contest plea hearing, the panel's findings as to aggravating circumstances were supported by evidence adduced during the sentencing hearing. This assignment of error lacks merit.

9. SENTENCE OF DEATH—MITIGATING FACTORS

Jenkins assigns error to the sentencing panel's failure "to give meaningful consideration to his lifelong serious mental illness, his unfulfilled request for commitment before the crime, and the debilitating impact of solitary confinement in violation of Fifth, Eighth, and Fourteenth amendments to the U.S. Constitution and Article I Sections 3 and 9 of the Nebraska Constitution." We constrain our analysis to the three areas assigned by Jenkins.

(a) Standard of Review

[30] The sentencing panel's determination of the existence or nonexistence of a mitigating circumstance is subject to de novo review by this court.[104]

[31] In reviewing a sentence of death, the Nebraska Supreme Court conducts a de novo review of the record to determine whether the aggravating and mitigating circumstances support the imposition of the death penalty.[105]

(b) Additional Background

(i) Lifelong Mental Illness

Jenkins' records show a history of behavioral issues. His first interaction with mental health professionals was in 1995, at age 8, when he was evaluated at a hospital. A letter in 1998 noted that "the majority of his difficulties seem to be behavioral rather than mental health in nature." In 1999, a psychiatric assessment stated that Jenkins "appeared very manipulative . . . and would appear to take on a victim role" and the diagnosis contained therein showed "Conduct Disorder" under "Axis I: Clinical Disorders." In 2001, a report stated: "Personality assessment suggests a Conduct Disorder, adolescent onset type, an Oppositional Defiant Disorder, and a Developing Antisocial Personality Disorder. No other problems of anxiety, depression, or psychosis were indicated."

The panel received the deposition of a chaplain at the Douglas County Youth Detention Center while

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[104] *State v. Torres*, 283 Neb. 142, 812 N.W .2d 213 (2012).

[105] *Id.*

Jenkins "was kind of a regular" there. The chaplain testified that he and Jenkins "hung out all the time" when Jenkins was 15 to 16 years old. Although not a mental health specialist, the chaplain did not observe any indications of mental illness in Jenkins. He did not recall Jenkins ever talking about Egyptian gods.

Baker testified that she had always thought Jenkins was mentally ill, but that she was not sure if his behaviors were due to mental illness or malingering. Weilage informed Jenkins in 2012 that a mental illness review team believed "'there was not an Axis I severe mental illness present'" to justify transferring Jenkins to an inpatient mental health unit at the Lincoln Correctional Center. And we have already detailed the conflicting evidence concerning whether Jenkins suffered from a serious mental illness or was malingering.

(ii) Requests for Commitment

In February 2013—months before Jenkins' scheduled release from prison—he sent an informal grievance to the warden requesting emergency protective custody and psychiatric hospitalization. In a grievance to the warden sent the next day, Jenkins advised that his mother was seeking an emergency protective custody order for psychiatric hospitalization. In a March letter to a member of the Nebraska Board of Parole, Jenkins stated that he had filed an emergency protective custody petition in Johnson County, Nebraska, to be submitted to the county's mental health board. The Johnson County Attorney's office acknowledged receipt of letters regarding Jenkins' mental health.

(iii) Effect of Solitary Confinement

Jenkins spent extensive time on room restriction and in disciplinary segregation. According to an ombudsman report, as much as 60 percent of Jenkins' time with the Department of Correctional Services was in segregation. On at least nine occasions between January 2009 and January 2012, Jenkins spent periods of at least 45 days in disciplinary segregation, five of those being 60 days in length.

The Douglas County Youth Detention Center chaplain testified that he kept in communication with Jenkins over the years. In 2009 or 2010, Jenkins told the chaplain that Jenkins had been in solitary confinement for 2 years. According to the chaplain, Jenkins was "different": "Angry, saying he wants to hurt people, wants to hurt himself. He was going crazy, said he's just sitting in his cell."

Kirk Newring, Ph.D., testified that extended periods of time in solitary confinement or segregation typically exacerbates any existing mental health diagnoses or condition. He testified that "[i]f somebody is in segregation and can't come up with other solutions, recurrent self-injury would not be unexpected as a problem-solving approach." Cimpl Bohn acknowledged that solitary confinement is generally not something that helps people become psychologically healthier, especially for individuals with a mental illness. Hartmann testified that an extended period of time in solitary confinement is "an extremely stressful experience" and that it could be detrimental to a person's mental health.

The ombudsman's report recognized that a board-certified psychiatrist who evaluated more than

200 prisoners to determine the psychiatric effects of solitary confinement concluded that "'such confinement may result in prolonged or permanent psychiatric disability, including impairments which may seriously reduce the inmate's capacity to reintegrate into the broader community upon release from prison.'" (Emphasis omitted.) The report also acknowledged the research of a professor of psychology who had studied the psychological effects of solitary confinement for more than 30 years: "'The psychological consequences of incarceration may represent significant impediments to post-prison adjustment.'"

(c) Discussion

[32, 33] A sentencer may consider as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[106] As noted, we review de novo the sentencing panel's determination of the existence or nonexistence of a mitigating circumstance.[107] We look to whether the sentencer "fairly considered the defendant's proposed mitigating circumstances prior to rendering its decision."[108] The risk of nonproduction and nonpersuasion as to mitigating circumstances is on the defendant.[109]

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[106] See *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

[107] *State v. Torres, supra* note 104.

[108] See *State v. Ryan*, 233 Neb. 74, 147, 444 N.W.2d 610, 654 (1989).

[109] See *State v. Torres, supra* note 104.

Jenkins assigns that the sentencing panel failed to give "meaningful consideration" to his lifelong history of mental illness. The sentencing panel recognized "significant divergence of opinion offered by mental health professionals as to whether Jenkins suffers from a mental illness, or if he is feigning mental illness." It accepted the opinions of Cimpl Bohn and her team and found that no statutory mitigating circumstance was proved. Nonetheless, the sentencing panel found that Jenkins' bad childhood was a nonstatutory mitigator to be considered in the weighing process as was his mental health. The panel's seven-page analysis of the bad childhood circumstance included discussion of mental health records from Jenkins' childhood and adolescent years. The panel adequately considered Jenkins' mental health issues, and we agree with its conclusion.

Jenkins also contends that the sentencing panel erred by failing to consider that the killings would have been prevented if his request to be committed had been fulfilled. But we do not find anywhere on the record where Jenkins advised the panel that he wished for such requests to be considered as a nonstatutory mitigating factor. The absence of such request likely explains why the panel's order did not discuss such requests. While there was evidence that Jenkins requested to be committed, we will not fault the panel for failing to discuss a nonstatutory mitigating circumstance that it was not specifically asked to consider. And although we review the sentencing panel's determination of the existence or nonexistence of mitigating circumstances de novo, we do so only on the record. To the extent the record contains evidence

of Jenkins' requests for commitment, his argument now relies only on speculation and conjecture. We have considered it and find it to be without merit.

Finally, Jenkins asserts that his extensive time in solitary confinemet should have been considered a mitigating circumstance. Our review of the record shows that contrary to Jenkins' assertion, the sentencing panel considered the impact of solitary confinement. The sentencing panel recognized Jenkins' "extensive history of misconduct in the State Penitentiary"; however, it found insufficient evidence to support solitary confinement as a nonstatutory mitigator. We see no error.

Unfortunately, solitary confinement can be a "necessary evil." Justice Kennedy stated:

> Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates. But research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price.[110]

Here, Jenkins' own actions led to his disciplinary segregation. The Department of Correctional Services must have some recourse to deal with an inmate who does such things as manufacture a weapon from a toilet brush, threaten to assault staff, assault staff, attempt to escape, and interfere with or

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[110] *Davis v. Ayala*, __ U .S. __, 135 S. Ct. 2187, 2210, 192 L. Ed. 2d 323 (2015) (Kennedy, J., concurring).

refuse to submit to a search. The sentencing panel acted reasonably in not rewarding such behavior by considering the resulting confinement as a mitigating factor. Upon our de novo review, we reach the same conclusion.

We affirm Jenkins' death sentences.

V. CONCLUSION

Many of the issues in this death penalty appeal turn on Jenkins' competency and mental health. Evidence touching on these matters was abundant and highly conflicting. The trial court and the sentencing panel, like the members of this court, are not medical experts. In light of the conflicting evidence, they gave weight to the expert evidence reflecting that Jenkins suffered from a personality disorder and was feigning mental illness. We find no error in that regard.

We cannot say that the district court abused its discretion in finding Jenkins to be competent to waive counsel, to enter no contest pleas, to proceed to sentencing, and to be sentenced to death. We reject Jenkins' constitutional challenges to the death penalty and affirm his convictions and sentences.

AFFIRMED.

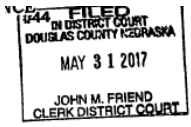
PAPIK and FREUDENBERG, JJ.,
not participating.

DISTRICT COURT
DOUGLAS COUNTY, NEBRASKA

STATE OF NEBRASKA,

Plaintiff,

CR 13-2768
CR 13-2769



vs.

NIKKO A. JENKINS,

Defendant.

ORDER OF SENTENCE

This matter came before this Court for the determination of the death sentence pursuant to Neb. Rev. Stat. § 29-2521. Defendant was present with his attorneys, Thomas C. Riley, Scott C. Sladek, and Thomas M. Wakeley. The State of Nebraska was represented by Donald W. Kleine, Brenda D. Beadle, and Nissa M. Jones. This hearing was held on November 14, 15, and 16, 2016. The Court also received additional evidence from the Defendant on January 17, 2017. A briefing schedule was set and the last brief was received on May 9, 2017. This matter was taken under advisement. This Court being advised in the premises, hereinafter sets forth its findings and sentence.

I. BACKGROUND

The Informations charging the Defendant were filed on October 1, 2013. At CR 13-2768, the charges were four counts of Murder in the First Degree, four counts of Use of a Deadly Weapon (Firearm) to Commit a Felony, and four counts of Possession of a Deadly Weapon by a Prohibited Person. In this case, the State requested the death penalty. At CR 13-2769, the charges were two counts of Possession of a Deadly Weapon by a Prohibited

Person.

On April 16, 2014, the Defendant waived his right to a jury trial, and pleaded no contest to all charges in both cases and was found guilty of all charges. During this time the Defendant was representing himself and had advisory counsel. His self-representation was his demand and the Court appointed advisory counsel to assist him, if necessary. Once the Court found the Defendant guilty of these charges, the Court then appointed Defendant's advisory counsel as his representative counsel due to the uniqueness and complicated nature of the death penalty phase. This appointment was over the objection of the Defendant. Thereafter, the Sentencing Determination Proceeding ("death penalty determination") pursuant to Neb. Rev. Stat. § 29-2521 was set to commence on August 11, 2014. At that time, the Defendant waived his right to a jury trial to determine the aggravating circumstances for this death penalty determination.

Prior to the commencement of the death penalty determination, there were a number of hearings as to the competency of the Defendant, and delays as a result of the death penalty being repealed by the Nebraska Legislature, and subsequently reinstated by the referendum vote in November of 2016. This matter eventually came on for the death penalty determination hearing on November 14, 2016. The first step was to determine the aggravating circumstances pursuant to Neb. Rev. Stat. § 29-2520. Because the Defendant had waived his right to a jury as to the determination of aggravating circumstances, the evidence was presented to the three judge panel ("Panel"), which was appointed by the Nebraska Supreme Court.

At the conclusion of the evidence and arguments, and after due consideration and deliberation, the Panel unanimously found beyond a reasonable doubt six aggravating circumstances, which are set forth later in this Order.

After the six aggravating circumstances were determined, the Panel proceeded with the hearing on the mitigating circumstances pursuant to Neb. Rev. Stat. § 29-2523. Evidence was adduced on November 15 and 16, 2016. At the conclusion of the evidence a briefing schedule was set. Before briefs were received, the Defendant requested leave to reopen his case as to the mitigating circumstances. This was granted, and the Panel received into evidence on January 17, 2017, the deposition of Robert Betzold. This matter was then taken under advisement pending the briefs of the parties. The last brief was received on May 9, 2017.

The Panel met on May 11 and 12, 2017, for deliberations in this matter. Set forth hereafter is the law as it relates to the death penalty and the Panel's findings and analysis.

II. LAW

LEGISLATIVE GUIDELINES FOR THE THREE JUDGE PANEL

Neb. Rev. Stat. § 29-2519(1)

> . . . . The Legislature therefore determines that the death penalty should be imposed only for crimes set forth in 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances

existing in connection with the crime outweigh the mitigating circumstances, as set forth in Secs. 29-2520 to 29-2524.

Neb. Rev. Stat. § 29-2521(2)

In the sentencing determination proceeding before a panel of judges when the right to a jury determination of the alleged aggravating circumstances has been waived, the panel shall, as soon as practicable after receipt of the written report resulting from the presentence investigation ordered as provided in section 29-2261, hold a hearing. At such hearing, evidence may be presented as to any matter that the presiding judge deems relevant to sentence and shall include matters relating to the aggravating circumstances alleged in the information, to any of the mitigating circumstances set forth in section 29-2523, and to sentence excessiveness or disproportionality. The Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances. Each aggravating circumstance shall be proved beyond a reasonable doubt. . . .

Neb. Rev. Stat. § 29-2522

The panel of judges for the sentencing determination proceeding shall either unanimously fix the sentence at death or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment.

Such sentence determination shall be based upon the following considerations:

(1) Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death;

(2) Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances; or

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

In each case, the determination of the panel of judges shall be in writing and refer to the aggravating and mitigating circumstances weighed in the determination of the panel.

If an order is entered sentencing the defendant to death, a date for execution shall not be fixed until after the conclusion of the appeal provided for by section 29-2525.

Neb. Rev. Stat. § 29-2923

The aggravating and mitigating circumstances referred to in sections 29-2519 to 29-2524 shall be as follows:

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat

of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a public servant having lawful custody of the offender or another in the lawful performance of his or her official duties and the offender knew or should have known that the victim was a public servant performing his or her official

duties;

(h) The murder was committed knowingly to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; or

(i) The victim was a law enforcement officer engaged in the lawful performance of his or her official duties as a law enforcement officer and the offender knew or reasonably should have known that the victim was a law enforcement officer.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his or her participation was relatively minor;

(f) The victim was a participant in the defendant's conduct; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

III. CASE BACKGROUND

As noted, after the Defendant was found guilty of all charges on April 16, 2014, the Defendant was appointed counsel to represent him in the death penalty determination phase as set forth at Neb. Rev. Stat. §§ 25-2919, "Special Procedure in Cases of Homicide." Shortly thereafter, the Defendant filed his motion to determine competency.

Competency hearing of July 10, 2014.

Evaluations were performed on the Defendant, and extensive evidence was adduced at the hearing. The Court took the matter under advisement. The following sets forth the pertinent evidence at that hearing.

Dr. Gutnik, the psychiatrist for the Defendant, testified that, among other things, that the Defendant was unable to cooperate with his attorneys. This has been an ongoing concern by Dr. Gutnik in all the competency hearings. Dr. Gutnik noted in his report of November 8, 2013 (Exhibit 1):

> However, Mr. Jenkins has not established rapport with his attorney, I seriously question his ability to meek stresses with his rationality or judgment breaking down. I seriously question whether he can confer coherently with some appreciation of the proceedings. I do not believe he could both give and receive advice from his attorney.

Dr. Gutnik testified that Defendant was more manic when he saw him in May than when he saw him in February of 2014. The manic he observed in May was more than "hypo manic" but a strong manic.

Dr. Gutnik went on to note that Mr. Jenkins did not believe that he has been found guilty and, even though he pled no contest, he anticipates the trial in this matter will commence on July 30, 2014.

Dr. Gutnik continued to opine that the Defendant has an Axis I mental illness, which is schizoaffective disorder, bipolar type. Dr. Gutnik noted that the Defendant was hypomanic during his interview in May. Defendant continued to have hallucinations and delusions and has hypomanic symptoms which the Defendant reports get better or worse over the course of the day. Defendant continues to have conversations with the Egyptian god Apophis. Dr. Gutnik further noted that the Defendant rambled, showed pressured speech, expansive and happy expressions, sadness, loose association, and was difficult to interrupt him. Defendant stated that Apophis continued to tell him to kill and destroy and believes that Cuban

diplomats will demand his release. Defendant also reports of visions of the future. Defendant continues to not trust people and continues to respond to Apophis. In summary, it was Dr. Gutnik's opinion that the Defendant had digressed and was not competent to stand trial or to proceed with the sentencing phase.

Dr. Moore saw the Defendant for the third time at the Lincoln Correctional Center along with Dr. Klaus Hartmann. Both are employed by the Lincoln Regional Center. They saw him for only one hour. This was the first time that Dr. Hartmann had met the Defendant.

Both Dr. Moore and Dr. Hartmann were of the opinion that the Defendant is competent to proceed with the sentencing phase and is competent to stand trial. The both opined that he is malingering, faking his condition, and is manipulative. Neither believes that he has a major mental illness- Axis I under the DSM 5, such as bipolar or symptoms of schizophrenia, however, they do believe he has a personality disorder.

Dr. Moore believes that the Defendant is lying at all times in a general sense. He also testified that he takes what the Defendant says with a "grain of salt". He further testified that he believes that the Defendant has been malingering since the age of 8 when he first received psychiatric treatment. As noted, Dr. Moore does not believe that the Defendant has a major mental illness (Axis I), however, he does have a personality disorder.

Standard for Competency.

A person has a constitutional right not to be put to trial when lacking "mental competency."

Indiana v. Edwards, 554 U.S. 164, 177 (2008). In *Indiana v. Edwards*, the United States Supreme Court reiterated the standard to determine if a Defendant is competent to stand trial, which includes whether the Defendant has a rational as well as factual understanding of the proceedings against him, and whether the Defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding. As the Court noted in its prior decision of *Godinez v. Moran*, 509 U.S. 389 (1993), requiring a criminal Defendant to be competent "has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." *Godinez v. Moran*, at 402.

The Nebraska Supreme Court in *State v. Guatney*, 207 Neb. 501, 299 N.W.2d 538 (1980), reiterated the three prong test in Nebraska to determine competency. The test of mental competency to stand trial is: 1) whether the defendant now has the capacity to understand the nature and object of the proceedings against him, 2) to comprehend his own condition in reference to such proceedings, and 3) to make a rational defense.

The Court further stated in *State v. Guatney*, at 509:

> Competency is, to some extent, a relevant matter arrived at by taking into account the average level of ability of criminal defendants. We cannot, however, exclude from trial all persons who lack the intelligence or legal sophistication to participate actively in their own defense. This is not the

> standard by which we measure competency. Should we do so, we would preclude the trial of a number of people who are, indeed, competent to stand trial as understood in the law. The accused need not understand every legal nuance in order to be competent. He need only meet the standards as established by us in Crenshaw and Klatt and set out above.

In the concurring opinion of *State v. Guatney*, Chief Judge Norman Krivosha set forth twenty factors, which could be of aid to court arriving at appropriate conclusions. The Nebraska Supreme Court has refused to adopt these factors, however, they can be useful in assisting a court in arriving at the opinion of competency and are regularly used to determine competency. These twenty factors are as follows: 1) the defendant has sufficient mental capacity to appreciate his presence in relation to time, place, and things; 2) that his elementary mental processes are such that he understands that he is in a court of law charged with a criminal offense; 3) that he realizes there is a judge the bench; 4) that he understands that there is a prosecutor present who will try to convict him of a criminal charge; 5) that he has a lawyer who will undertake to defend against the charge; 6) that he knows that he will be expected to tell his lawyer all he knows or remembers about the events involved in the alleged crime; 7) that he understands that there will be a jury present to pass upon evidence in determining his guilt or innocence; 8) that he has sufficient memory to relate answers to questions posed to him; 9) that he has established rapport with his lawyer;

10) that he can follow the testimony reasonably well; 11) that he has the ability to meet stresses without his rationality or judgment breaking down; 12) that he at least minimal contact with reality, 13) that he has the minimum intelligence necessary to grasp the events taking place; 14) that he can confer coherently with some appreciation of proceedings; 15) that he can both give and receive advice from his attorneys; 16) that he can divulge facts without paranoid distress; 17) that he can decide upon a plea; 18) that he can testify if necessary; 19) that he can make simple decisions; and 20) that he has a desire for justice rather than undeserved punishment.

Judge Krivosha further noted that ". . . in order to establish competency, it is not necessary that an accused meet all of the above factors but only that, considering the various factors as a whole, one is compelled to conclude the accused has the capacity to understand the nature and object of the proceedings against him, to comprehend his own condition in reference to such proceedings, and to make a rational defense." *Id.* at 513.

Finding as to Competency.

The Court noted that it was quite mindful that a person can have a major mental illness and still be competent to proceed to trial, or in this case, to the sentencing phase for a death penalty case. The Court was quite mindful that Dr. Moore and Dr. Hartmann could be accurate in their opinions of the Defendant. Especially concerning to the Court, was the little amount of time that the State's witnesses took to evaluate the Defendant. This Court further noted that it must be satisfied that the Defendant is competent to proceed with the sentencing phase of a

death penalty case. The fact that this is a death penalty case heightens the concern and consideration of this Court. As such, this Court found that the Defendant was not competent to proceed further and ordered that attempts be made to restore him to competency, which Dr. Gutnick opined that Defendant could be restored to competency. The Defendant was then housed at the Lincoln Correctional facility for attempts to restore the Defendant to competency.

Hearing of February 17, 2015.

Hearing was held on February 17, 2015, and again extensive evidence was adduced as to the competency of the Defendant. This time the State had taken extensive time to evaluate, view, and attempt to treat the Defendant. The Court received a 31 page report from Jennifer Cimpl Bohn, Psy.D., Rajeev Chaturvedi, MBBS, and Mario J. Scalora, Ph.D., and Dr. Cimply Bohn's testimony in which she opined that the Defendant was competent to proceed with the death penalty phase of this matter. In the conclusion of their report, they stated:

> To conclude, it is the opinion of the undersigned that Mr. Jenkins is currently competent to proceed with sentencing. The defendant has demonstrated an adequate factual understanding of the proceedings. Additionally, Mr. Jenkins has demonstrated the ability to rationally apply such knowledge to his own case. He can coherently discuss previous proceedings in detail and is able to extensively describe the purpose of

> upcoming hearings and potential legal strategies. Lastly, if he desires to do so, he has the ability to consult with counsel with a reasonable degree of rational understanding. While Mr. Jenkins' may behave in ways that disrupt the proceedings and ineffectively communicate with counsel, these behaviors are largely volitional and related to personality characteristics, as opposed to a major mental illness.

The Court was satisfied that ample time was taken to evaluate and attempt to treat the Defendant, which time was over six months. The Court accepted the opinions of Dr. Cimpl Bohn and found that the Defendant was competent to proceed. This matter was then set for the death penalty determination hearings to commence on July 7, 2015.

Repeal of the Death Penalty.

Before this hearing could be held, the Nebraska Legislature repealed the death penalty and this repeal was to go into effect on August 29, 2015. As a result of this action by the Nebraska Legislature, the death penalty determination hearing was continued. Soon thereafter, a Referendum Petition was initiated to repeal the action of the Nebraska Legislature to restore the death penalty. Prior to August 29, 2015, the Referendum Petition obtain enough verified signatures to stay the implementation of the legislative action repealing the death penalty. Thus, the death penalty remained the law. The Referendum action required the vote of the citizens of Nebraska at the next general election,

which was November 8, 2016. The death penalty determination hearing was then scheduled to commence in November, 2015.

Competency hearing of December 11, 2015.

Prior to this commencement of the death penalty determination hearing in November of 2015, the Defendant again filed a Motion to determine competency as his psychiatrist opined that he had significantly deteriorated since the last hearing. Competency hearing was then held on December 11, 2015. Evidence was adduced and Dr. Cimpl Bohn again testified for the State and Dr. Gutnik testified for the Defendant. The Court found that the Defendant was competent to proceed with the1 death penalty determination phase.

Competency hearing of June 7, 2016.

Before the death penalty phase could begin, another hearing was held on June 7, 2016, as to the Defendant's competency. Again, Dr. Cimpl Bohn and Dr. Gutnik testified. Court again found that the Defendant was competent to proceed with the death penalty determination phase.

This matter was then set for hearing for the death penalty determination hearing on November 14, 2016. On November 8, 2016, the citizens of Nebraska supported the Referendum, and the legislative action repealing the death penalty was repealed and the death penalty remained.

Intellectually Disability hearing of November 14, 2016.

Before the death penalty phase could proceed on November 14, 2016, there was a hearing to

determine if the Defendant was intellectually disabled so as to prevent the death penalty. Hearing was held, evidence adduced, and the Court found that the Defendant was not intellectually disabled. The Panel then proceeded with the death penalty determination hearing. The first step was the determination of the aggravating circumstances pursuant to Neb. Rev. Stat. § 29-2520.

IV. AGGRAVATION HEARING.

The hearing to determining the aggravating circumstances was held on November 14, 2016. Evidence was adduced and the following are the facts of each of the four murders for which the Defendant was found guilty. These factual descriptions come from factual basis given by the State at the time of the Defendant's pleas of no contest to all counts on April 16, 2014, Exhibit 81.

A. Facts.

As to the murders of Jorge Cajiga-Ruiz and Juan Uribe-Pena, on the Sunday morning of August 11, 2013, police were called to a pickup truck with the doors open in an entrance road to Spring Lake Swimming Pool at or about 17th and F Streets in Omaha, Douglas County, Nebraska. When the police arrived, they found the deceased bodies of Jorge Cajiga-Ruiz and Juan Uribe-Pena in the pickup truck. These two individuals had been at a bar in South Omaha the night before, where they met a Christine Bordeaux and Erica Jenkins, the cousin and sister, respectively, of the Defendant. The Defendant wanted to get money so he planned a robbery with the assistance of Ms. Bordeaux and Ms. Jenkins. Ms. Bordeaux and Ms. Jenkins were to get some men to go to a private area where the

Defendant could rob them.

The four of them drove in one of the victim's pickup truck to the area of 17th and F Streets, which is somewhat of a dark road that goes to Spring Lake Park Pool. As they were there in the pickup truck, the Defendant arrived with a shotgun. Ms. Bordeaux and Ms. Jenkins exited the truck and then the Defendant shot Mr. Cojiga-Ruiz and Mr. Uribe-Pena in the head with a shotgun. It appeared that money was taken from them as they had no billfolds and the pockets of one of the victims were turned inside out.

Mr. Jorge Cajiga-Ruiz was killed with a single gunshot wound involving the head, neck, chest, and right hand. The projectile was consistent with a deer slug, which passed through his right hand, which must have been raised in a defensive manner.

Mr. Juan Uribe-Pena was killed with a single gunshot wound consistent with a deer slug, which entered his right eye.

As to the murder of Curtis Bradford, on Monday, August 19, 2013, police were called to 1804 North 18th Street in Omaha, Douglas County, Nebraska. They observed the body of the victim, Curtis Bradford, at this location. Mr. Bradford had suffered two gunshot wounds to the head. One being a deer slug consistent with the deer slug that was used at the homicides of Mr. Cajiga-Ruiz and Mr. Uriba-Pena, and a small caliber gunshot wound to the head. The shotgun wound entered the back of his head and exited through his forehead. There was also a second gunshot wound to the back of his head.

The Defendant and Ms. Jenkins had a plan with Mr. Bradford to either rob or burglarize someone that night. Unbeknownst to Mr. Bradford,

Ms. Jenkins did not like him and planned with the Defendant to kill him that night.

When they picked up Mr. Bradford, they gave him a .9 millimeter rifle, which, unknown to him, was empty. Once they got to the location of 1804 North 18th Street, Erica Jenkins shot him once in the back of the head and then the Defendant shot him in the back of the head with the deer slug from the shotgun after he fell to the ground.

As to the murder of Andrea Kruger, on August 21, 2013, Ms. Kruger was coming home from work at approximately 1:30 to 2:00 o'clock in the morning. She was stopped at 168th and Fort Street by a vehicle, which included the Defendant; his uncle, Warren Levering; his sister, Erica Jenkins; and his cousin, Christine Bordeaux. Defendant got out of his vehicle and went to Ms. Kruger's vehicle. Ms. Kruger was pulled from the car and shot several times by the Defendant. She was killed by two gunshot wounds to her head, and gunshot wounds to her neck and back.

The purpose for the murder of Ms. Kruger was to obtain her vehicle. The Defendant spotted Ms. Kruger in her vehicle at the McDonalds' drive-thru. When she left, he followed her and stopped her at 168th and Fort. There was a Lil Wayne concert in the next few days, during which the Defendant wanted to use a newer vehicle to rob people. Ms. Kruger just happened to be driving the vehicle that the Defendant wanted.

B. Finding as to Aggravators.

As noted above, the Panel found the following six aggravating circumstances:

With regard to the murders of Jorge Cajiga-Ruiz and Juan Uribe-Pena, the aggravating circumstances under Neb. Rev. Stat. § 29-2523(l)(e) applies, that at the same time of the murder of Jorge Cajigia-Ruiz, Defendant also murdered Juan Uribe-Pena; and at the same time of the murder of Juan Uribe-Pena, Defendant also murdered Jorge Cajiga-Ruiz.

With regard to the all the murders, Jorge Cajiga-Ruiz, Juan Uribe-Pena, Curtis Bradford, and Andrea Kruger, aggravating circumstances under Neb. Rev. Stat. § 29-2523(l)(a) applies, that Defendant was previously convicted of crimes involving the use of threat of violence to the person, those being the convictions of armed robbery of Charles Price, Jr. on June 24, 2002, and Kathryn Bright on August 26, 2002.

Additionally, with regard to the murder of Curtis Bradford, Defendant had a substantial prior history of serious assaultive or terrorizing criminal activity, that being the murders of Jorge Cajiga-Ruiz and Juan Uribe-Pena.

Further, with regard to the murder of Andrea Kruger, Defendant had a substantial prior history of serious assaultive or terrorizing criminal activity, that being the murders of Jorge Cajiga-Ruiz, Juan Uribe-Pena, and Curtis Bradford.

All of these homicides occurred within a relatively short time span of ten days. Since the Nebraska Supreme Court's opinion in *State v Moore*, 316 N.W.2d 33, 210 Neb. 457 (1982), the term "substantial history" in aggravating circumstance (l)(a) has been interpreted to include any previous homicide that predates the homicide that is the

subject of the sentencing. In *Moore*, the Defendant was convicted of two homicides that occurred four days apart and the court applied aggravator (l)(a) to the second homicide. The Panel in this case has taken the same approach on the Bradford and Krueger homicides, which approach is supported by Nebraska case law.

The Panel determined that the convictions for the armed robberies of Charles Price and Kathryn Bright satisfy that portion of aggravating circumstance (l)(a) that pertains to "previous convictions of crimes involving the use or threat of violence to the person." The Panel determined that those convictions apply to all four homicides.

V. MITIGATION HEARING

After the Court's findings as to the six aggravating circumstances, the Court then proceeded with the hearing on the mitigating circumstances. Evidence was adduced, each party rested, and a briefing scheduled was set.

In making its decision as to the mitigating circumstances, Neb. Rev. Stat. § 29-2521 requires the sentencing panel to consider "any relevant mitigating circumstance." The Supreme Court of the United States has concluded that the court in a capital case must consider as a mitigating factor "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). *See also Kansas v. Marsh*, 548 U.S. 163, 174 (2006). Thus, when a defendant is faced with imposition of the death penalty, he or she "may offer any evidence on the issue of mitigation, even though the mitigating

factor is not specifically listed." *State v. Reynolds*, 235 Neb. 662, 696, 457 N.W. 2d 405, 425 (1990).

Aggravating and mitigating circumstances are, to a large extent, prescribed by statute, but the three judge panel is required to consider any evidence in mitigation. Neb. Rev. Stat. § 29-2522. *State v. Joubert*, 224 Neb. 411, 423-24, 399 N.W.2d 237, 247 (1986). In order for something to be considered a mitigating factor it must be probative of any aspect of the defendant's character or record or any of the circumstances of offense that could be proffered as a basis for sentence less than death. Neb. Rev. Stat. § 29-2522. *State v. Rust*, 208 Neb. 320, 326, 303 N.W.2d 490, 494 (1981). For example, in *State v. Sandoval*, the sentencing panel concluded no statutory mitigating circumstances existed, but found that one non-statutory mitigating factor existed — that the defendant suffered from a bad childhood resulting from being raised in a dysfunctional family. *See also State v. Galindo*, 269 Neb. 443, 450-51, 694 N.W.2d 124, 140 (2005) (sentencing panel found no statutory mitigating circumstances but considered two nonstatutory mitigating circumstances: the defendant's strong relationship with members of his family and his ability to adapt to life in prison); *State v. Ellis*, 281 Neb. 571, 610, 799 N.W.2d 267, 300 (2011) (sentencing panel did not find any statutory mitigating circumstances to exist, but considered the nonstatutory mitigators of the defendant's history of mental health problems); *State v. Mata*, 266 Neb. 668, 676, 668 N.W.2d 448, 462 (2003) (sentencing panel found no statutory mitigating circumstances to exist, but considered four nonstatutory mitigating circumstances, the defendant's ability to adapt to

prison conditions, the defendant's IQ of 85, the defendant's history of substance abuse, and the defendant's relationship with his parents).

The Defendant presented substantial evidence of the Defendant's personal and mental health history from the time he was eight years old, through his years of incarceration, to the present. This evidence included information concerning the Defendant's family history and his upbringing that included him being physically assaulted and sexually assaulted. This evidence also revealed how the Defendant was bounced from foster home to foster home with virtually no stability or positive familial interaction.

The Defendant submits that there is sufficient evidence to support the presence of statutory mitigating circumstances at Neb. Rev. Stat. § 29-2523(2)(c): "The crime was committed while the offender was under the influence of extreme mental or emotional disturbance" and (2)(g): "At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication." In addition to these factors, the Defense contended that the Defendant's current mental health and how it has been effected by his treatment (or lack thereof) during his incarceration, is a powerful non-statutory mitigating circumstance. Additionally, the Defendant's pleas of no contest and his admission of his participation in these crimes to the police investigating these cases, are also non-statutory mitigating circumstances that the Defendant contends should be included in the weighing process.

The Defense reminded this Court that the United States Supreme Court, and Nebraska statutes provide that the government shall not impose capital punishment on a person who becomes seriously mentally ill after conviction of a capital offense. The Defense asserts that there is overwhelming evidence that the Defendant is severely mentally ill, that his illness is of longstanding duration, and that his mental health has deteriorated due in large part to his being subjected to long term solitary confinement by the State of Nebraska.

VI. DISCUSSION

Statutory Mitigating Circumstances.

It is the Defense's position that the Defendant has a severe mental illness that gives rise to the applicability of statutory mitigating circumstances set forth in Neb. Rev. Stat. §29-2523 (2)(c) and (2)(g) and also is a non-statutory mitigating circumstance that the Panel must consider.

Neb. Rev. Stat. § 29-2523(2)(c) and Neb. Rev. Stat. § 29-2523(2)(g).

Mitigator (2)(c) states: The crime was committed while the offender was under the influence of extreme mental or emotional disturbance."

Mitigator (2)(g) states: "At the time of the crime the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication."

The Panel finds that there is insufficient evidence to support these statutory mitigating factors. Each one of these murders was a deliberate and planned act. The victims were pre-selected and the murders were purposeful. In each case, the Defendant developed a specific plan, carried through with that plan, and only the intended victims were harmed.

The trial court in this case has been continuously confronted with issues concerning the Defendant's mental health and his self-mutilation. The record of this case illustrates significant divergence of opinion offered by mental health professionals as to whether Jenkins suffers from a mental illness, or if he is feigning mental illness. In essence, the Panel had to determine which group of experts is more credible. This Panel agrees with the experts of the State, in particular, Dr. Cimpl Bohn and her team were given great weight as they had spent considerable time with the Defendant to support their opinions and these opinions were accepted by this Panel. Therefore, this Panel finds no statutory mitigators exist.

Non-Statutory Mitigators.

Plea of no contest.

The Defense contends that the Defendant's pleas of no contest are nonstatutory mitigator. The pleas of guilty or no contest are non-statutory mitigating factors. *State v Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). This Panel acknowledges that a plea of guilty or no contest is a non-statutory mitigating factor. The question is how much weight it should be afforded. Typically, sentencing courts in

all criminal cases, both homicide and nonhomicide cases, consider a guilty or no contest plea as a mitigating factor to be weighed in arriving at an appropriate sentence. The thinking is that such pleas save the State the cost of a lengthy trial and also spare victims or their relatives from undergoing the stress accompanying a trial.

This Panel finds that this non-statutory mitigating circumstance is tempered by the Defendant's lack of remorse and his actions and behavior since his arrest. As such, little weight is given this Mitigator.

Solitary Confinement.

The report of the Ombudsman's Office indicates that from October 17, 2003 through July 30, 2013, when he was serving his sentence, of the 97 months Nikko Jenkins was in the physical custody of the Nebraska Department of corrections, he spent 58 months or nearly 60% of his time in "segregation" i.e. solitary confinement.

The evidence before this Panel was that the Defendant was placed in solitary confinement for the protection of others and himself. Defendant's solitary confinement was as a result of his own actions and threats. Exhibit 123 sets for his extensive history of misconduct in the State Penitentiary. As a result, this Panel finds that there is insufficient evidence to support this non-statutory mitigator.

Bad Childhood.

The childhood history of the Defendant was important for this Panel as it could be a non-statutory mitigating circumstance. The following describes the Defendant's childhood history as best

can be determined. This history is from the report of the State's expert, Dr. Jennifer Cimpl Bohn's report of February 11, 2015 (Exhibit 51). In pertinent part this report stated:

> Mr. Jenkins reported witnessing and experiencing traumatic life events throughout his childhood. He recalled cleaning blood from the floor of his family home at age 4 after conflicts between his parents. Methodist Richard Young records indicate that his mother acknowledged that Mr. Jenkins once separated a marital fight by hitting his father in the head with a rock or brick. During LRC sessions, Mr. Jenkins volunteered that he called police and ran away from home during incidents when his mother was assaultive towards his stepfather. Mr. Jenkins reported being verbally and physically abused by several family members and sexually abused by his cousin. Methodist Richard Young records indicate that the content of his nightmares was associated with some of those traumatic family experiences.
>
> Mr. Jenkins' tumultuous home environment and conduct problems as a child have been consistently documented. According to available records, he was removed from home and placed in emergency foster care at age 7 after bringing a handgun to school. He was expelled from school on numerous occasions for fighting, breaking

windows, and going home without permission, Mr. Jenkins reported that he stopped attending school in 7th grade due to legal troubles, but later obtained a GED while incarcerated. Methodist Richard Young records indicate that he was in special education classes, and his IQ was assessed to be in the Low-Average range at age 8. NDCS records indicate that he reported that he began to carry a weapon and became involved in gang activity at age 11. According to NDCS records, Mr. Jenkins obtained five charges related to theft, one charge related to arson, one weapon charge, and two charges related to criminal mischief prior to age 12. The earliest available documentation of Mr. Jenkins' mental health treatment involved an inpatient psychiatric evaluation and treatment at Methodist Richard Young Hospital at age 8. Those hospital records indicate that Mr. Jenkins' admission was primarily due to aggressive behavior at school and towards family members as well as due to suicidal statements. According to a 02/03/1995 Methodist Initial Clinical Assessment, he discussed having prior thoughts of stabbing himself and acts of self-harm (i.e., intentionally jumped off a tire swing to injure himself, attempted to choke himself), and he expressed intentions to shoot his peers and kill people that caused him difficulty.

Records note that while hospitalized, he was verbally aggressive toward his mother and hospital staff. At Richard Young, Dr. Jane Dahlke diagnosed him with Oppositional Defiant Disorder; Attention-Deficit/ Hyperactive Disorder (ADHD); and Functional Enuresis, Nocturnal (i.e., 02/27/1995 Discharge Summary).

In a 02/10/1995 Methodist Psychological Report, Mr. Jenkins was noted to have a "value system that varies" due to him being rewarded for misbehavior by family members and peers, while conversely being punished for similar behaviors by legal and school authorities. During I-JRC sessions, Mr. Jenkins confirmed that others reinforced his antisocial behaviors. He discussed his father and uncles teaching him fighting and firearm use techniques. He indicated being shown how to make a Molotov cocktail and burning several buildings in his neighborhood. In addition, he reported shooting animals and carrying their remains in a plastic bag to present to family members. Mr. Jenkins described being spoiled by his mother and further commented about his ability to manipulate her.

While his conduct problems are consistently documented in collateral

records, Mr. Jenkins' description of other mental health problems as a youth have been inconsistent. During LRC sessions, Mr. Jenkins reported that he first experienced auditory hallucinations at age 5 and heard voices daily since that age. He indicated originally believing the hallucinatory voices were his conscience acting in an "advisory" manner. He expressed that the voices encouraged wrongdoing, threatened to "kill [or] possess me if I didn't do bad things," and were responsible for his childhood misconduct, such as bringing a gun to school and vandalizing property. He reported his mother admitted him to the hospital at age 8 due to her concerns about the voices. Methodist Richard Young Hospital records provide some corroboration to that statement, although do not convey the same severity as his self-report. Those records indicate that upon admission, Mr. Jenkins reported that he heard "voices" telling him to steal. However, later during that hospitalization he clarified that the voices instructing him to steal were from actual older boys, "and he only hears them when the boys are there with him" (i.e., 02/09/1995 Psychological Report). In fact, Mr. Jenkins was described as displaying "no evidence of psychosis or auditory hallucination" in a psychological assessment, and it was documented that he may have

misunderstood the question about auditory hallucinations in a previous interview (i.e., 02/10/1995 Psychological Report).

Regarding mood problems, Methodist Richard Young Hospital records indicate that Mr. Jenkins displayed labile moods during assessments and that his mother expressed concerns about his mood. However, over the course of that hospitalization, his mood fluctuations were conceptualized as distractibility and impulsivity, which were exacerbated by a high level of anxiety. Upon discharge from Richard Young, Mr. Jenkins' mood problems were attributed to anxiety, maladaptive coping techniques, and personality characteristics that made him inclined to seek "emotional stimulation" (i.e., 02/21/1995 Discharge Summary).

Methodist Richard Young records also indicate that his mother was concerned about Mr. Jenkins wetting his bed, trouble sleeping, and "carrying on a conversation with someone... saying stuff like leave me alone" (i.e., 02/04/1995 Psychiatric Admission Assessment). While hospitalized at Richard Young, Mr. Jenkins reported seeing black spirits in his room at night. Records indicate that his sleeping difficulties and violent events he had witnessed. While at Richard Young, he

was prescribed Tofranil for enuresis, but no other psychotropic prescriptions were provided. Treatment recommendations included therapy and psychosocial interventions to address trauma, anger management, anxiety, and self esteem. During LRC sessions, Mr. Jenkins reported that he agreed with Dr, Jane Dahlke's opinion, as provided in testimony during a 2014 hearing, in which she reported that, in hindsight, she believed he suffered from Bipolar Disorder as a child.

Mr. Jenkins' report about his childhood mental health treatment has varied over time, ranging from:

- Denial of any childhood mental health problems (12/04/2003 NDCS Initial Psychological Evaluation; 02/07/2007, 06/08/2007 NDCS Behavioral Observations and Suicide Assessments)
- Attribution of the hospitalization at age 8 to behavioral problems and ADHD (02/27/2006 NDCS Behavioral Observations and Suicide Assessments; 07/30/2009 NDCS Psychiatric Evaluation)
- Reporting that childhood mental health problems were limited to being abused and exposed to traumatic events (i.e., 03/03/2010 Douglas County Corrections Note)

- Assertion that auditory hallucinations precipitated his hospitalization at age 8 (LRC sessions; 03/14/2013 NDCS psychiatric Consultation).

Adolescence

During IRC sessions, Mr. Jenkins discussed being removed from home often as an adolescent. He reported living with his aunt for a period of time, with whom he described having a strong relationship. He noted that he struggled with her absence after her death, which occurred while he was incarcerated. NDCS records indicate that he was placed in several group homes and detention centers from ages 11-17. He received substance abuse treatment at a residential facility at approximately age 13. According to a 12/07/2003 NDCS Classification Study, he received seven charges between the ages of 12 and 17, including charges for arson, assault, theft, unlawful absence, and missing juvenile. He did not successfully complete juvenile probation, was described as a "continuous runaway for months at a time," and spent time at the Youth Rehabilitation and Treatment Center — Kearney. At age 17, Mr. Jenkins was convicted and sentenced as an adult for Robbery and Use of a Deadly Weapon to Commit a Felony after forcing owners from their cars at gunpoint in two separate incidents. He

began serving his sentence on 11/17/2003 at a youth correctional facility.

Mr. Jenkins' antisocial behaviors continued while he was detained, and he obtained 13 misconduct reports at the youth correctional facility, two of which were related to violent incidents. He was involved in a riot situation on 07/04/2005 and evaded staff for approximately ten minutes to reengage in attacks on other inmates. Mr. Jenkins described his involvement as defending a friend, stating "[he] was like a brother to me...I couldn't let the other guy win" (i.e., 08/16/2005 NDCS Mental Health Contact Note). Additionally, according to 01/05/2006 and 02/10/2006 NDCS Mental Health Contact Notes, Mr. Jenkins informed mental health professionals about his intentions to act upon his anger and be "remember[ed]" by correctional personnel once out of prison.

During LRC sessions, Mr. Jenkins indicated having "racing thoughts ... all the time," except when using substances or taking Depakote and hearing voices "all the time" since age 5. However, collateral records do not support these assertions. Available records indicate Mr. Jenkins denied experiencing major mental health symptoms during his 11/17/2003 — 02/25/2006 imprisonment at .the youth

facility, despite regular participation in individual and group therapy sessions aimed at reducing criminal thinking and developing future plans. In the month prior to his transfer from the youth facility to an adult facility, Mr. Jenkins described feeling stressed and having difficulty sleeping on two occasions, but those were isolated reports. There is no indication that he expressed mental health difficulties in his remaining individual sessions at the youth facility, and he denied mental health concerns upon transfer to an adult facility in February 2006.

While at the youth correctional facility, Mr. Jenkins received an IQ score in the "high end of the Mentally Retarded range of intellectual functioning" (i.e., a 69 WAIS-R equivalent score on the Shipley Institute of Living Scale), but there were concerns about the validity of the obtained score due to Mr. Jenkins completing the test extremely fast (i.e., 12/04/2003 NDCS Initial Psychological Evaluation). According to that same psychological evaluation, Mr. Jenkins completed the Minnesota Multiphasic Personality Inventory-Adolescent, but the results were invalid "due to his attempt to present himself in an unrealistically positive light."

As to the bad childhood mitigator, the Panel finds that it is a non-statutory mitigator to be

considered in the weighing process.

Mental health.

The Panel accepts and adopts the opinions of Dr. Cimpl Bohn and her team (see Exhibit 51) that the Defendant has a personality disorder of narcissistic, antisocial, and borderline. The Panel finds that this is a nonstatutory mitigator to be considered in the weighing process.

VII. Aggravators are sufficient for Death penalty.

After this Panel made its findings as to the aggravating and mitigating circumstances, the Panel, pursuant to Neb. Rev. Stat. § 29-2522(1), had to determine Whether the aggravating circumstances as determined to exist justify imposition of a sentence of death." After considering the evidence of the aggravating circumstances, this Panel unanimously determined that the aggravating circumstances, as determined to exist by this Panel, justify the imposition of a sentence of death.

VIII. Comparison of Mitigators with Aggravators.

The next requirement of the Panel is pursuant to Neb. Rev. Stat § 29-2522(2), "Whether sufficient mitigating circumstances exist which approach or exceed the weight given to the aggravating circumstances."

Under the statutory scheme governing the death penalty, if sufficient mitigating circumstances exist which approach or exceed the weight given to aggravating circumstances, the death penalty cannot be imposed. Neb. Rev. Stat. §§ 29-2519, 29-2522.

State v. Sandoval, 280 Neb. 309, 373, 788 N.W.2d 172, 224 (2010).

For purposes of imposing the death penalty, balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires careful weighing and examination of the various factors. Neb. Rev. Stat. § 29-2522. *State v. Victor*, 235 Neb. 770, 794, 457 N.W.2d 431, 447 (1990). In the balancing of the aggravating and mitigating circumstances, the death penalty will not be imposed simply because aggravating circumstances outnumber mitigating circumstances. The test is whether aggravating circumstances in comparison outweigh mitigating circumstances. Neb. Rev. Stat. §§ 29-2522, 29-2523. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977).

Nebraska's death penalty statutes contemplate the weighing of the aggravating and mitigating factors and a decision on the death penalty according to which type carries the most weight. This is unavoidably a matter of judgment to be determined by the sentencing panel subject to review. Absolute certainty in such matters is unattainable but the provision in Nebraska law for mandatory review in capital cases is a positive safeguard and insures against error. *State v. Holtan*, 197 Neb. 544, 546, 250 N.W.2d 876, 879 (1977) *disapproved of on other grounds by State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

The Panel notes that it received statements from family members of some of the victims. This Panel did not consider these statement for sentencing purposes.

After due deliberations in light of the evidence and the law, the Panel finds that there are mitigating circumstances, however, these mitigating circumstances do not approach or exceed the weight given to the six aggravating circumstances.

IX. Proportionality

The Defense has submitted a compilation of cases from around the state for comparison (Ex. 116) pursuant to Neb. Rev. Stat. § 29-2522(3).

The sentencing panel is faced with the daunting task of determining "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." Neb. Rev. Stat. § 29-2522(3). As noted by Defense counsel, this requires the ghoulish exercise of comparing homicides to determine if there are equivalently appalling, or even more appalling cases where the sentence was less than death.

The Defendant's commission of these four murders over a ten day period is one of the worst killing sprees in the history of this state. Based on the evidence presented and the law, this Panel finds that the sentences of death are not excessive or disproportionate to the penalty imposed in similar cases, considering the crimes and the Defendant.

CONCLUSION

In summary, this Panel finds that the aggravating circumstances as determined to exist, justify the imposition of a sentence of death for each murder. That there are mitigating circumstances, however, these mitigating circumstances do not

approach or exceed the weight given to the six aggravating circumstances. That the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases, considering the crimes and the Defendant.

Therefore, this Panel finds that the death penalty is appropriate, should be, and is hereby given for each of the four murders by the Defendant. It is therefore, the sentence of this Court as follows:

At CR 13-2768,

Count I. Murder First Degree, a Class I Felony, death;

Count II. Use of a Deadly Weapon (Firearm) to Commit a-Felony, a Class IC Felony, 45 to 50 years to run consecutive to all murder convictions at Counts I, IV, VII, and X;

Count III. Possession of Deadly Weapon by Prohibited Person; Class ID Felony, 45 to 50 years, to run consecutive to all murder convictions at Counts I, IV, VII, and X, and Count II;

Count IV. Murder First Degree, a Class I Felony, death, to run consecutive to murder conviction at Count I;

Count V. Use of a Deadly Weapon (Firearm) to Commit a Felony, a Class IC Felony, 45 to 50 years to run consecutive to all murder convictions at Counts I, IV, VII, and X, and Counts II and III;

Count VI. Possession of Deadly Weapon by Prohibited Person; Class ID Felony, 45 to 50 years, to run consecutive to all murder convictions at Counts I, IV, VII, and X, and Counts II, III, and V;

Count VII. Murder First Degree, a Class I Felony, death, to run consecutive to murder convictions at Counts I and IV;

Count VIII. Use of a Deadly Weapon (Firearm) to Commit a Felony, a Class IC Felony, 45 to 50 years to run consecutive to all murder convictions at Counts I, IV, VII, and X, and Counts II, III, V, and VI;

Count IX. Possession of Deadly Weapon by Prohibited Person; Class ID Felony, 45 to 50 years, to run consecutive to all murder convictions at Counts I, IV, VII, and X, and Counts II, III, V, VI, and VIII;

Count X. Murder First Degree, a Class I Felony, death, to run consecutive to all murder convictions at Counts I, IV, and VII;

Count XI. Use of a Deadly Weapon (Firearm) to Commit a Felony, a Class IC Felony, 45 to 50 years to run consecutive to all murder convictions at Counts I, IV, VII, and X; and Counts II, III, V, VI, VIII, and IX;

Count XII. Possession of Deadly Weapon by Prohibited Person; Class ID Felony, 45 to 50 years, to run consecutive to all

murder convictions at Counts I, IV, VII, and X, and Counts II, III, V, VI, VIII, IX, and XI;

At CR 13-2769,

COUNT I. Possession of Deadly Weapon by Prohibited Person; Class ID Felony, 45 to 50 years, to be served consecutive to all other counts at CR 13-2768, and

COUNT II. Possession of Deadly Weapon by Prohibited Person; Class ID Felony, 45 to 50 years, to be served consecutive to all other counts at CR 13-2768 and Count I at CR 13-2769.

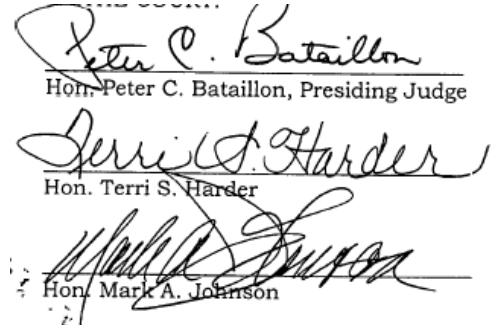
Commitment ordered accordingly. Credit for time served of 1,370 days is given against this sentence imposed. Mittimus signed.

It is further ordered that pursuant to Neb. Rev. Stat. § 29-4106 (Reissue 2008), as amended by L.B. 190, 2010 Nebraska Laws, the defendant shall submit to a DNA test and shall pay to the Nebraska Department of Correctional Services twenty-five dollars ($25.00). Such amount may be taken by the Department of Correctional Services from funds held by the defendant in the trust account maintained by the Department of Correctional Services on behalf of the Defendant, until the full amount in the order has been remitted.

IT IS SO ORDERED.

Dated this 30th day of May, 2017.

BY THE COURT:



cc: Donald Kleine, Esq., Brenda Beadle, Esq., Nissa Jones, Esq. Thomas Riley, Esq., Scott Sladek, Esq., Thomas Wakeley, Esq.

CLERK OF THE NEBRASKA SUPREME COURT AND NEBRASKA COURT OF APPEALS

August 9, 2019

IN CASE OF: S-17-000577, State v. Nikko A. Jenkins
S-17-000657, State v. Nikko A. Jenkins

TRIAL COURT ID: Douglas County District Court CR13-2768
Douglas County District Court CR13-2769

The following filing: Motion Appellant for Rehearing
Filed on 7/24/19
Filed by appellant Nikko A. Jenkins #5880

Has been reviewed by the court and the following order entered:

Motion of appellant for rehearing overruled for failure to comply with Neb. Ct. R. App. P. § 2-113(A).

Respectfully,

Clerk of the Supreme Court and Court of Appeals

STATE OF NEBRASKA
OFFICE OF THE PUBLIC COUNSEL/OMBUDSMAN

December 9, 2013

OMBUDSMAN'S REPORT

Performance of the Mental Health Component of the Nebraska Department of Correctional Services As Represented By the Case of Inmate Nikko Jenkins

Introduction

The situation involving former correctional inmate Nikko Jenkins, and the serious allegations that have been filed against Mr. Jenkins, have commanded public attention ever since he was first singled out for multiple murder charges on September 4, 2013. Of course, Mr. Jenkins is innocent until proven guilty, and is entitled to assert appropriate affirmative defenses to the charges against him. However, given the extent of our information about Mr. Jenkins' long, long history of odd, troubling, and sometimes antisocial, behavior, together with the serious questions that have been raised about his mental health, I believe that it is useful to examine his case to determine whether that history has any lessons to teach us about how our criminal justice system works, and about how the system might be changed to better manage those troubled/dangerous individuals who represent the

system's "most difficult cases."

Nikko Jenkins has a history of involvement in the criminal/juvenile justice system that goes back at least to when he was seven years old, and was first placed in foster care by the State. In fact, even before he was first sent to prison in 2003, Nikko Jenkins had been incarcerated in the Douglas County Juvenile Detention Center multiple times. As a juvenile, Mr. Jenkins had multiple placements in group homes, and was also placed in the Youth Rehabilitation and Treatment Center in Kearney for about six months beginning in August of 2001, when he was fourteen years old. It goes without saying that Mr. Jenkins must take personal responsibility for his most recent criminal actions, if any, but even if he is not guilty of the allegations against him, his extensive history of troubling behavior and involvement in the criminal and juvenile justice systems is likely to be a deep and productive resource for those of us who are seeking insights into how those systems work…and into how those systems can sometimes fail.

Mr. Jenkins first entered the Nebraska correctional system in November of 2003, and the Ombudsman's Office has had a history of contact and involvement with Mr. Jenkins going back to May of 2007, when he initially contacted us to complain about his continued placement in Administrative Confinement, a classification that confined him to a segregation cell for 23 hours every day. Our involvement with Mr. Jenkins and his situation continued over the years right up to the time that he was discharged from the Nebraska State Penitentiary on July 30, 2013, and was thus no longer in the custody or control of any agency of

State government. Over the years, our work in investigating Mr. Jenkins' complaints, and (in some instances) advocating on his behalf, covered three general areas:

1. Whether (and/or when) Mr. Jenkins should be released from Administrative Confinement (i.e., segregation);

2. Whether Mr. Jenkins was receiving proper and necessary services to address his mental health and/or behavioral health issues; and

3. Whether it would be desirable for the Nebraska Department of Correctional Services to develop and execute a comprehensive transition plan for Mr. Jenkins, so that he could receive all needed programming, and be gradually moved out of his solitary confinement in a segregation cell, and returned to the institution's general population before he was finally discharged and reintegrated into the larger community.

During our work on Mr. Jenkins' complaints, Ombudsman's Office had an opportunity to examine his situation in some detail, and to collect a large number of documents relating to his situation. Based upon this information, the goal of this report is to offer a narrative of our long involvement with Mr. Jenkins.

Needless to say, our prisons are occupied by many desperate, volatile, and sometimes very dangerous people, many of whom have significant mental health issues, and some of whom suffer from a serious mental illnesses. Mental health practitioners could, and did, differ over the question of whether Nikko Jenkins was mentally ill in the strict, clinical sense, but it seems to have been clear

to nearly all mental health specialists who came into contact with Mr. Jenkins that he, at the very least, had some serious behavioral issues, with the potential for dangerous behavior. Throughout his career as an inmate in our correctional system Mr. Jenkins exhibited violent behaviors that repeatedly got him into trouble, and that resulted in his being placed in a segregation cell for a high percentage of his time in the system. During these periods of segregation Mr. Jenkins was locked up alone in a cell for 23 hours per day, and was, by definition, separated from most normal human contact with others for many months at a time. He was also isolated from all but the most rudimentary programming that might otherwise have been made available to him. Programming (for example the Department's violence reduction program) is generally available to inmates in the Nebraska correctional system, but those inmates in segregation are not allowed to have access to this programming, even though they often are some of the most troubled and dangerous inmates in the entire system. All of this might have mattered only to Mr. Jenkins and his family, if Mr. Jenkins had been destined to serve a long sentence in the Nebraska correctional system, but the cold, hard reality was that Mr. Jenkins was an inmate - an often antisocial, deeply troubled, and potentially psychotic inmate - who was likely to be released from State custody in mid-2013.

One of the most important issues involved in the analysis of Mr. Jenkins' case boils down to the basic question of whether he truly suffers from a mental illness, or whether his issues are merely behavioral in nature. Obviously, all of this matters very little to Mr. Jenkins' victims, and to their

families, but the whole question of Mr. Jenkins' mental health, and whether he, in fact, has a "serious mental illness," is extremely important in analyzing how he was treated and managed in the criminal justice system. Of course, whether Nikko Jenkins in fact has a serious mental illness is a question that the Ombudsman's Office does not have the expertise or capacity to answer. As the reader of this report will see, however, there were a number of well qualified experts who have offered an opinion on this question (although those experts tended to arrive at sharply differing opinions on the subject). Our purpose in writing this report is not to weigh in on any side in the argument over whether Mr. Jenkins is mentally ill. Instead, insofar as that subject is concerned, we will simply provide an account of the basic facts that we have access to, and do so in the most straightforward and matter-of-fact way possible, to allow the reader decide for himself/herself what those facts disclose.

Our intent in writing this report is not to depict Nikko Jenkins as either the victim or the victimizer, or to demonize or dignify the actions of the Department of Correctional Services. Instead, our purpose is to simply state the facts as we know them to be, and let those facts speak for themselves. We are in a position to do this because we have extensive files of copies of Mr. Jenkins' mental health records that were provided to us while he was incarcerated in the correctional system. We are also able to do this because we have a release signed by Mr. Jenkins that authorizes us to collect additional medical/mental health records, if needed, and to disclose the content of those records. (Please see Attachment #1) We will begin with a summation of

the history of Mr. Jenkins' placements within the Nebraska correctional system, and will end with a narrative of various interventions that the Ombudsman's Office had made in response to Mr. Jenkins' many complaints. We would, of course, recommend that those interested in this subject read the entire length of the report. However, those looking for a "shortcut" can get a good sense of the realities of the case by reading the report's final section, which is entitled "Impressions and Observations."

History of Mr. Jenkins' Placement in the Correctional System

Nikko Jenkins was introduced into the Nebraska correctional system on November 11, 2003, when he was placed in the Nebraska Correctional Youth Facility following his conviction on multiple offenses which included two counts of Robbery, and one count of Use of a Weapon to Commit a Felony. Mr. Jenkins' sentence at this point was for an indeterminate term of fourteen to fifteen years. Later on, he was also sentenced to two years for one count of Assault in the Second Degree, which related to an assault that he committed while at NCYF. Mr. Jenkins' sentences for all of these four offenses were to be served consecutively, and, in the aggregate, provided for imprisonment for an indeterminate term consisting of a minimum of sixteen years and a maximum of seventeen years. It should be noted that when he received his first sentence (fourteen to fifteen years) Mr. Jenkins was given credit for 268 days of jail time, for months that he was held in custody prior to his sentencing. According to Nebraska's laws pertaining to good time and sentencing, this meant that Mr. Jenkins would be

required to serve a minimum of eight years before he would be eligible for parole, and a minimum of eight and one-half years before he would be subject to discharge. However, in 2011 Mr. Jenkins was given an additional consecutive sentence of two to four years for Assault on a Correctional Employee, Third Degree, which extended his basic sentence to a term of from eighteen to twenty-one years. Of course, the calculation of this term would have to be adjusted to consider jail time credits, and also good time taken away from Mr. Jenkins by the Department of Correctional Services for acts of misconduct while incarcerated.

Mr. Jenkins would have been seventeen years old at the time of his commitment, which explains why he was first placed at NCYF. After being an inmate at NCYF for more than a year and one-half, on July 4, 2005, Mr. Jenkins was involved in aggressive actions in the yard of NCYF that the staff later characterized as being a "riot," or "near-riot" situation. One staff to witness this event described Mr. Jenkins as having hit another inmate in the head with his fists "more than ten times." The reports on this incident indicate that when the NCYF staff tried to intervene Mr. Jenkins ignored directives, and evaded staff for up to ten minutes, while he was engaging in physical attacks on other NCYF inmates. In all, as many as nine NCYF inmates were involved in this altercation. After this incident, Mr. Jenkins was placed in the segregation unit of NCYF, where he remained for 40 days. In addition, Mr. Jenkins was also processed through the DCS institutional disciplinary procedure, and lost 30 days of good time as a result of this event. Finally, a felony charge for Assault in the Second Degree was

filed against Mr. Jenkins in Douglas County in connection with his having hit and kicked another inmate in the head, and he was ultimately sentenced to serve an additional consecutive term of two years for that offense.

Mr. Jenkins was placed in segregation at NCYF for an additional five days from December 15, 2005, through December 20, 2005, although he was destined to soon be transferred from NCYF to a different facility. This happened on February 20, 2006, when Mr. Jenkins was transferred from NCYF to the Lincoln Correctional Center (he was approximately nineteen and one-half years old at the time). On April 9, 2006, while still at LCC, Mr. Jenkins was placed in segregation, where he remained until he had to be transferred to Douglas County Jail for court proceedings. He remained in Douglas County from April 24, 2006, until May 9, 2006, when he was returned to LCC, where he was placed back in a segregation cell until May 11, 2006. Mr. Jenkins was back in Douglas County again from June 15, 2006, until August 31, 2006, when he was again returned to LCC. Mr. Jenkins received a misconduct report, and lost 30 days of good time for "tattoo activities" on October 20, 2006, and records indicate that on October 26, 2006 he was transferred from LCC, which is a maximum custody facility, to the Omaha Correctional Center, which is a minimum custody facility.

On January 4, 2007, Mr. Jenkins was allegedly involved in the assault of another inmate at OCC, with the other inmate being injured to the point that he required nine stitches to his upper lip. Mr. Jenkins was then placed in segregation at OCC, where he remained from January 4, 2007, through

January 26, 2007. Mr. Jenkins was later charged with an act of misconduct under the DCS disciplinary system in connection with this alleged assault, however, when Mr. Jenkins' case was finally heard by the OCC Disciplinary Committee Mr. Jenkins was found not guilty of the assault, and the charge of misconduct was dismissed by the Committee. As a result, Mr. Jenkins did not lose any good time in relation to the alleged assault at OCC. (Please see Attachment #2)

On February 7, 2007, Mr. Jenkins was transferred back to LCC. However, a mere ten days later, on February 17, 2007, Mr. Jenkins was involved, along with two other inmates, in the assault of a Native American inmate. Because the target of this attack was supposed to be a leader of one of the gangs that were operating underground at LCC, and because Mr. Jenkins was understood to be a member of the Crips gang, it was assumed that the assault was gang-related. Mr. Jenkins allegedly struck the other inmate several times in the head, and one of the other assailants supposedly used a heavy padlock to bludgeon the Native American inmate. In fact, there were numerous fights at LCC on February 16 and 17, 2007, and it was assumed that they all might be gang-related. Following the assault on the Native American inmate on February 17, 2007, Mr. Jenkins was placed in the segregation unit at LCC. He was charged with misconduct through the institutional disciplinary process, and lost 45 days of good time in connection with the assault at LCC. Mr. Jenkins was later transferred to the Tecumseh State Correctional Institution on June 8, 2007. After his arrival at TSCI, Mr. Jenkins was immediately placed in TSCI's segregation unit as a

classification action (Administrative Confinement), with the expectation that he would remain there indefinitely.

After more than a year in segregation at TSCI, Mr. Jenkins had progressed to the point that by August of 2008 he was included on the waiting list for placement in the Transition Program at the Nebraska State Penitentiary. The NSP Transition Program was the idea of former Director of Corrections Robert Houston, and was specifically designed to facilitate the gradual transition of inmates in Administrative Confinement (i.e., those in segregation) back into the institution's general population. However, it was during this period that Mr. Jenkins was heard articulating certain "homicidal ideations" and "threats to hurt others once he is released from incarceration," and so his name was ultimately removed from the waiting list for the Transition Program based on the recommendations of unit staff and TSCI's mental health staff.

Mr. Jenkins remained in segregation at TSCI from June 8, 2007, until December 4, 2008, when he was moved into a different unit at TSCI. On January 26, 2009, Mr. Jenkins approached staff in the TSCI yard and was taken inside for a search, which disclosed a homemade weapon (a toilet brush sharpened to a point) concealed in his waistband. At that point, Mr. Jenkins was returned to segregation and went through the TSCI disciplinary process resulting in the loss of 90 days of good time. Mr. Jenkins was disciplined two other times in 2009, on March 16 for Use of Threatening Language, and on May 8 for and on again for Use of Threatening Language. On each of these occasions, Mr. Jenkins

went through the institutional disciplinary process and lost 45 days of good time.

Mr. Jenkins remained in the segregation unit at TSCI until December 17, 2009, when he was given a temporary Travel Order that allowed him to be taken to Omaha under escort to attend the funeral of a relative. While he was at the church to attend this funeral, Mr. Jenkins attempted to escape from the DCS staff, struck the escort in the face, and attempted to bite the staff person, as he was being secured in restraints. After Mr. Jenkins was secured, he was immediately transported back to TSCI, and was returned to segregation. Mr. Jenkins again went through the institutional disciplinary process, and lost 90 days of good time in connection with the incident in Omaha. Mr. Jenkins would also remain in segregation at TSCI until February 13, 2010, when he was transferred to the Douglas County Jail in connection with the adjudication of the criminal charges filed as a result of his aborted escape attempt.

Mr. Jenkins remained at the Douglas County Jail for approximately seventeen months, from February 13, 2010, to July 19, 2011. Although the Jail has its own version of segregation, it is our understanding that Mr. Jenkins remained in the Jail's general population through most of his stay there. Mr. Jenkins was ultimately convicted on the charge of Assault of a Correctional Employee in the Third Degree, and had an additional consecutive sentence of from two to four years added to his sentence. On July 19, 2011, he was returned to TSCI where he was immediately placed in segregation. While he was back at TSCI Mr. Jenkins lost more good time, including 90 days in October of 2011 for

the Refusal to Submit to a Search, 45 days in January of 2012 for the Use of Threatening Language, and another 45 days in May of 2012. Mr. Jenkins would remain in segregation at TSCI for approximately twenty months until he was transferred from TSCI to the Nebraska State Penitentiary on March 15, 2013. The transfer to the Penitentiary would supposedly allow Mr. Jenkins to participate in the Transition Program at NSP. In reality, Mr. Jenkins never received the transition programming, and was kept in segregation status in Unit 4D while at NSP, until he was finally discharged from custody on July 30, 2013.

Altogether, Mr. Jenkins served a sentence that lasted from October 17, 2003, through July 30, 2013, a total of roughly 116½ months. However, because a significant portion of his sentence was served while in the Douglas County Jail, Mr. Jenkins was actually in the custody of the Department of Correctional Services for a total of about 97 months. Of that 97 months, approximately 58 months were spent in a segregation cell. In other words, Mr. Jenkins was being held in a segregation cell for nearly 60% of his time in the Department's custody. For the most part, that time served in segregation was the result of violent actions by Mr. Jenkins, including his involvement in a near-riot at NCYF on July 4, 2005, his alleged assault on another inmate on January 4, 2007, while at OCC, his involvement in an attack on an inmate at LCC on February 17, 2007, and his assault on a correctional employee on December 17, 2009, when he was in Omaha on a travel order. While he was serving his sentences in the correctional system, Mr. Jenkins lost a total of 555 days of good time in connection with his acts of

misconduct as an inmate. However, a block of 30 days of good time was restored to Mr. Jenkins in November of 2007, while he was at TSCI.

History of Mr. Jenkins' Psychological and Behavioral Treatment in the Nebraska Correctional System Prior to February 13, 2010

Throughout his stay as an inmate in the Nebraska correctional system Mr. Jenkins exhibited a proclivity toward violent/assaultive behavior, most of it directed at other inmates. However, Mr. Jenkins assault of a correctional employee on December 17, 2009, was definitely a watershed event in his history with corrections. Mr. Jenkins also exhibited a tendency at times to injure himself, including on August 17, 2009, when a DCS Sergeant reported that Mr. Jenkins threatened to choke himself, saying "I have a evil half and I'm going to kill it." This incident resulted in Mr. Jenkins being placed in an observation cell. On April 8, 2012, Mr. Jenkins had to be placed in therapeutic restraints after he made threats to harm himself, and then on May 10, 2012, Mr. Jenkins was observed as having two large cuts on his face and forehead, which staff suspected had been self-inflicted by banging his head against a metal shelf in his cell. Photographs of Mr. Jenkins show a man with heavy tattooing on his neck and on the left side of his face, with additional facial scarring that appears to be the result of self-inflicted wounds.

Mr. Jenkins also had a significant history of verbalizing threats of violence against others while he was incarcerated in the correctional system. On August 25, 2008, Mr. Jason Hurt, a Unit Manager at

TSCI, reported on two conversations that he had with Mr. Jenkins. According to Mr. Hurt, he spoke with Mr. Jenkins on July 22, 2008, at which time Mr. Jenkins said "he's just going to randomly go to suburban houses and start killing people outside of North Omaha, maybe go to Tecumseh or Syracuse with his gang members and start killing people." Mr. Hurt also reported that he had spoken with Mr. Jenkins on July 31, 2008, at which time Mr. Jenkins "expressed the same desire to kill the administration and other people when he gets out of prison." In addition, Mr. Hurt indicated in his Incident Report that he had reported both of these two conversations to the TSCI Mental Health staff, and that one of those Mental Health professionals,Connie Boerner, had stated that "she has had similar conversations with Jenkins and...that he is a very dangerous individual." In fact, Ms. Boerner has recorded her observations of Mr. Jenkins in a memorandum sent to Mr. Hurt, and dated August 11, 2008. That memorandum included the following language:

> Inmate Jenkins has expressed having ongoing homicidal ideations and has made threats to hurt others once he is released from incarceration. He went into detail as to how he would kill others, similar to the recent Von Maur shootings. Inmate Jenkins appears sadistical and potentially harmful, due to homicidal ideations and ongoing verbal intentions to hurt others upon release.

Ms. Boerner indicated that she was providing this information to Mr. Hurt "to assist in determining Inmate Jenkins's suitability for the Transition

Program."

Mr. Jenkins' odd behavior continued in 2009, although for a time it appeared that he might be making progress. In fact, Mr. Jenkins was released from segregation from December 4, 2008, until January 26, 2009, a situation which probably put him less "under the microscope" in the sense of being audited by staff at TSCI. However, on January 15, 2009, Heidi Widner, a Mental Health Practitioner at TSCI, had a conversation with Mr. Jenkins in which Mr. Jenkins complained to her about what he characterized as "institutional wrongdoing." The TSCI Mental Health Contact Notes from that meeting relate that:

> (Mr. Jenkins) denied difficulty adjusting to (general population), but said the two years he did in segregation had ruined him for life and made him very mentally ill due to the abuse he suffered at the hands of staff. (Mr. Jenkins) said that he was unjustly held in segregation as he had gone two years MR free. (Mr. Jenkins) said that this is a breeding ground for the criminally insane and that staff intentionally berate and abuse inmates because staff want inmates to go kill their own kind when they get out...(Mr. Jenkins) spoke about the life of crime that awaits him once he is out...that his crimes and killing will not be limited to just his own kind...and that it was the worst thing possible for him to have been thrown in the hole for two years. (Mr. Jenkins) also talked about how dismissed he felt

> and that he had been in the system for a long time and that no one has provided him with the skills or tools to make his life different.

The Mental Health Contact Notes for January 15, 2009, further indicate that Mr. Jenkins "talked about being sexually abused when he was younger, and being exposed to violence at a very young age," and that he said that "it was helpful to come and vent and get everything off of his chest."

After he had been returned to segregation in late January of 2009, Mr. Jenkins was again in contact with TSCI Mental Health staff, in this case with Ms. Boerner. On February 23, 2009, Mr. Jenkins spoke with Ms. Boerner and expressed his frustration with "the isolation in seg that he feels is making him 'homicidal.'" Mr. Jenkins indicated that he "fantasizes of 'killing' others once he is released." Mr. Jenkins also stated that "he sees himself 'destined' to be a 'homicidal maniac.'" In the Mental Health Contact Notes relating to the interview, Ms. Boerner said:

> No specific person identified by inmate, but MHP is concerned about inmate's intention to act upon HI (presumably "homicidal ideations"), once released. Inmate denies any intention to harm anyone while incarcerated. MHP will consult with Dr. White/Weilage for further guidance. (Note: Dr. Cameron White is the Department's Behavioral Health Administrator, and Dr. Mark Weilage is the Assistant Administrator for Mental Health.)

Following this interview, Ms. Boerner decided that it would be advisable to "refer (Mr. Jenkins) to Dr. Weilage for further evaluation and assessment," and also to prepare an Incident Report on the interview "to warn staff to be careful given (Mr. Jenkins') comments."

Following the referral discussed in the February 23 Contact Notes, Dr. Mark Weilage, the Department's Assistant Administrator for Mental Health, interviewed Mr. Jenkins in the TSCI Segregation Unit on March 27, 2009. Dr. Weilage's Notes from that interview include the following:

> He discussed his belief that he is schizophrenic and multiple personalities. His personalities are a serial killer, an (?) gangster, and Nikko...He is interested in "rehab" and the MHU (Mental Health Unit) at LCC.

With respect to the idea of sending Mr. Jenkins to the DCS Inpatient Mental Health Unit at LCC for treatment, Dr. Weilage noted that it was "not clear if he would be appropriate." Dr. Weilage said that he would "follow up in 2 weeks." As a matter of fact, Mr. Jenkins was never transferred to the Inpatient Mental Health Unit at LCC at any point before his eventual discharge on July 30, 2013.

On May 13, 2009, TSCI Unit Manager Shawn Sherman submitted a Mental Health Referral reporting that Mr. Jenkins "claims to be hearing the voice of an Egyptian god...telling him to massacre children." Two days later, another Mental Health Practitioner, Stacy Simonson, met with Mr. Jenkins in response to this referral. After speaking with Mr. Jenkins, Ms. Simonson reported that Mr. Jenkins

"does not appear to be psychotic," and suggested that his statements were "attention seeking" in nature. In the Mental Health Contact Notes, Ms. Simonson also observed that Mr. Jenkins was "highly narcissistic, anti-social," and that he had a "personality disorder." She also mentioned that Mr. Jenkins "refuses consideration of any intervention." On July 17, 2009, another mental health professional reported a discussion with Mr. Jenkins at his cell door. The Mental Health Contact Notes relating to that event mentions that it was "the opinion of long-term custody staff that (Mr. Jenkins) is basically afraid of everyone and is a 'coward.'" However, the Mental Health Contact Notes also include the remark that Mr. Jenkins "appears to be at considerable risk for reoffending and for interpersonal violence."

As previously noted, on August 17, 2009, Mr. Jenkins threatened to choke himself, and was placed in an observation cell with a directive for unit staff to conduct checks of his status every 15 minutes. On August 27, 2009, the psychiatrist at TSCI, Dr. Norma Baker, visited with Mr. Jenkins and found that he reported that he was "feeling better." Dr. Baker summarized her observations of Mr. Jenkins by using terms like "cooperative with good eye contact," "less agitated, remains intense," "speech spontaneous," and "talkative with rapid speech." Dr. Baker also related that Mr. Jenkins' was "extremely narcissistic" although his "thoughts appear fairly well managed." It is notable that, in fact, this was a period during which Mr. Jenkins was actually receiving medication for his mental health/behavioral health issues, in particular Risperidone and Depakote. Although Risperidone is characterized as being an "antipsychotic drug," it is our

understanding that Risperidone and Depakote will typically be prescribed not only for patients with a "serious mental illnesses" like schizophrenia, but also for patients who have other kinds of mental health issues, including major depressive disorders, bipolar disorders, PTSD, self-injury, and panic disorders, among others. In other words, the simple fact that Mr. Jenkins had been receiving these two drugs would not necessarily be inconsistent with the diagnosis that Mr. Jenkins' problems were not, in fact, a case of schizophrenia or of a schizoaffective disorder. On the other hand, this also demonstrates that a patient, like Mr. Jenkins, would not need to suffer from schizophrenia in order to be prescribed, and benefit from, these medications. Dr. Baker related that during the August 17 meeting with Mr. Jenkins she discussed with him "coping skills, anger issues," and also "the importance of med compliance." Finally, in her notes from that meeting, Dr. Baker discussed her plans to continue, and to adjust, the Risperidone and Depakote being prescribed for Mr. Jenkins.

Dr. Baker next saw Mr. Jenkins on October 8, 2009. In her notes from that meeting, Dr. Baker reported that Mr. Jenkins was "compliant and tolerating medications." Dr. Baker reported that he denied that he was having any "difficulty with energy or concentration." Dr. Baker also observed that Mr. Jenkins' "thoughts appear fairly well organized," and were "less paranoid overall." In addition, she observed that Mr. Jenkins was "a little calmer...remains somewhat intense and narcissistic," with "less paranoia overall," and less difficulty with "anger/aggressive behaviors." Once again Dr. Baker discussed her plans to continue the medication

regimen, and to eventually make adjustments to the Risperidone and Depakote dosages that were being prescribed for Mr. Jenkins.

These relatively positive reports on Mr. Jenkins started to change when Dr. Baker next saw him on December 3, 2009. Dr. Baker's notes reflect that Mr. Jenkins told her that he had discontinued taking his medications three days earlier "as he doesn't feel they help him and he does not want to take them." She reported that Mr. Jenkins had denied "feeling depressed or anxious," or any "feeling of anger/rage towards society in general." However, Mr. Jenkins again mentioned hearing the voice of an "Egyptian god" who wanted him "to harm others," and although Dr. Baker's notes used terms like "less paranoid overall," and "fairly stable," she also noted that Mr. Jenkins appeared "more hypomanic/agitated." Dr. Baker's notes further indicate that Mr. Jenkins said that he was willing to continue to work with Mental Health staff, and that he "feels 'counseling' is most beneficial for him." Because Mr. Jenkins stopped taking the medications, Dr. Baker said that she intended to discontinue the Risperidone and Depakote scripts due to his "refusal." Dr. Baker's notes for December 3 concluded with the statement that Mr. Jenkins "appears to be meeting his basic needs at this time," and that he "is not an imminent danger to himself or others at this time." Dr. Baker said she intended to see Mr. Jenkins again in two months, or "sooner if needed," but circumstances with Mr. Jenkins' case were dramatically altered just two weeks later, on December 17, 2009, when Mr. Jenkins had his travel order to Omaha, and attempted an escape which resulted in the assault of a correctional staff person.

Immediately after his escape attempt and assault of the corrections employee on December 17, 2009, Mr. Jenkins was returned to TSCI, and placed in segregation. The next day, December 18, 2009, Mr. Jenkins spoke with Katherine Stranberg, another Mental Health Practitioner working at TSCI. The notes from that meeting indicate that Mr. Jenkins "seemed upset and regretful over the events" of the previous day, but that he "did not take responsibility for his actions, choosing instead to blame the evil Opophus who dwells in him." According to the notes, Stranberg suggested that Mr. Jenkins "should consider taking medications to weaken the voice of Opophus," and the notes reflect that Mr. Jenkins "seemed willing to consider the possibility, and stated he would send a medical request to Dr. Baker." The notes from the December 18 meeting also reflect that Mr. Jenkins "reported that he wanted to go to the Inpatient Mental Health Unit (at LCC) because there he would be able to get the ongoing treatment he needed." In fact, this request/statement by Mr. Jenkins was but one of many such requests that he would make in which he was asking, in essence, to be hospitalized for his mental health issues. As a matter of fact, however, Mr. Jenkins would never be hospitalized for treatment of mental health issues.

On December 28, 2009, Mr. Jenkins sent a Health Services Request Form to Dr. Baker reporting that the "voice" in his mind was telling him to "hurt guards," and to "start war between good and evil," and that he would "take the pills," because he did not want to "feel this way." Dr. Baker responded the next day, December 29, 2009, by re-initiating the prescriptions for Risperidone and Depakote, which

the doctor said "should help stabilize (Mr. Jenkins') symptoms." Dr. Baker's next notation that concerned Mr. Jenkins is dated December 31, 2009, just two days after she had represcribed the Risperidone and Depakote. In that December 31 note, Dr. Baker reported that after a discussion of Mr. Jenkins' "mental status" with the TSCI Mental Health staff, she concluded that Mr. Jenkins' symptoms "***are inconsistent and more behavioral/Axis II*** (i.e., personality disorder) ***in nature.***" (emphasis added) In addition, Dr. Baker's notes also suggest that Mr. Jenkins was actually attempting to use his mental health symptoms "for secondary gain, including to avoid legal consequences in court for (his) recent behaviors."

As a matter of fact, while this December 31, 2009, diagnosis by Dr. Baker might seem inconsequential to the layperson, the reference to Mr, Jenkins having "Axis II" disorders is significant in terms of the kind of treatments that TSCI staff might be offer to Mr. Jenkins in terms of helping him to manage his thoughts and his actions. Also, an Axis II diagnosis for Mr. Jenkins is not something that was clearly reflected in earlier mental health notes that we have seen relating to Mr. Jenkins' problems, and how those problems might be correctly categorized. It should also be noted that the TSCI Mental Health records further indicate that on the same day that this Axis II diagnosis was made, the prescription for Mr. Jenkins to receive Risperidone was ordered to be discontinued, even though that medication had just been represcribed by Dr. Baker a mere two days earlier.

Mr. Jenkins' behavior in early 2010 is notable. On January 9, 2010, Mr. Jenkins sent a Health Services Request Form to Dr. Baker asking to know "the reason I was taken off Risperidal," saying that "I need that medication it helped my symptoms of the voice of Opophis and remaining stable in reality." On January 10, 2010, TSCI Caseworker Howell reported in a Mental Health Referral that Mr. Jenkins had "exhibited increasingly aggressive behavior in the past week...claiming to hear voices telling him to injure staff." On January 11, 2010, Mr. Jenkins' prescription for Depakote was discontinued, with the notation of "due to refusing." The answer to the Caseworker's referral from the TSCI Mental Health staff was, "Thank you for the information, Mental Health will follow up."

History of Mr. Jenkins' Psychological and Behavioral Treatment in the Douglas County Jail from February 13, 2010 Through July 19, 2011

On February 13, 2010, Mr Jenkins was transferred from TSCI to the Douglas County Jail in connection with the adjudication of the new criminal charges against him relating to the incident on December 17, 2009, when he assaulted a correctional employee while he was in Omaha on a travel order. Mr. Jenkins was to remain in the Douglas County Jail until July 19, 2011, which was about one week after he had been sentenced for that offense by District Judge Gary B. Randall. Throughout his time at the Douglas County Jail, Mr. Jenkins was in frequent contact with the Mental Health staff at the Jail. To understand the treatment that our criminal justice system provided for Mr. Jenkins in connection with his mental health/behavioral health issues, it is

important to provide an account of how his case was handled by the mental health professionals at the Douglas County Jail.

On the same day of his arrival at the Douglas County Jail, Mr. Jenkins was seen by the Jail's medical staff. Mr. Jenkins told the medical staff that he had a "diagnosis (of) Bipolar and Schizophrenia...and was on Risperdal and Depakote." He also told the medical staff that he was "hearing voices all the time." As a result, he was immediately referred to the Jail's mental health staff via a Staff Referral Form including the notation "inmate states Tecumseh prison was holding medication, no meds since December 2009." It should be emphasized that Correct Care Solutions, which is a private medical care provider, had been retained to provide medical and mental health services at both the Douglas County Jail, and at the Tecumseh State Correctional Institution.

Throughout his stay at the Douglas County Jail, Nikko Jenkins' condition was closely monitored by a Licensed Mental Health Practitioner, Denise Gaines. It appears that Ms. Gaines first saw Mr. Jenkins on February 16, 2010, three days after he had arrived at the Jail. At that time, Mr. Jenkins informed Ms. Gaines that "he was on meds at Tecumseh until December '09," which Ms. Gaines recorded, along with the notation that Mr. Jenkins had said that he "began refusing his meds." Ms. Gaines met with Mr. Jenkins again on February 19, 2010, and the Mental Health Progress Notes from that meeting reflect that:

> Patient provided an extensive history of abuse (physical/sexual) and history of

> drug, alcohol abuse as well. Patient indicated he has been institutionalized starting at age 11.

Ms. Gaines' notes from February 19 further indicate that Mr. Jenkins "spoke openly about (his) anger issues...(and) spoke about having other personalities that he fights to control." Ms. Gaines also noted that Mr. Jenkins said that he "was on Depakote and Risperdal at Tecumseh and would like to resume taking these meds." In offering her own observations of Mr. Jenkins, Ms. Gaines said that:

> inmate is or appears to (be) intense...Patient reported hearing voices in his head. Patient may benefit from medications as it appears he may have problems with intermittent explosive-ness...Patient was calm, cooperative, grandiose at times, no suicidal /homicidal ideations, delusional (?).

Ms. Gains' notes conclude with the statement that a follow up visit would be scheduled, and that she would "refer to psych for evaluation."

Mr. Jenkins' situation was first addressed by the psychiatrist at Douglas County Jail, Dr. Eugene Oliveto, on February 22, 2010. On that day, Dr. Oliveto wrote orders reflecting a need to "reorder medications prescribed at Tecumseh." Dr. Oliveto's orders also note the need to obtain the "records from Tecumseh prison to order medications - need doses of Risperdone and Depakote." Ms. Gaines next saw Mr. Jenkins five days later on February 27, 2010, and visited with him in greater depth about his condition. Ms. Gaines' notes on that meeting include the following entry:

> Patient also talked about the horrific acts that the Egyptian god Opophus (sp.) wants him to inflict on Catholics, whites, and children...Patient stated he knows these things are wrong, but the god-Opophus tells him to do these things.

Significantly, the notes of the February 27 meeting included the notation "mental health will continue to meet with inmate weekly or more if needed."

Ms. Gaines next saw Mr. Jenkins on March 1, 2010, when she spoke to him briefly "in Mod 20," at which time Mr. Jenkins "went on a rant about getting his meds before he becomes more violent." The Physician's Orders relating to the time that Mr. Jenkins was at the Douglas County Jail indicate that he was seen by the psychiatrist, Dr. Oliveto, on March 3, 2010, and that Mr. Jenkins was eventually given a prescription for Risperdal - 1 mg., and Depakote - 500 mg. Also, on March 4, 2010, Dr. Oliveto added a notation to the Physician's Orders to the effect that Mr. Jenkins "needs a forensic psychiatric evaluation at Lincoln Regional Center." It would appear that medications were actually commenced on or about March 10, 2010. However, in a note that is dated March 15, 2010, Dr. Oliveto indicated that he was going to discontinue the Risperdone and Depakote due to the fact that the "patient refused after asking for them."

The next notation of a visit by Ms. Gaines with Mr. Jenkins is dated April 8, 2010. The notes of that meeting reflect that Mr. Jenkins talked about personal issues, and about how "different

relationships affect him." Ms. Gaines reported that she advised Mr. Jenkins that "Mental Health and patient need to create a treatment plan." Ms. Gaines said that she observed that Mr. Jenkins was "cooperative, (with) good eye contact, no suicidal/homicidal ideations, pleasant." However, Dr. Oliveto again remarked in the Physician's Orders, dated April 23, 2010, that Mr. Jenkins "needs forensic psychiatric evaluation at Lincoln Regional Center." There is also a document from April 23, 2010, that appears to reflect Dr. Oliveto's own diagnosis of Mr. Jenkins' condition, which reads as follows:

> Axis I – ***Schitzoaffective disorder vs. bipolar I*** (emphasis added)
>
> Axis II– Anti-social/Impulsive/Obsessive

(Please compare this diagnosis to Dr. Baker's note of dated December 31, 2009, indicating that Mr. Jenkins' symptoms were "inconsistent and more behavioral/Axis II in nature.") The April 23, 2010, document signed by Dr. Oliveto also includes, once again, the notation that Mr. Jenkins "needs to be evaluated at LRC."

Part of the adjudication of the pending criminal charges against Mr. Jenkins involved an evaluation to determine whether he was mentally competent to stand trial on those charges. This evaluation was to be done by psychiatrist Dr. Y. Scott Moore. Dr. Moore had familiarized himself with the police report on the allegations against Mr. Jenkins, and also met with and interviewed Mr. Jenkins at the Douglas County Jail on July 20, 2010, at which time Mr. Jenkins described his psychiatric symptoms, including hearing "voices." In

summarizing his impressions of Mr. Jenkins' condition in a July 20, 2010, letter to Judge Randall, Dr. Moore said:

> ***I think that the possibility of a psychotic illness is present, but I do not think that it is a very good possibility. The descriptions that Mr. Jenkins gives me of his psychotic symptoms appear to me to be thought out and probably acquired from someone else.*** They don't really follow the usual path of auditory hallucinations. It also appeared to me that when I did not instantly accept his description of the symptoms, he began to add to them and sort of "played it by ear" adding more and more symptoms to the mix that he had. I believe ***his major diagnosis is Antisocial Personality Disorder, and I doubt the presence of psychosis.*** (emphasis added)

Dr. Moore concluded that Mr. Jenkins was competent to stand trial, and that Mr. Jenkins did not have a condition that would qualify him to raise an insanity defense to the criminal charges pending against him. Dr. Moore's fundamental conclusion with regard to Mr. Jenkins' condition was that while "there is the possibility that Mr. Jenkins does indeed have a psychotic illness, I don't think this is a very good possibility."

Records reflect that Ms. Gaines again saw Mr. Jenkins on August 7, 2010. Ms. Gaines' notes on that meeting include the following entry:

> Patient stated that he continued to feel as though he is losing grip and "Opophus" is taking over...Patient stated that he is trying to get help but the system is not listening. He said that Opophus is telling him that the day is coming soon that "they will see." "When Opophus takes over that's it." Patient spoke of how he is fighting the voice in his mind (Opophus) to destroy Catholics and Christians...continued with homicidal rant about Opophus taking him over and him killing others once released from prison if he doesn't get some help.

Ms. Gaines followed up with a meeting with Mr. Jenkins on August 12, 2010. At that meeting Ms. Gaines observed that Mr. Jenkins was "cooperative, good eye contact, calm, still appears delusional (i.e., Opophus)." In her notes Ms. Gaines said that Mr. Jenkins "continued to state that he wants help fighting his 'mental illness' because he wants to be there for his family," and that Mr. Jenkins had also acknowledged that it was "helpful to speak with the Mental Health Professional weekly."

Ms. Gaines had a routine follow-up session with Mr. Jenkins on September 14, 2010. On that occasion, Mr. Jenkins "stated that he feels more and more that 'the evil is overwhelming the good in him.'" Ms. Gaines reported that at this meeting Mr. Jenkins also continued to "express his desire to get the proper mental health care before leaving NDOC." Ms. Gaines added the personal observation that she was "concerned that this client is going to act on the delusion of Opophus once released from prison." One

week later, on September 21, 2010, Ms. Gaines again met with Mr. Jenkins because he had requested "to be on his meds again." Ms. Gaines' notes from this session indicate that Mr. Jenkins "stated he is losing his grip and doesn't know how much longer he can maintain," and that "Opophus is taking over and nobody believes him or wants to give him the proper treatment needed." She also noted that Mr. Jenkins was "mad at 'the system' including this MHP because he feels as though he is not getting the proper psychiatric mental health care." Ms. Gaines referred Mr. Jenkins to the psychiatrist, presumably because of his interest in reinstating the medications.

Dr. Oliveto saw Mr. Jenkins on the following day, September 22, 2010. Dr. Oliveto's Follow-up Notes include these remarks:

> Still psychotically obsessed with plot to kill him or set him up to kill others here like in Tecumseh. He is psychotic, delusional, but has refused meds. Was evaluated by LRC psychiatrist, but no transfer done. Appears intense with dramatic behavior that can evoke fear in others...Has refused medications but wants them now if I can guarantee no one will tamper with them.

On this occasion, Dr. Oliveto's diagnosis of Mr. Jenkins' condition was summarized as follows:

> Axis I – ***Schitzoaffective disorder vs. paranoid schizophrenia*** (emphasis added)
>
> Axis II – Anti-Social/Obsessive/Impulsively dangerous to others/Explosive

Dr. Oliveto's September 22, 2010, Follow-up Notes on Mr. Jenkins conclude with the statement "needs transfer to LRC." In conjunction with his observations, as reflected in his Follow-up Notes, Dr. Oliveto wrote an order that included a prescription for Risperdone - 2 mg., and Depakote - 500 mg. (It should be noted that the prescription for the Risperdone was double the dosage that had been prescribed by Dr. Oliveto on March 3, 2010.) Dr. Oliveto's Order also included the following statement: "***Needs transfer to LRC before his discharge to stabilize him so he is not dangerous to others.***" (emphasis added)

Ms. Gaines had a regular follow-up session with Mr. Jenkins on October 8, 2010. Ms. Gaines' Progress Notes from that session state:

> Client discussed that he is trying to get help for his mental disorder. Client states "he doesn't want to kill Christians and Catholics." Client expressed sadness about being mentally ill, but was adamant that he needs help...Client continued to complain that the system does not believe that he will follow through on killing people when he gets out of prison.

Ms. Gaines concluded her October 8, 2010, Progress Notes with the following observation - "This writer sincerely believes that this client wants help, but is giving up on anyone (the system) providing him with help."

Ms. Gaines' had another follow-up session with Mr. Jenkins on November 13, 2010. The records of that session reflect that Mr. Jenkins returned to

the recurring theme of his odd delusions. In her notes, Ms. Gaines said that Mr. Jenkins "continues to talk about the destruction that Opophus wants him to inflict on Caucasians, Christians, and Jews." She said that he had denied "wanting to follow on this, but continued to ask for 'the proper help.'"

All that had gone on up to this point in terms of the sessions that Ms. Gaines and Dr. Oliveto had with Mr. Jenkins led up to the production of a document which summarized their professional opinions, and their profound concerns, in regard to Mr. Jenkins, his condition, and the implications for society. The document in question is a December 1, 2010, letter addressed to the Nebraska Board of Parole, a letter signed by Ms. Gaines. (It is our understanding that the Department of Correctional Services received a copy of this letter and/or that DCS staff had access to it in Mr. Jenkins' mental health records.) In this letter Ms. Gaines said the following:

> I have worked with Mr. Jenkins since he arrived at our facility in February, 2010. ***He has been evaluated by Dr. Eugene Oliveto, the attending psychiatrist at Douglas County Corrections. He was diagnosed by Dr. Oliveto with Schitzoaffective disorder vs. paranoid schizophrenia and in his last evaluation, it was recommended by the psychiatrist that he be transferred to Lincoln Regional Center for treatment before being discharged (from the correctional system) for "stabilization so he is not dangerous***

to others."

> During the time that I have worked with Mr. Jenkins, he has been compliant and has not acted out behaviorally since coming to Douglas County Corrections. He has been on and off psychotropic medications since being detained here; however, he refused to take them because of how he felt on the medication.
>
> ***Based on his history, current psychiatric state (i.e., fixation with Apophis - Egyptian god of war) and recommendations by Dr. Oliveto, it is requested that Mr. Jenkins continue to receive mental health treatment at a facility (if possible) and if paroled, mental health treatment to be a condition of parole.*** He has expressed to this writer that he desires to "get well" and would like to get the treatment he needs in order to work through issues such as grief and getting rid of "Apophis." (emphasis added)

Obviously, it is possible for reasonable mental health professionals to differ in their diagnosis of the condition of the same patient, but in Mr. Jenkins' case there was a rather surprising convergence of different opinions, from Dr. Baker's conclusion that Mr. Jenkins' symptoms were "inconsistent and more behavioral/Axis II in nature," to Dr. Moore's opinion that "there is the possibility that Mr. Jenkins does indeed have a psychotic illness, (but) I don't think

this is a very good possibility," to Dr. Oliveto's diagnosis of "Schitzoaffective disorder vs. paranoid schizo-phrenia," with a recommendation that Mr. Jenkins would need to be transferred to the Lincoln Regional Center "before his discharge to stabilize him so he is not dangerous to others." (Please see Attachment #3)

Shortly after writing this letter, Ms. Gaines again saw Mr. Jenkins for a routine follow-up on December 11, 2010. Ms. Gaines Progress Notes from that session include the following:

> Met with client in the medical clinic. He was very open and expressive during this session. Client seems scared about being released because of the violence that he is (through Apophis) inflict on people and police. Client expressed fear about losing control and does not want to.

Mr. Jenkins expressed a similar concern to Ms. Gaines at a routine session on March 25, 2011. In that instance, Ms. Gaines' Progress Notes recorded that Mr. Jenkins "continued to express thoughts about doing murderous acts on society (i.e., killing/torturing nuns, children, etc.)." She also recorded that Mr. Jenkins "continues to struggle with thoughts and indicates that he doesn't want to do these things, but feels the destructive acts at his hand are inevitable."

On July 11, 2011, Mr. Jenkins was sentenced by the District Court of Douglas County in connection with the Assault on an Officer, Third Degree, charge connected with the escape attempt and assault at the funeral on December 17, 2009. Mr.

Jenkins had entered a plea of No Contest to the charge, and was sentenced to a term of from two to four years, which sentence was to run consecutively to his other sentences. The sentencing Order, signed by sentencing Judge Gary B. Randall, is remarkable for the inclusion of the following paragraph:

> The Court notes for the benefit of the Department of Corrections that at the sentencing the Defendant requested treatment for his mental health issues. The record in this case would support the Defendant's request, although competent to stand trial, and not mentally incapacitated at the time of committing this crime, the Defendant has a long and serious history of mental illness which inhibits his ability to be rehabilitated. ***The Court therefore recommends to the Department of Correctional Services that Defendant be assessed and treated for issues regarding his mental health.*** (emphasis added)

We should particularly note that when Judge Randall included this language in his sentencing Order he had presumably already seen Dr. Y. Scott Moore's assessment of Mr. Jenkins, and nevertheless made his recommendation for Mr. Jenkins to receive an assessment and treatment "for issues regarding his mental health" based upon an acknowledgment by the Judge that Mr. Jenkins had a "long and serious history of mental illness." (Please see Attachment #4) Of course, while the Department of Correctional Services Mental Health staff might have

followed up on Judge Randall's recommendation, presumably their action or inaction in that regard would have been partly influenced by the fact that Dr. Baker had already determined, on December 31, 2009, that Mr. Jenkins' symptoms were actually "inconsistent and more behavioral/Axis II in nature."

Management of Mr. Jenkins' After His Return to TSCI on July 19, 2011

On July 19, 2011, with the adjudication of his criminal charges in Douglas County having finally been completed, Mr. Jenkins was returned to the Tecumseh State Correctional Institution. During the time that he was held at the Douglas County Jail, Mr. Jenkins had received more or less regular counseling sessions with Ms. Gaines, a Licensed Mental Health Practitioner, and had also received, off and on, medications to address his perceived mental health issues. It is our understanding that Mr. Jenkins had been able to function with a relative degree of success in the general population of inmates during the roughly seventeen months that he was at the Douglas County Jail. However, upon his return to TSCI Mr. Jenkins was immediately returned to a segregation cell, where he was to remain for almost all of the remaining two years of his incarceration in the Nebraska correctional system. Notwithstanding the unusual recommendation from Judge Randall to the effect that the Department of Corrections should see to it that Mr. Jenkins was "treated for issues regarding his mental health," the involvement of DCS Mental Health staff with Mr. Jenkins after his return from the Douglas County Jail was, for the most part, limited to evaluation and occasional visits at Mr. Jenkins' cell door. Mr. Jenkins did not receive any

psychotropic drugs after his return to the custody of DCS in July of 2011, although arguably that was due to the fact that he had stopped taking those drugs when they were prescribed for him in the past. On some occasions, Mr. Jenkins described this refusal as being motivated by a lack of trust for the DCS Mental Health staff.

Although Mr. Jenkins received somewhat limited mental health treatment while in the custody of DCS after July 19, 2011, he made it very clear that he was asking for more. In fact, Mr. Jenkins repeatedly asked to be provide with therapy to address his mental condition. In addition, he repeatedly requested to be transferred to the Inpatient Mental Health Unit at LCC. In addition, Mr. Jenkins even lobbied to be committed to the Lincoln Regional Center in order to receive treatment there. For example, when Mr. Jenkins was interviewed by DCS Mental Health staff on August 31, 2011, he said that he wanted to "parole" to the Lincoln Regional Center, and he reported that he "steps in and out of reality and that he was repeatedly being awakened by "terrors" every night when he was trying to sleep. In addition, Mr. Jenkins expressed "concern about his release...managing symptoms when nor in SMU...what would happen (revenge) without treatment including medications and intense therapy.." The notes from this meeting state that "treatment options were discussed."

On September 26, 2011, Mr. Jenkins was seen by Dr. Baker (apparently at his cell door). Dr. Baker observed that Mr. Jenkins had "complained about auditory hallucinations relating to harming others." Dr. Baker's notes state that she had observed "questionable delusions of grandiose type," and that

Mr. Jenkins was "angry/verbally aggressive," with "significant narcissistic/antisocial traits/behaviors." In addition, Dr. Baker recorded that Mr. Jenkins told her that he had discontinued taking the Risperdal and Depakote prescribed by Dr. Oliveto at the Douglas County Jail, and that he was refusing to take those medications again, but that he was requesting "daily psychotherapy to help him cope." Dr. Baker also reported that Mr. Jenkins was "very focused on wanting to be transferred to LRC (the Lincoln Regional Center) and states he will only take meds if recommended if he is at LRC." The notes of Mental Health staff from when Mr. Jenkins was seen by two days later (September 28, 2011) reflect that he stated that the "Douglas County Mental Health had recommended psychotherapy and that TSCI Mental Health and the Department of Corrections was refusing him treatment." Those notes also reflect the opinion that Mr. Jenkins "did not present in a manner consistent with someone experiencing hallucinations or other psychotic symptoms," and that there were "no observable signs of mental illness."

It appears that Dr. Baker next saw Mr. Jenkins on December 23, 2011, while he was on the "yard" at TSCI. In her notes from that meeting, Dr. Baker stated that Mr. Jenkins continued to refuse to take psychotropic medications outside of the Lincoln Regional Center. The notes further reflect that Mr. Jenkins had reported that "he does have violent thoughts due to his traumatic past," and that, while he "denies he will harm anyone while incarcerated," Mr. Jenkins "feels he will hurt others when released back into the community." Mr. Jenkins was continuing to complain about his "intermittent

auditory hallucinations," but Dr. Baker's impressions of Mr. Jenkins from this meeting included the observation that he was "easily agitated, manipulative, (and) argumentative," and that Mr. Jenkins presented with "questionable delusions of grandiose type." Dr. Baker was interested in having further testing of Mr. Jenkins, but she noted he had not been "cooperative with testing so far." Dr. Baker also mentioned the idea of discussing psychotropics and treatment options with Mr. Jenkins in the future, after "testing is completed and reviewed." Two days later, on December 28, 2011, Mr. Jenkins had an encounter with Elizabeth Geiger, a DCS Clinical Psychologist. She reported that while Mr. Jenkins "reported going 'in and out of psychotic states all day every day,'" he displayed "no signs of psychosis or anger/agitation," and that "no overt threats or aggression (were) noted." She observed that while Mr. Jenkins "stated his belief that others do not take his mental illness seriously," in this case "no signs of major mental illness (were) noted."

On February 1, 2012, Mr. Jenkins had a meeting with Dr. Mark Weilage, the Department's Mental Health Director (presumably this was preparatory to a Mental Illness Review Team evaluation of Mr. Jenkins). During this meeting, Mr. Jenkins "specifically requested daily psycho-therapy...stated (that) daily psychotherapy would help with his hypomania, stabilize his psychosis, and help him deal with the grief of confinement," and said that "he would comply with medications, therapy, if transferred to LCC and comply with MHU expectations." The notes from the meeting also record that Mr. Jenkins stated that "he wants help and if he does not get it from us then his first thought when he

gets out is that he needs to 'get some weapons.'" Dr. Weilage's summary of the meeting with Mr. Jenkins included the observation that in all of his interactions with Mr. Jenkins, "his statements and behavior appeared well planned, purposeful and deliberate." (It should be noted here that in the MIRT Referral/Review Form relating to this meeting with Mr. Jenkins, Dr. Weilage did acknowledge that he had access to, and had reviewed, "Psychiatric Provider Follow-up Notes written by E. Oliveto, M.D., received from Douglas County Corrections Mental Health Department.")

A document that reflects the results of Dr. Weilage's examination of Mr. Jenkins and his condition for the purpose of the Mental Illness Review Team's evaluation of Mr. Jenkins (dated February 8, 2012) includes the following:

> Since returning to Tecumseh State Correctional Institution, inmate Jenkins has been seen by licensed Mental Health staff for evaluation and/or monitoring on 10 occasions. It is the professional opinion of the evaluators that noted signs, and reported symptoms, do not indicate, or support, a diagnosis of Dissociative Identity Disorder (AKA Multiple Personality Disorder), Bipolar Disorder, Schizoaffective Disorder or any Psychotic Disorder. Nor does he meet the criteria for a diagnosis of Post Traumatic Stress Disorder (PTSD), at this time.

The MIRT document indicates that the "most recent diagnosis per Dr. Baker includes Psychosis NOS ("not otherwise specified"), possible Bipolar

Affective Disorder with psychotic features or Delusional Disorder, Grandiose Type, Probable PTSD, Relational Problems NOS, Polysubstance dependence (and) Antisocial and Narcissistic Traits." (The reference "NOS" is a category which would include psychotic symptoms, for instance, delusions or hallucinations, about which there is not adequate information to make a specific diagnosis, or about which there is contradictory information indicating symptoms that do not meet the criteria for any specific psychotic disorder.) Dr. Weilage reported having watched over three hours of video visits that Mr. Jenkins had with his mother and girlfriend, and observed that:

> His presentation in video visits is of a person very clear minded and goal directed. He repeatedly instructs his mom and girlfriend to do all sorts of things related to monitoring staff, calling attorneys, filing appeals, making complaints, sending him money. He is very demanding and berates and belittles them.

In light of his review of documentation, including the review of the "records received from Douglas County," the clinical interview of Mr. Jenkins, and his observation of the video visits, Dr. Weilage's report to the MIRT team indicated that Mr. Jenkins' "self-reported symptoms seem more consistent with Axis II diagnosis of Narcissistic and Antisocial Personality Disorder and some post-trauma experiences that have not developed into any Axis I disorder but instead have fostered the development and solidification of the Axis II disorders." Having determined that "no acute mental

health issues (were) noted," and that the "predominant feature is a personality disorder," the MIRT team concluded that a "transfer to the (Mental Health Unit) is not indicated or recommended at this time," although the Team did suggest that Mr. Jenkins be "considered for the transition program at NSP to allow time in GP (general population) prior to discharge next year."

On February 15, 2012, Dr. Weilage met with Mr. Jenkins at TSCI to "give him feedback about the MIRT review." Dr. Weilage informed Mr. Jenkins that the team did not find him to be appropriate for a transfer to the Inpatient Mental Health Unit at LCC, and that, in fact, "the evidence seemed to point that there was not an Axis I severe mental illness present" to justify such a transfer. Dr. Weilage also said that he "discussed with (Mr. Jenkins) that there was still treatment that could be made available to him," and that they "could look at individual therapy and working to get him to transition to general population and back to the community." According to Dr. Weilage's notes of the interview, Mr. Jenkins said "that he was not interested in any Mental Health services from (DCS) based on what (Dr. Weilage) had just told him." Dr. Weilage also reported that, as security staff were escorting Mr. Jenkins back to his cell, Mr. Jenkins yelled back to him, "Remember Dr. Weilage, Tik Tok!"

At a meeting with TSCI Mental Health staff on March 23, 2012, for regular follow-up, Mr. Jenkins again reported problems sleeping, and mentioned "visions," and that he was being "spoken to by the demonic forces." In addition, Mr. Jenkins "insisted that he needed 'intense psychotherapy' before he was released," and that the Mental Health staff should

recommend that he "be placed in a psychiatric hospital immediately due to the high level of distress he was experiencing." Instead, he was offered "materials in regard to distress management."

Dr. Baker saw Mr. Jenkins again at his cell door on April 19, 2012. On this occasion, Dr. Baker said that Mr. Jenkins was "fairly cooperative," but that Mr. Jenkins was "easily agitated/irritable," and that he was, as before, having "questionable delusions of grandiose type," with "significant narcissistic/anti-social traits/behaviors." Dr. Baker reported that Mr. Jenkins expressed "concerns about what he will do once he is released from DOC," and that he again said that he would like to be transferred to LCC or LRC for mental health treatment. Dr. Baker also made note that Mr. Jenkins "continues to refuse all psychotropics including Risperdal and/or Depakote until he can be transferred to LRC/LCC."

On April 28, 2012, Mr. Jenkins made threats toward TSCI staff and threatened to harm himself, which resulted in his being placed in "therapeutic restraints." On the following day, TSCI Mental Health staff interviewed Mr. Jenkins and recommended that he be returned to his cell, with "limited property," and checks by staff every fifteen minutes. Apparently, on the same day Mr. Jenkins was again placed in therapeutic restraints after he broke the fire suppression head in his cell, and caused the cell to flood. Dr. Pearson saw Mr. Jenkins on the segregation unit on April 30, 2012. Dr. Pearson expressed that her own "psychological assessment" did not "show any basis for diagnosis (of) mental illness," with the notation that the "risk for harm to others remains relatively stable to his

baseline," Dr. Pearson also noted that Mr. Jenkins "denies plans, intent or ideation for imminent threat."

Mr. Jenkins was next seen by Mental Health staff on May 2, 2012, after he was found with two large cuts on his "face and forehead." Blood in his cell suggested that Mr. Jenkins had used a metal shelf in his cell to inflict the wounds to his face. It was reported that at this meeting Mr. Jenkins "expressed the belief that his 'psychosis' is changing and getting worse." In addition, it was noted that Mr. Jenkins had also "expressed frustration regarding the response to his reported mental health issues by Mental Health and Unit staff." When Mr. Jenkins was again seen by TSCI Mental Health staff on May 15, 2012, Mr. Jenkins "insisted that he was not receiving proper psychological/psychiatric/mental health treatment for his mental illness." Of course, back in February the Department's MIRT team had concluded that Mr. Jenkins' condition supported a diagnosis of no serious mental illness, and that Mr. Jenkins did not need to receive residential mental health services, and so at that point it was explained to Mr. Jenkins that he "had been assessed on more than one occasion by Dr. Weilage and it was determined that he did not suffer from major mental illness which required the type of treatment Mr. Jenkins was describing."

In early May of 2012, Mr. Jenkins addressed an Informal Grievance form to DCS Director Robert Houston stating that he had an "emergency need of medical treatment psychologically," and that the "mental health department has very unprofessionally handled (his) case." Mr. Jenkins' grievance also explained that he had been evaluated while in the

Douglas County Jail, and that "their findings were very serious," and that they had made a recommendation to Judge Gary Randall to the effect that Mr. Jenkins "suffer from severe psychological disability of mental illness." Mr. Jenkins stated that he was still held in segregation at TSCI, and said that he continued "to be rapidly deteriorating mentally." Mr. Jenkins complained that he was "not receiving psychotherapy sessions," or medication, and added that he wanted to be approved to receive treatment at the "LCC mental health mod for (the) mentally ill." It appears that in this instance Mr. Jenkins' grievance was ultimately routed to DCS Deputy Director for Institutions Frank Hopkins for a response.

On July 2, 2012, Dr. Baker again visited Mr. Jenkins at the door of his segregation cell. As before, Dr. Baker reported her observations of Mr. Jenkins' condition, stating that his "thoughts appear fairly well organized with grandiosity about his abilities/ intelligence." The doctor again noted that Mr. Jenkins "continues to refuse all psychotropics including Risperdol, Depakote, or sleep aids." Dr. Baker also noted that Mr. Jenkins had "met with Dr. Weilage in February of 2012 and presented with significant Axis II issues and no major mental illness." Of course, this opinion was consistent with what Dr. Baker herself had determined back in December of 2009, when she concluded that Mr. Jenkins' symptoms "are inconsistent and more behavioral/Axis II in nature."

On September 21, 2012, Dr. Pearson had an unusual telephone conversation with a medical doctor from Omaha (not a psychiatrist) who reported having recently received a letter from Mr. Jenkins.

The doctor described the contents of this letter as being "very psychotic and disorganized," and "very disturbing," enough so, in fact, that the doctor spoke with a friend who worked for the Omaha Police Department who recommended that the doctor contact the DCS Mental Health Department. During the course of this tele-phone conversation the doctor expressed distress over the fact that Mr. Jenkins' tentative release date was less than one year away, and also "asked about procedures regarding release of inmates with Mental Illness who are dangerous to the community." Citing confidentiality, Dr. Pearson said that she "could not release information specific to the inmate," but assured the doctor "that NDCS follows up with Mental Health Board Commitment procedures for inmates with Mental Illness and high risk for danger to self or others."

On January 10, 2013, Mr. Jenkins was seen by Dr. Pearson at his cell door to address "staff reports of suicidal statements." During this interview, Mr. Jenkins complained about the "perceived refusal of necessary mental health care." Mr. Jenkins also stated "that he was 'psychotic' and needed transferred to the Lincoln Regional Center for care." Mr. Jenkins once again referred to hearing the voice of an Egyptian god (Apophis), and said that he was "scared for his safety as he believed that 'Apophis' would harm him." On the following day, January 11, 2013, Mr. Jenkins was interviewed by Licensed Mental Health Practitioner Larry Murphy, again at his cell door. Mr. Jenkins related to Mr. Murphy "that he had Schizophrenia, that he was not being treated, that being in segregation was harming his mental illness, and that he had previously cut his face because he had been told to do so by an Egyptian

god." Several days later on January 15, 2013, Mr. Jenkins was seen (again at his cell door) in this case by Dr. Gibson, a psychologist. Notes of the meeting reflect that Mr. Jenkins related that he had been "having a 'bad morning' because he was reportedly considering the idea of going to be with his family with psychosis," and that he "indicated he did not want to do this." The notes also reflect that Mr. Jenkins had said "he views everyone as 'prey' and followed-up with a number of violent images," and that he expressed that he "needs to be hospitalized and observed to the aforementioned issue." Dr. Gibson met with Mr. Jenkins again at his cell door on January 16, 2013. The notes from this meeting indicate that Mr. Jenkins had "reported a belief that he should be hospitalized for psychiatric concerns (particularly being dangerous to others), as he will be released soon." It was noted that Mr. Jenkins "acknowledged that he has refused care from NDCS employees in the past and reported that he will do so in the future unless he was hospitalized." Dr. Gibson said that "Mr. Jenkins presented themes of isolation, anger, and violence toward others," with a "presentation of content (that) seemed grandiose and disorganized at times." On the night of January 18, 2013, Mr. Jenkins again inflicted significant wounds to his face using a loose floor tile that he had obtained. The following morning, Dr. Gibson received a call from the TSCI medical staff. The nurse reported to Dr. Gibson that Mr. Jenkins had been "screaming about wanting psychiatric treatment, as he is reportedly afraid he will get out and 'rip someone's heart out.'" The medical staff made a similar call to Dr. Gibson on the following day, reporting that Mr. Jenkins was continuing to claim that he need psychiatric care.

Mr. Jenkins was returned from medical to his cell in the segregation unit on January 22, 2013. He was placed on a regimen of staff checks every fifteen minutes, and was restricted from having certain items of personal property, including his glasses and "ear-buds." On each of the following three days, LMHP Murphy spoke to Mr. Jenkins outside of his segregation cell door. After consultation with Dr. Pearson, it was recommended that the restrictions on Mr. Jenkins be continued on January 22, and 23, and the same recommendation was made after consultation with Dr. Gibson on January 24. Mr. Jenkins was next seen on January 25, 2013. The notes from that interview relate that Mr. Jenkins:

> requests hospitalization so that he does not harm other people. When asked what he would gain from hospitalization, he was only able to elaborate that he would receive therapy, but did not identify any benefits of therapy. Inmate stated that, when released, he would give in to "apophis" who wanted him to kill "man, woman and child" of "every age group."

After talking with Mr. Jenkins outside of his cell door on January 28, 2013, and after consulting with Dr. Pearson, Mr. Murphy recommended that Mr. Jenkins be removed from the every-15-minute watch list. This was ordered to be done, however, Mr. Jenkins was returned to 15-minute watch and limited property status on February 2, 2013, when he again damaged a sprinkler head and reported to security staff that he was hearing voices.

On February 4, 2013, Mr. Jenkins was interviewed in regard to his continued status on

fifteen minute checks by Licensed Mental Health Practitioner Brandy Logston. The notes of this meeting indicate that Mr. Jenkins reported that he had "numerous mental health issues making statements such as 'I am a psychotic powerful warrior at the mercy of Aphophis' and 'I am preparing for what is to come.'" Mr. Jenkins also claimed he had been having "difficulty with sleep due to constant hypervigilence and the 'current torture of these deplorable conditions' referring to his limited property status." Ms. Logsdon reported that Mr. Jenkins was "highly agitated and he endorses high levels anxiety and paranoia," and that he "continues to refuse any psychotropic medications stating he will not take these because he does not trust staff." As a result of this interview, it was recommended that Mr. Jenkins continue on fifteen minute checks, and limited property status. There were additional interviews of Mr. Jenkins regarding the 15-minute watch issue conducted by Mr. Murphy at Jenkins' cell door on February the 5th, 6th, 7th, 8th, and 11th, and each time it was recommended that he continue on 15-minute watch and limited property status. The 15-minute watch status was finally discontinued by Dr. Pearson on February 12, 2013. Ms. Logston next saw Mr. Jenkins on February 19, 2013. Ms. Logston reported that Mr. Jenkins told her "he 'wanted it documented' that he was in need of 'emergency psychiatric treatment,'" and also that Mr. Jenkins "expressed that he was 'psychologically deteriorating' as a result of his current living conditions and limited property status." The notes from this meeting further reflect that Mr. Jenkins "expressed that he was fearful of taking any medications at TSCI because 'they are going to kill me,'" and that Mr. Jenkins "stated he would take medications if housed

at a different institution." Ms. Logston added her own observation that during this interview Mr. Jenkins had "presented all this information...in a logical and calm manner."

It is notable that Mr. Jenkins sent an Informal Grievance to TSCI Warden Fred Britten on February 17, 2013, just a few months before Mr. Jenkins was scheduled to be released from custody. In the case of that grievance, Mr. Jenkins stated that he was "requesting emergency protective custody and removal from SMU (segregation)." Mr. Jenkins also said that he was "requesting psychiatric hospitalization for severe psychosis conditions of enragement episodes of my schizophrenia disease." Mr. Jenkins also claimed that he was "suffering psychological and emotional trauma in (his) current confinement," and specifically referenced the Nebraska Mental Health Commitment Act (Neb. Rev. Stat. §§71-901 thru 71-963) in connection with his appeal. The response to this rather extraordinary grievance, in which an inmate who was soon to be released from custody was, in effect, asking that he be sent instead to the Lincoln Regional Center, was disappointing. In place of a response from the Warden, the grievance was answered by a Sergeant Bernard, who replied that the grievance "does not meet the criteria which governs emergency grievances, as you are in no immediate danger of being subject to a substantial risk of personal injury or serious or irreparable harm." In other words, instead of being given a substantive answer, Mr. Jenkins' grievance was simply dismissed on technical/procedural grounds. Meanwhile, the clock was ticking, and Mr. Jenkins' discharge date was less than six months away.

Mr. Jenkins sent another grievance to TSCI Warden Britten on February 18, 2013. In that grievance, Mr. Jenkins was complaining that his mother had been told that her visiting privileges at TSCI were being suspended for 30 days. (The explanation for this sanction, as stated in a February 14, 2013, letter from TSCI Unit Administrator Shawn Sherman, was that Mr. Jenkins' mother had "taken 2 pieces of paper and the pen from the Gatehouse desk and were taking notes during your visit.") In his February 18 grievance, Mr. Jenkins explained that his mother "was writing down a petition of notification under Nebraska State Law Mental Health Act...to be submitted to the County Attorney of Johnson County for direct forwarding to the Mental Health Board." Mr. Jenkins mentioned in his grievance that he was "set to be released July 30, 2013," and that his mother was "seeking the emergency protective custody order for psychiatric hospitalization." Once again, Mr. Jenkins' grievance to the Warden was answered by a Sergeant who replied that the grievance "does not meet the criteria which governs emergency grievances, as you are in no immediate danger of being subject to a substantial risk of personal injury or serious or irreparable harm."

In what is perhaps an extremely important event in this case, Dr. Baker, the psychiatrist, met with Dr. Pearson, the TSCI psychologist, on March 4, 2013, to discuss Mr. Jenkins. The note on that meeting states (in full) as follows:

> Discussed inmate with Dr. Baker on this date. Dr. Baker requested inmate be added to list of inmates to be seen by Dr. Wetzel for a second opinion. Her

> expressed concerns are verification of absence or presence of mental illness due to his previous history of major mental illness diagnosis by other psychiatric providers. Her primary concern is his dangerousness to the community upon release and that he appears to be laying the groundwork for insanity defense if he harms someone in the community. Is requesting that Dr. Wetzel assess him for dangerousness risk. Will relay request to TSCI MIRT representative. M. Pearson, PsyD.

Dr. Wetzel would, in fact, interview Mr. Jenkins for the purposes of this evaluation on March 14, 2013 (Dr. Martin Wetzel is a psychiatrist associated with the Inpatient Mental Health Unit at LCC).

Mr. Jenkins was next seen by Mental Health staff at his cell door on March 5, 2013, at which time Mr. Jenkins was told about the intended evaluation to be conducted by Dr. Wetzel. During that interview, Mr. Jenkins stated "that he is mentally ill and disabled and we made him that way." When asked why he refused to take medications for his condition, Mr. Jenkins replied that "he won't take them here." In addition, on March 5 Mr. Jenkins was taken by the security staff to attend a meeting for a review of his classification The security staff reported that Mr. Jenkins "spoke as if apophis was in control of him," however, the security staff also said that "it appeared that Mr. Jenkins was cognizant, aware, and fully in control of the things he was saying during both transport and at his cell."

Beginning on March 7, 2013, Kathy Foster, a Department of Correctional Services social worker met with Mr. Jenkins to begin planning for his release. This planning was supposed to cover matters like where Mr. Jenkins would reside after his release, and what community services might be available to him after release. (At the time, Mr. Jenkins' tentative release date was set at July 30, 2013.) Ms. Foster made extensive notes of her visits with Mr. Jenkins to help him prepare a discharge plan, and her notes from March 7 include the statement that Mr. Jenkins said that he "does not want to discharge to the community because he will kill people and cannibalize them and drink their blood." He also made a statement to her "of intended violence that he will commit if he is discharged to the community," and told her that he was seeking a Mental Health Board commitment. Ms. Foster's notes indicate that she intended to "look into potential community services for discharge follow-up," and that she would be contacting Mr. Jenkins' mother. Ms. Foster did contact Mr. Jenkins' mother, Lori Jenkins, by telephone on March 15, and talked with her about issues relating to her son's eventual place of residence (either Lincoln or Omaha), about treatment resources, about securing identification docu-mentation for Mr. Jenkins, and about helping Mr. Jenkins to apply for Social Security and Medicaid.

In a letter written by Mr. Jenkins and addressed to Ms. Ester Casmer of the Nebraska Board of Parole on March 10, 2013, Mr. Jenkins stated that he was "now in a very seriously severe emergency need," because he was "set to be released July 30th 2013." (It should be mentioned that this

communication had nothing to do with a parole, since by this point in his sentence it was clear that Mr. Jenkins was not going to be paroled.) In this letter, Mr. Jenkins explained that he was in "isolation 23 hour lockdown (with) no medication," and with no "therapeutic sessions of psychological treatment for the very severe psychosis condition of (his) schizophrenia disease as well as bipolar disorder and PTSD." Mr. Jenkins claimed that he was "deteriorating daily physically psychologically and emotionally," and that he had experienced "another self-harming psychotic episode of self-mutilation that resulted in 11 more stitches in (his) face." Mr. Jenkins stated that he had "carved...facial wounds into my face with a piece of tile from the gallery floor," and that a correctional officer "had to spray (him) with pepperspray to get (him) to stop carving into (his) face." In this letter, Mr. Jenkins also stated that he had filed an "emergency protective custody petition in Johnson County to...be submitted to the Mental Health Board," under the Nebraska statutes dealing with "dangerous persons of mental illness," in order to have a "hearing on grounds of release to the psychiatric hospital for mental health treatment."

In connection with his campaign to have himself committed to hospitalization at the Lincoln Regional Center, Mr. Jenkins had also contacted the Johnson County Attorney (Johnson County was Mr. Jenkins' "residence" at the time because he was at TSCI). On March 11, 2013, Mr. Richard Smith, the Deputy Johnson County Attorney, wrote a letter to Mr. Jenkins acknowledging the receipt of letters from Mr. Jenkins "as well as materials provided by (his) mother and (his) fiancée" regarding Mr.

Jenkins' mental health. Mr. Smith's letter included the following explanation:

> Please rest assured that I am not taking your situation lightly. In order to file a mental health board petition, however, I need to hear from a mental health expert who can testify as to mental illness and dangerousness. I have been in contact with the psychologists with the Department of Corrections and have explained your concerns. They have assured me that they will continue to evaluate, monitor, and treat your mental health.

Mr. Smith added that prior to Mr. Jenkins' release, "the Department will evaluate whether you are fit to be released or whether to seek further inpatient commitment to treat your mental illness," and that DCS would "forward copies of its recommendation to (the Johnson County Attorney's Office) as well as to the County Attorney in the County from which you are incarcerated," at which point "a determination will be made about whether a mental health petition is appropriate." (Please see Attachment #5) It should be noted that this letter, sent on March 11, 2013, was dated just a few days before Dr. Martin Wetzel was scheduled to meet with Mr. Jenkins for his "second opinion" evaluation. Interestingly, Mr. Jenkins was transferred from TSCI to the Nebraska State Penitentiary on March 15, 2013. Since Mr. Jenkins was no longer located in Johnson County, the question of whether Mr. Jenkins' case should be referred to a Board of Mental Health for a possible civil commitment was no longer a question within the jurisdiction of the Johnson

County Attorney.

Dr. Wetzel's interview with Mr. Jenkins was on March 14, 2013, while he was still at TSCI. According to Dr. Wetzel's report, an "ongoing theme throughout the interview" was Mr. Jenkins' assertion that "he was severely mentally ill and in need of immediate transfer to a psychiatric hospital." Mr. Jenkins also informed Dr. Wetzel that he was "seen by Dr. Oliveto and diagnosed with PTSD, Bipolar Disorder and Schizophrenia." Mr. Jenkins reported that "he has nightmares every night," and maintained that he was "deteriorating physically and (was) severely paranoid." Mr. Jenkins told Dr. Wetzel that he had been physically abused repeatedly as a child, that he was "allowed to run the streets and was constantly in trouble beginning at a very early age," that he "began setting fires and engaging in fights" at the age of seven or eight, and also that "at age 9 he was hospitalized at Richard Young for hearing voices." Mr. Jenkins also said that as a child he had been "placed on Ritalin which made him even more 'hyper and psychotic.'" Mr. Jenkins also admitted that he began using street drugs at a very early age, starting with tobacco, marijuana, and alcohol at the age of seven, and using "PCP and embalming fluid" at the age of fourteen. Mr. Jenkins told Dr. Wetzel about having had auditory hallucinations, and that he had been "on medications for 3 - 1⁄2 months, which softened the voices and made them 'lower and slower.'" Mr. Jenkins informed Dr. Wetzel that he was due to be released from prison in July, and that he "wants to be placed in a psychiatric hospital to stabilize for 'modern times.'"

In summarizing Mr. Jenkins' "mental status," Dr. Wetzel reported that he observed that Mr.

Jenkins was, at times, "extremely over activated and restless," and at other times "generally calm." Dr. Wetzel further reported that Mr. Jenkins "did express repeated thoughts of harming other people in the form of cannibalism and 'waging war," but Dr. Wetzel added that it was "unclear if he is exhibiting psychotic symptoms." Dr. Wetzel said that he also observed that Mr. Jenkins "was expressing bizarre, and very unusual auditory hallucinations and delusions, but these did not appear to be consistent with typical symptoms of a psychotic disorder." Dr. Wetzel summarized his assessment of Mr. Jenkins as follows:

> ***Bipolar Disorder NOS, Probable PTSD, Probable*** Antisocial and Narcissistic PD (personality disorder) Traits Polysubstance Dependence in a Controlled Environment (emphasis added)

In addition, Dr. Wetzel's report includes the following observations and assessment:

> This patient presents with a dramatic flair, yet there is enough objective evidence of disruption in sleep cycle, mood and behavior to suggest an element of major mood disorder influencing the clinical picture. The patient has an unusual list of demands, the first of which has been placement in a psychiatric hospital. This could be related to a singular motive or a combination of motives, including malingering and/or a sense of disease... Long-term strategies recommended for

> this patient include development of a rapport and trust to enhance participation in psychiatric care, ongoing development of objective evidence supporting - - or not supporting - - the presence of major mental illness and the possibility of further psychological formal testing to help clarify diagnostic picture.

By the time that Dr. Wetzel's report on Mr. Jenkins was written and delivered, Mr. Jenkins had already been transferred from TSCI to the Penitentiary. Dr. Baker now had her second opinion, but Dr. Baker no longer had Mr. Jenkins as her patient, although he certainly continued to be a responsibility of the DCS Mental Health Department in general terms.

On March 19, 2013, shortly after his transfer to the Penitentiary, Mr. Jenkins was seen by Licensed Mental Health Practitioner Jeremy Simonsen during a meeting dealing with Mr. Jenkins' classification. The notes relating to that meeting indicate that Mr. Jenkins was hoping "to return to general population (and) to transition to the community," something that was scheduled to happen in about less than six months. According to the notes, Mr. Jenkins "had difficulty taking feedback that the chance for this may be limited, and that he should be open to the Transition Program, which still could afford him contact with others and some programming as he nears discharge." Mr. Simonsen's notes indicate that Mr. Jenkins stated "that he would consider moving to the program." Mr. Simonsen next interviewed Mr. Jenkins on April 10, 2013. He described Mr. Jenkins as having "grandiose

and highly narcissistic ideas about his own abilities, intelligence, and knowledge" and that Mr. Jenkins wanted to argue with him "about the definition of schizophrenia, and that he has it," although Mr. Simonsen said that "there is no evidence of current thought disorder or other psychotic symptoms." Mr. Simonsen interviewed Mr. Jenkins for a third time on April 16, 2013. As had been the case so many times before, he found that Mr. Jenkins was demanding" psychiatric treatment," even though he did not "appear to understand that would primarily consist of psychotropic intervention, which does not interest him." Mr. Simonsen also recorded that Mr. Jenkins had expressed that he was willing to participate in behavioral program as part of transition, and that Mr. Jenkins had made "grandiose statements about the damage he will cause when he gets out, and his ability to inflict harm." Mr. Simonsen said that they "discussed symptoms displayed today as indicative (that) a mood stabilizer may assist him with Bipolar characteristics.." Mr. Simonsen also recorded that "evidence of thought disorder was not apparent, though delusional beliefs were present regarding his own abilities." Mr. Simonsen further stated that "stronger evidence persists for Cluster B personality traits" (i.e., antisocial, histrionic, and narcissistic personality disorders), and that he would need to consult with Dr. Weilage and Dr. Cheryl Jack, the psychiatrist at the Penitentiary, regarding Mr. Jenkins' discharge plans.

On April 5, 2013, the social worker, Ms. Foster, again met with Mr. Jenkins. Her notes on that meeting indicate that she told Mr. Jenkins that she had talked to his mother, and that he would need

to make a decision on a place of residence after his release. During this meeting, Ms. Foster made arrangements for a telephone interview so that Mr. Jenkins could apply for Social Security. She also told Mr. Jenkins that arrangements could be made later for him to receive mental health services in the community after his release. Mr. Jenkins asked Ms. Foster whether he could talk to the Mental Health Center "today," but Ms. Foster told him that it would premature to do that now. Ms. Foster's notes from that meeting also reflect that Mr. Jenkins "stated a couple of times that he is 'not kidding,' it will be bad' when he gets out." Ms. Foster had yet another meeting with Mr. Jenkins on April 30, 2013, at which point Mr. Jenkins engaged in his telephone interview with Social Security. He was informed that he would not be eligible to receive SSDI because of his status as a felon, but he was allowed to apply for SSI. They again discussed the Community Mental Health Center and Mr. Jenkins told Ms. Foster that "he would be open to being evaluated for medication and is 'more inclined to take them on the outside.'" The notes also reflect that on this occasion Mr. Jenkins told Ms. Foster "that when he gets out 'it will begin' and he made allusions to killing 'without prejudice.'"

Mr. Jenkins was interviewed by Dr. Jack on April 25, 2013. Mr. Jenkins told Dr. Jack that he did not want medications, but that he "wants to engage in therapy." In her notes from the interview, Dr. Jack stated Mr. Jenkins "appeared to be 'on stage' and performing for" her. Dr. Jack described Mr. Jenkins as being self-aggrandizing, self-absorbed, and flagrantly narcissistic in his presentation and verbiage. Dr. Jack's notes reflect that her "impression" of Mr. Jenkins was - "Axis I: No

diagnosis; and Axis II: Antisocial Personality, with narcissistic features vs. Narcissistic Personality with antisocial features."

An interesting document in our collection is a copy of an email sent by Ms. Trudy Clark to Mr. Wayne Chandler on May 20, 2013. Ms. Clark is an Administrative Assistant with the Nebraska Board of Parole, and Mr. Chandler is in charge of the Department's Inpatient Mental Health Unit at the Lincoln Correctional Center. In this email, Ms. Clark indicated that the Board of Parole had received more than one odd letter from Mr. Jenkins. Specifically, the email said:

> This e-mail is written from a personal level only. Why isn't Nikko Jenkins #59478 in the mental health unit? The Board is getting letters from him that he is going to eat people, specifically Christians and Catholics. This is only one of many bizarre letters the Board has gotten from him. Is he being evaluated for a mental health commitment? As a taxpayer, this guy scares me to death!!

It is our understanding that Mr. Chandler forwarded this email to Dr. Weilage, the Department's Mental Health Director. Our records do not include any answer that Ms. Clark may have received in response to her inquiry. Of course, we know that Mr. Jenkins' case had been evaluated by the DCS MIRT team in February of 2012, and that the team had concluded at that time that Mr. Jenkins' condition supported a diagnosis of no serious mental illness, and that Mr. Jenkins thus did

not need to receive residential mental health services.

Licensed Mental Health Practitioner Stacy Simonsen saw Mr. Jenkins on June 6, 2013. She described Mr. Jenkins as displaying "grandiose and highly narcissistic ideas about his own abilities, intelligence, and knowledge." She also noted that while "delusional beliefs were present, his ability to communicate and articulate his thought process was not impaired." Ms. Simonsen added that, although Mr. Jenkins referred to himself as being "psychotic," there was "minimal evidence of thought disturbance," and "while hallucinations were reported, nevertheless there was no evidence that he was responding to internal stimuli." Ms. Simonsen again saw Mr. Jenkins On July 2, 2013, less than one month from his discharge date. Her notes from that meeting reflect that Mr. Jenkins "continues to present as grandiose and has highly narcissistic ideas about his abilities, intelligence, and knowledge, but he articulates himself well." She also said that Mr. Jenkins "spoke at length about his plans for release as he will be discharged later this month."

On July 25, 2013, the social worker, Ms. Foster, had her last meeting with Mr. Jenkins to see "if any further assistance regarding discharge planning was needed." During this meeting, Mr. Jenkins told Ms. Foster that he was "schizophrenic," and said that "he needed therapy while he was incarcerated because medications would...address his mental illness satisfactorily." Ms. Foster's notes from this meeting reflect that Mr. Jenkins "was less dramatic in his statements of the threat he poses to society." She said that she gave Mr. Jenkins a document listing "various resources (clothing, food,

mental health, etc.) for both Omaha and Lincoln," but that Mr. Jenkins "did not look at them and left them in the table as we left the room." At this point, Nikko Jenkins was five days away from being discharged.

Mr. Jenkins was discharged from the Nebraska correctional system on July 30, 2013. Because he was discharged and not paroled, Mr. Jenkins was not under parole supervision, or any other kind of special supervision. After his release, Mr. Jenkins took up residence in Omaha. It is alleged that on August 11, 2013, Mr. Jenkins murdered Mr. Juan Uribe-Pina and Mr. Jorge Cajiga-Ruiz, that on or about August 19, 2013, he murdered Mr. Curtis Bradford, and that on August 21, 2013, he murdered Ms. Andrea Kruger. Criminal charges have been filed in those cases, and Mr. Jenkins case is awaiting disposition in the courts.

Narrative of Interventions by the Ombudsman's Office in Mr. Jenkins' Case

The Ombudsman's Office has a long history of involvement with Nikko Jenkins that stretches back to May of 2007, when Mr. Jenkins initially contacted our office to complain about his ongoing placement in segregation. At the time, Mr. Jenkins was an inmate at LCC, but he was soon thereafter moved to TSCI, where Mr. Jenkins continued to be classified to Administrative Confinement, and to be held in segregation. (Over the years, our contacts in relation to Mr. Jenkins' complaints have included some discussions with Ms. Laurie Jenkins, who is Nikko Jenkins' mother, and who at times was active in advocating on her son's behalf.) Because at that point Mr. Jenkins had only been in segregation for a few

(approximately three) months, the decision was made to continue to monitor Mr. Jenkins case, and to wait to see whether there might later be an opportunity to suggest to the TSCI administration that he might be transitioned out of segregation, and back into general population at the facility.

In August and September of 2008, Deputy Ombudsman for Corrections James Davis again worked on the issue of Mr. Jenkins' confinement to segregation. At that time, the subject of Mr. Jenkins' mental health status was raised with Mr. Davis by 1Jenkins' name placed on the list of inmates to be reviewed for possible mental health services, but that the mental health professionals at TSCI had expressed the opinion that Mr. Jenkins did not have a serious mental illness, but was only a case of "behavioral problems." Nevertheless, in September of 2008 Mr. Davis helped to make arrangements for a review of Mr. Jenkins' situation to determine whether he might be suitable for a transfer to the Department's Inpatient Mental Health Unit located at the Lincoln Correctional Center. On that occasion, Mr. Wayne Chandler, the supervisor of the Mental Health Unit, and Dr. Mark Lukin, a licensed psychologist employed by the Department, reviewed Mr. Jenkins' case, and concluded that Mr. Jenkins did not exhibit any indication of a serious mental illness, and that Mr. Jenkins would not be an appropriate individual to be admitted to the DCS Inpatient Mental Health Unit at LCC. On September 26, 2008, Mr. Davis wrote a letter to Mr. Jenkins explaining to him that he had been very close to being sent to the Transition Program at NSP to help prepare him to be released from segregation, but that this idea had been discarded when Mr. Jenkins had

threatened staff at TSCI. Mr. Davis advised Mr. Jenkins that the Ombudsman's Office would not be able to advocate for him to be released from segregation unless he acted appropriately, and did not threaten staff or other inmates. As Mr. Davis explained it, the Ombudsman's Office would not be able to "take (Mr. Jenkins') complaint seriously, because of (his own) negative behavior."

Over the years, Mr. Davis has worked on many cases of inmates who were being held in segregation for prolonged periods of time. In most of these cases, Mr. Davis has tried to advocate for the inmate to be given a fresh consideration of how his behavior may have changed, and whether the inmate might finally be a suitable candidate for reintegration into the prison's general population. In this work, it has not been an unusual event to find that the inmate in question is someone who had, or appeared to have, serious mental health issues that could not be adequately addressed in a segregation cell. Although the Ombudsman's Office is not qualified to arrive at a medical diagnosis of Mr. Jenkins' condition, we can say that Mr. Jenkins' case certainly appeared to be one of these instances. Obviously, this condition issue complicated any effort to help to build Mr. Jenkins up as a prospect for transition back into the general population, because Jenkins' own unpredictable behavior would tend to torpedo those efforts. Nevertheless, the Ombudsman's Office wanted to continue to monitor Mr. Jenkins' situation so that he would not be "lost in the system," as can happen when reviews of segregation cases by the institution's staff become "too routine," and cannot identify any new reason to change the inmate's classification.

Our next contact with Mr. Jenkins' situation happened in late 2009, when Mr. Jenkins' sister, Melony Jenkins, wrote to the Ombudsman's Office saying that she had received a letter from her brother in which he told her that he was "very ill mentally," and that he was not receiving his medications at TSCI. In her letter, Ms. Jenkins reported that her brother "claims he has different personalities and is crying out to me in his letter, that he wants to change and take his medications." Ms. Jenkins also said that her brother had told her that "its hard for him to stay grounded in reality without his medication." Of course, this was shortly after Mr. Jenkins' aborted escape attempt, and his assault on a correctional staff person on December 17, 2009. It was also shortly before Mr. Jenkins was to be transferred to the Douglas County Jail on February 13, 2010. Assistant Ombudsman Jerall Moreland followed-up on the matter by contacting Dr. Melinda Pearson, a psychologist at TSCI. Dr. Pearson told Mr. Moreland that there was a "provisional diagnosis" on Mr. Jenkins that included a possible "psychotic disorder," and that he had been on Risperidone, but that she understood that the medication had been discontinued due to Mr. Jenkins' noncompliance in taking the medication. In fact, as we now know from the records, on December 28, 2009, Mr. Jenkins had sent a note to Dr. Baker asking to restart his medications. Dr. Baker had ordered the medications to be discontinued after a December 3, 2009, meeting she had with Mr. Jenkins at which time he reported to the doctor that he had stopped taking the medications three days earlier. Dr. Baker responded to the December 28, 2009, request by re-initiating prescriptions of Risperidone and Depakote for Mr. Jenkins on the following day,

December 29, 2009. A notation made by the doctor at the time said that this was a step that "should help stabilize (Mr. Jenkins') symptoms." However, two days later Dr. Baker discontinued the prescription for Risperidone, and made a notation Mr. Jenkins' chart that she had concluded that Mr. Jenkins' symptoms were actually "inconsistent and more behavioral/Axis II in nature." In any case, by the time that Mr. Moreland had an opportunity to ask about the medications issue Mr. Jenkins had already been transferred to the Douglas County Jail, where the mental health staff eventually renewed the medications. Mr. Moreland did, however, speak later with Melony Jenkins, and asked her to urge her brother to be compliant in taking his meds.

On March 12, 2010, former Senator Brenda Council sent a letter to the Ombudsman's Office requesting a review of the possible "medical mismanagement" of Mr. Jenkins' case while in the Douglas County Jail. Senator Council's inquiry had been occasioned by a contact which her office had received from a friend of the Jenkins family, and once again Assistant Ombudsman Jerall Moreland followed-up on the case. After checking into the matter, Mr. Moreland sent a Memorandum to Senator Council on March 28, 2010. In that memo, Mr. Moreland explained that while at the Douglas County Jail Mr. Jenkins had asked for and received a renewal of his earlier prescriptions beginning on March 10, 2010, although the prescriptions were discontinued on March 15, 2010, because Mr. Jenkins had refused to take the meds. Mr. Moreland reported in the memo that he had spoken with Mr. Jenkins, and that Mr. Jenkins "seems to realize that he needs some sort of treatment to control the voices

in his head." Mr. Moreland also reported that had "emphasized to Nikko how important it is that he tries to stay medically compliant to his treatment program." Mr. Moreland also reported his findings on Mr. Jenkins to Senator Council, including the background relating to Mr. Jenkins' transfer to the Douglas County Jail, and the fact that Mr. Jenkins had asked for, but later stopped taking, medications that he had been receiving at TSCI. Mr. Moreland also advised Senator Council that while there "does not appear to be anything else that this office can do for Nikko Jenkins at this time, I have emphasized to Nikko how important it is that he try to stay medically compliant with his treatment program."

In November of 2011, the Ombudsman's Office was contacted by Ms. Sherry Floyd, who is a friend of Mr. Jenkins. Ms. Floyd related that she had visited with Mr. Jenkins at TSCI, and that "he is not Nikko any more." Ms. Floyd said that she was concerned that Mr. Jenkins was not receiving needed mental health services at TSCI. As follow-up to this contact, Mr. Moreland sent an email to Dr. Pearson which specifically advised her that the Ombudsman's Office had a new case relating to Mr. Jenkins involving a complaint that he was not receiving needed mental health services. Mr. Moreland related that Mr. Jenkins was claiming that he had recently been diagnosed, while at the Douglas County Jail, as being Bi-polar, with both PSTD, and schizophrenia. Mr. Moreland also stated that he had learned of the court order for Mr. Jenkins latest conviction wherein Judge Randall had indicated that he believed that Mr. Jenkins "has a long and serious history of mental illness," and that, according to Judge Randall, the record in Mr. Jenkins' case would support his request

for "treatment for his mental health issues." Mr. Moreland also pointed out that Judge Randall had recommended that the Department of Correctional Services see to it that Mr. Jenkins was "assessed and treated for issues regarding his mental health." In the email to Dr. Pearson, Mr. Moreland also related that Mr. Jenkins was continuing to "claim that he would like to begin treatment for his mental illness and have an opportunity to discuss the recent loss of family members." Also, Mr. Moreland emphasized that "it appears that Mr. Jenkins will be available for release in 2013." Mr. Moreland asked Dr. Pearson whether the "multidisciplinary team" might try to "put in place a plan for Mr. Jenkins to return to general population," pointing out that he had recently contacted Douglas County staff, and was told that "Mr. Jenkins was able to maintain himself in general population for approximately 17 months, while receiving weekly mental health sessions," when he was in the jail in Douglas County. Mr. Moreland also inquired after "any MIRT committee evaluation of Mr. Jenkins for the Mental Health Unit at LCC," and specifically asked Dr. Pearson for her own input as to whether Mr. Jenkins could be placed in the "LCC mental health program." Mr. Moreland added that during a recent conversation with Nikko, "Mr. Jenkins shared that he is hearing voices and believes he has experienced deterioration while at DCS based on his ability to function at Douglas County."

Dr. Pearson responded to Mr. Moreland's inquiry as follows:

> Nikko Jenkins #59478 is monitored by Mental Health on a monthly basis due to his segregated status. He does not

> present with signs of major mental illness and has refused psychological assessment for clarification of reported symptoms on February 12, 2010 and October 31, 2011. He was seen by the psychiatrist on September 26, 2011 after self discontinuing his DCC-prescribed medications upon return to NDCS. At that time, he refused re-initiation of psychotropic medications unless he was transferred to the Lincoln Regional Center. There has been no evidence of decline in mental status since his return to NDCS. Mr. Jenkins presents with significant psychopathic traits and does not appear to be mentally ill at this time. Mental Health will continue monitoring him and provide assessment and treatment as clinically indicated.

Mr. Moreland responded to this message from Dr. Pearson with an email telling her, in regard to the psychological assessment, that "Mr. Jenkins claims to not have refused the assessment," and that he had "indicated to me that he would like to take the assessment." Under the circumstances, Mr. Moreland suggested that the Department should move forward with an assessment of Mr. Jenkins' condition.

In early February of 2012, the MIRT team reviewed Mr. Jenkins' situation and reported on its findings. Mr. Moreland spoke with Dr. Weilage later that month to obtain some sense of what the MIRT team had concluded. Dr. Weilage replied that it was the team's opinion that Mr. Jenkins was not mentally ill, and that there was no indication of

PTSD, or other Axis I disorders. Dr. Weilage said that he disagreed with Dr. Oliveto's assessment, and that it was his opinion that Mr. Jenkins was, in fact, purposefully making up his apparent mental dysfunction.

Although in the following months Mr. Jenkins repeatedly contacted the Ombudsman's Office about his mental health condition, and his desire to be transferred to LRC or to the Inpatient Mental Health Unit at LCC, it appeared that the Ombudsman's Office had essentially reached a dead end, in terms of our ability to advocate for different mental health treatment for Mr. Jenkins, in light of the outcome of the MIRT review completed in February of 2012. However, as months passed, and as Mr. Jenkins' custody status (segregation) continued unaltered, the Ombudsman's Office became more and more concerned about the fact that Mr. Jenkins' discharge date, scheduled for July of 2013, was approaching. We were acutely aware that, if circumstances did not change significantly, then Mr. Jenkins would be discharged from a segregation cell directly into the community, with no opportunity to have access to the kind of counseling and transition opportunities that would have been desirable even to make him suitable to live in the general population of a correctional facility. With this in mind, the Ombudsman's Office opened discussions with DCS to try to find a way to "ease Mr. Jenkins back" from the isolation of a segregation cell and into the community, where it was hoped that he would be able to survive, and manage to remain within the limits of the law notwithstanding his apparent mental health difficulties.

Because it was clear that Mr. Jenkins would not be paroled, and thus would not have the opportunity to gradually reintegrate into society through any arrangement which was supervised, the sense within the Ombudsman's Office was that it was even more important that Mr. Jenkins at least be reintegrated into the general population of a corrections facility. We also were of the view that it would be desirable for Mr. Jenkins to go through the Transition Program at NSP, which was specifically designed to help those inmates who had spent long months, and sometimes years, in segregation to deal with reintegrating into a larger community, like a prison's general population. In our opinion, this was far from being an ideal arrangement, but it was, as we viewed it, something that DCS could do that might have some hope of making a difference in terms of Mr. Jenkins ability to cope with release into the community. It should be emphasized, however, that the Ombudsman's Office staff continued to be very concerned about the potential threat that Mr. Jenkins might present to the community after his release. Thus, on February 25, 2013, Deputy Ombudsman for Corrections James Davis sent an email to Dr. Randy Kohl, the DCS Deputy Director for Health Services, requesting a meeting with Dr. Kohl, Frank Hopkins, DCS Deputy Director for Institutions, and Dr. Cameron White, the Department's Behavioral Health Administrator. In that email, Mr. Davis, having noted that "Mr. Jenkins has a tentative release date of July 2013," went on to express "concerns" that Mr. Jenkins "may pose a safety risk to the community," if he were to be released "without providing him with the necessary tools to succeed in the community." In fact, Mr. Jenkins had also written to Senator Ernie Chambers,

who also expressed concern about the "treatment plans" that DCS might make "for Mr. Jenkins to return to the community, instead of being released directly from Administrative Confinement (segregation) to the community." Later that day (February 25), Mr. Houston, who had received a copy of Mr. Davis' email, responded with an email saying that "Dr. Kohl will be in touch with you."

Our next effort along these lines was to send a letter to Dr. Kohl on March 5, 2013, to make one last proposal for treatment for Mr. Jenkins. In that letter, signed by Assistant Ombudsman Moreland, the Ombudsman's Office pointed out again that Mr. Jenkins had spent a considerable amount of time in segregation at TSCI, and was due to be discharged soon. Noting that "it appears that the Courts and (the mental health staff at the jail in) Douglas County would agree to the presence of psychosis," while the Department "has doubts in that regard," Mr. Moreland reminded Dr. Kohl that "all parties identify a behavioral issue in Mr. Jenkins." However, Mr. Jenkins himself was "resistant to any explanation other than a major mental illness." With all of this in mind, Mr. Moreland made the following proposal:

> I wonder if any consideration has been given to moving Mr. Jenkins to a different environment that might make it possible for the barrier of resistance to treatment to be cracked or completely broken down. I note that at one time Mr. Jenkins was being treated with psychotropic medications by the Department. I believe this was as recently as January 2010. However, his

> medications were discontinued due to his refusal and the issue of whether there is a major mental illness, it does definitely appear that something is happening with Mr. Jenkins, in terms of his mental condition, and that is standing in the way of his getting the needed mental health treatment prior to his discharge.

With the expressed belief that "we all want to help Mr. Jenkins get better before he is released into the community," and with the understanding that Mr. Jenkins was soon to be released, Mr. Moreland said that he was hopeful that there would be an "attempt to persuade Mr. Jenkins to recognize and address his problems." In that connection, Mr. Moreland wrote:

> In the interest of what is best for the community, and for Mr. Jenkins, I would like to suggest that Mr. Jenkins be told during his assessment by Dr. Weilage (actually by Dr. Wetzel) that the Department is considering transferring him to LCC segregation for the purposes of receiving needed behavioral therapy. If Mr. Jenkins would agree to this treatment, and if he shows progress, then he could be considered for a transfer to OCC in the month of May, shortly before his discharge in June (actually in July).

This letter was sent to Dr. Kohl via email, with an electronic copy going to Director Houston. (Please see Attachment #6) Later, Mr. Houston sent a response stating that he was "redirecting this issue

to Larry Wayne (DCS Deputy Director for Programs) as this is a classification issue based on a behavioral health assessment," adding the assurance that "we are all working to have as good an outcome possible for Mr. Jenkins and the Nebraska community."

On March 7, 2013, Mr. Moreland followed-up with an email to Mr. Wayne reinforcing the point that the Ombudsman's Office continued to have "concerns" relating to Mr. Jenkins, and the prospect of his "being released directly into the community after spending such a long duration in a segregated status at a high security unit, without a comprehensive discharge plan." Mr. Moreland said that it would be a good idea "to sit down to discuss possible discharge strategies when dealing with this segment of your population," and suggested the scheduling of a meeting the following week to address those concerns. Mr. Moreland sent another email to Mr. Wayne on March 15, 2013, thanking him for "moving forward with the transfer consideration for Mr. Jenkins" (in fact, Mr. Jenkins was transferred from TSCI to NSP on that date), and for his willingness to have "further discussion on strategies pertaining to his discharge plan." Mr. Moreland explained that he believed that "a system to facilitate the return to lower levels of custody (of) those housed in long- term segregation is important," and that, unless there were clear and compelling reasons not to, "a person serving a long sentence who would otherwise be released directly to the community from long-term segregated housing, should be placed in a less restrictive setting for the final months of confinement."

On March 20, 2013, there was a meeting at the central offices of DCS involving staff from DCS (Mr.

Wayne, Dr. Weilage, Kathy Foster, and Sharon Lindgren), and staff from the Ombudsman's Office (Mr. Davis, Mr. Moreland, and Mr. Sean Schmeits) to discuss Mr. Jenkins' case. According to our notes of that meeting, the following "discharge plan" for Mr. Jenkins was discussed and agreed to:

1. Moved from TSCI to NSP Control Unit (segregation) Friday, March 15, 2013;

2. After 30 days, he will transition to NSP Transition Unit baring any compelling reasons;

3. Mental Health with treatment (for) Mr. Jenkins every 15 days;

4. After 30 days of being in transition Mr. Jenkins will be reviewed for general population; and

5. Kathy Foster Social Worker, will meet with Mr. Jenkins to assist with the 5 risk factors of discharging.

However, when Mr. Moreland contacted NSP Warden Diane Sabatka-Rine to inquire about Mr. Jenkins on April 12, 2013, he was advised that while Mr. Jenkins had been approved for the transition program, it would take an additional two to four weeks to actually transfer him to that program. On April 23, Mr. Moreland sent an email to Mr. Wayne complaining that the situation with Mr. Jenkins still being in the segregation unit at NSP was not consistent with his understanding of what had been agreed upon at the March 20 meeting. Mr. Moreland recalled that at the meeting "we were told that after 30 more days on (segregation), Mr. Jenkins would transition to (the) NSP Transition Unit," and that

this had not, in fact, happened. In addition, Mr. Moreland reminded Mr. Wayne that "during the meeting, we were told that Mr. Jenkins would be seen by Mental Health every 15 days," and that it was now his "understanding that these actions were not carried out." Mr. Wayne responded to this with an email message saying that he understood from Warden Sabatka-Rine that Mr. Jenkins "has been doing well," but that he had told the Warden that any changes in Mr. Jenkins' classification, and any resulting movements within the system "should occur in line with institutional resources for time and space along with trying to situate Mr. Jenkins to have the best chance of success now and after his upcoming release." Mr. Moreland's response to this message was to say, via email, that it "does not capture the meeting we had on March 20, 2013...we discussed time lines and action items to assure Mr. Jenkins moved through the system...to make sure (that) issues such as institutional resources, time and any other reason outside of Mr. Jenkins being uncooperative wouldn't negatively affect the transitional plan."

On April 24, Mr. Wayne sent Mr. Moreland a copy of a message from Warden Sabatka-Rine stating that Mr. Jenkins would be "moved from the Control Unit to (the Transition Unit) no later than April 30th as a part of his 'transition plan.'" However, a month later, on May 29, 2013, Warden Sabatka-Rine sent an email to Mr. Moreland informing him that since the "current Transition Confinement Group" would not complete its programming until June 3, and because the next Transition Confinement Group would not start its programming until June 10, Mr. Jenkins would not be able to go to the Transition

Unit to start programing until June 10. Given that Mr. Jenkins' discharge date was on July 30, this meant that Mr. Jenkins would only "have the opportunity to progress through Week #7 (of the Program) before his discharge from NDCS." In fact, Mr. Jenkins never went through any part of the Transition Program, and he was eventually released from custody in segregation to the community without any meaningful programming.

Impressions and Observations

Those of us who work in the Ombudsman's Office have the greatest sympathy for the victims, and the families of the victims, of the murders that Mr. Jenkins is accused of having committed – in fact, even more so after sifting through records from Mr. Jenkins' incarceration in the Nebraska criminal justice system. Clearly, nothing that happened to Mr. Jenkins while he was incarcerated could possibly justify, excuse, or explain the brutal murder of four innocent human beings. All of those victims were valued and valuable members of our society, and we are all diminished by their loss.

Although the name Nikko Jenkins is prominently featured in this report, in fact, the report is not about Mr. Jenkins, but is actually about the Department of Correctional Services and how it managed the care and treatment of an inmate who was clearly troubled and troubling. The fact that we possess so much information on this subject gives us a rare opportunity to examine in great detail how "the system," particularly the Department's mental/ behavioral health system, functioned on an ongoing basis in its efforts to address Mr. Jenkins' needs, not to mention his frequent antisocial behavior. We are

acutely aware of the fact that this report is unusual, in terms of the extent of the detail that it presents from the mental health records of the individual concerned. Certainly, this report could have been shorter, and less detailed, but much of the detail that we have included in the report is there in order to be fair to the mental health professionals involved, and to provide a meaningful representation of what they did, and what their opinions were. Of course, we could have written a shorter report that was limited simply to the expression of our impressions based upon what we had observed in the record, but that would have been, to a large extent, a "hollow report," rendered much less meaningful without the critical context that the detail from the records can provide. As it is, a great deal of time and effort has gone into the preparation of this report. We might have done otherwise - indeed, we might have done nothing - but given what we know about the situation, and given the potentially dire consequences of some of the decisions made in the case, we could not have, in good conscience, done less than we have here.

In writing this report, our intention is to draw back the curtain so that the reader can observe how the mental health professionals working for the Department of Correctional Services acted and reacted in the ongoing management of Mr. Jenkins' case. For the most part, we can do this by simply allowing the facts to "speak for themselves." However, in order to give this effort some greater focus, we will need to add an accounting of some of our own impressions and observations.

The Segregation Question

While he was an inmate being held in the Nebraska correctional system Mr. Jenkins spent much of his time in segregation, in fact, perhaps as much as 60% of his time with the Department. His placement in segregation was supposedly less a punitive matter than a matter of classification, and in technical terms Mr. Jenkins was in a segregation cell because he was classified to a status known as "Administrative Confinement." In essence, an inmate will be classified to Administrative Confinement (segregation) because he/she is viewed as being an unacceptable risk to the safety and good order of the institution. In Mr. Jenkins' case, there was some reason to believe that he was in a gang, or was a "security threat group" member. But more significantly Mr. Jenkins had repeatedly exhibited violent behaviors toward other inmates and staff that resulted in his being placed in a segregation cell for much of his stay in the State's correctional system. During the periods when he was in segregation, Mr. Jenkins was locked up alone in a cell for twenty-three hours per day, every day. This not only meant that for months at a time Mr. Jenkins was separated from what most of us would consider to be "normal human contact," but it also meant that he was isolated from all but the most rudimentary programming that is supposed to be made available to the inmate population. Thus, Mr. Jenkins' Administrative Confinement classification, and his placement in segregation for much of his term of incarceration, was a measure that would have broader implications for his progress in terms of his rehabilitation, and potentially his "condition."

The programming available in the Nebraska correctional system falls into three general categories: (1) anger management/violence reduction programming; (2) sex offender programming; and (3) substance abuse programming. Although he also had a history of substance abuse, the kind of programming that would clearly have been most applicable to Mr. Jenkins' case would be the anger management/violence reduction programming. The Department's Anger Management Program involves participation in what amounts to a twelve session regimen that consists of group therapy. Obviously, an inmate who has to be locked in a segregation cell for safety's sake cannot attend group sessions, or at least not as a group session is normally done. On a couple of occasions over the years, Mr. Houston mentioned the idea of bringing programming to the inmates in the segregation units by providing the programming through television in the inmates' cells, but that has not been accomplished thus far. The other programming that might have been desirable in Mr. Jenkins' case was the Department's Violence Reduction Program, which is designed to be an intensive, inpatient program, with more than one hundred clinical sessions over the period of twelve months. The Violence Reduction Program is supposedly reserved for the Department's most violent inmates and, until very recently, had a capacity that was limited to twelve inmates per year. Because the Violence Reduction Program is an inpatient arrangement, and because it is offered only at the Penitentiary and nowhere else in the system, it would be quite impossible for Mr. Jenkins, or any other inmate living in segregation, to participate in that program, no matter how much the inmate might need it. Furthermore, even if Mr. Jenkins had not

been in segregation he would have needed to be transferred to the Penitentiary to receive the Violence Reduction Programming because it is made available only there.

Clearly, the programming provided by the Department of Correctional Services addresses many of the most significant areas where our prison population may need treatment and rehabilitation, but for the inmates in segregation programming is simply not available, even though the segregated inmates are often some of the most troubled and dangerous inmates in the entire system. The Ombudsman's Office has long advocated that the Department find a way to bring meaningful programming to the inmates in the segregation units, but thus far those suggestions have not had positive results. As for a somewhat larger issue, we are also beginning to question whether DCS is short of programming resources across the board. Statistics from DCS for late September of 2013 indicate that only 619 of the Department's total inmate population were in some form of programming. If this is the case, then that would equal only about 13% of the Nebraska correctional population. Furthermore, it appears that about 450 of those 619 inmates are participating in the Department's substance abuse programs, which means that only about 3.5% of the total DCS population is in something other than substance abuse programming. One of the more positive things that the Department has done over the last several years is to increase its substance abuse programming resources. We are, however, not aware of there being any similar resourcing enhancements in the other DCS programming areas. As the Nebraska prison

population now stands, we have reached a point where the Nebraska prisons and community centers are filled to about 150% of their design capacity. Obviously, more inmates necessarily means more programming demands, and over the years, as the prison population has gone up, the Nebraska corrections system may not have adequately supplemented its programming resources to deal with the increased demand. In fact, we know that over the last decade or so the Nebraska prison population has gone up by about 20%, while the correctional budget has been increased by only 7%. At the very least, we would like to suggest that this is a situation that needs to be examined in detail, to see if the current programming resources are sufficient to meet the current needs, including the need to provide programming for the segregation inmates (and for the inmates in protective custody, who are also isolated from access to programing). When we consider how troubled and potentially dangerous some of these inmates can be, and when we consider that most of them will eventually be discharged back into our communities, it would seem that the dollars that would be spent on programming segregation inmates while they are under the control of DCS would be dollars well spent.

The campaign (if we can call it that) by Mr. Jenkins to be transferred from TSCI to the Inpatient Mental Health Unit at LCC so that he could receive mental health therapy there raises yet another interesting question as it relates to Mr. Jenkins' segregation status. In fact, if we are searching for a continuum of access to, and quality of, the mental health services being provided to the inmates in our correctional system, then the segregation units, on

the one hand, and the LCC Inpatient Mental Health Unit, on the other hand, would be at the opposite ends of that spectrum. The segregation inmates are supposed to be seen/interviewed by mental health professionals once per month to make sure that they are maintaining their grip on reality, and are not suffering a "breakdown" due to their being locked up alone in a cell for 23 hours per day, or due to any other reasons. An inmate in segregation will also receive visits from the institution's mental health professionals after situations where the inmate had injured himself/herself, or had to be put into therapeutic restraints, or had threatened to commit suicide. However, these contacts are typically done at the door of the inmate's segregation cell, and are often completed in a relatively short period of time, perhaps only a matter of minutes. And, although these contacts can develop into longer conversations between the mental health professional and the inmate, standing in the gallery and speaking to the inmate through a cell door is hardly a setting that is conducive to anything that would be characterized as "therapeutic," not to mention "confidential." It should also be kept in mind that the inmates in segregation are often some of the most troubled and dangerous inmates in the entire system, and therefore are apt to be inmates who could use therapeutic intervention/counseling, even when they do not have a serious mental illness. All of this makes us wonder whether the fact that an inmate like Mr. Jenkins is in segregation might actually create as much of a barrier to his receiving needed mental health/behavioral health therapy, as it does for his receiving needed programming in important areas like substance abuse and violence reduction. Clearly, our correctional system has its share of troubled and

dangerous inmates, but the critical, unavoidable truth is that most of those inmates will eventually return to our communities, even if they are not paroled. If providing these inmates mental health ***and behavioral health*** counseling while they are in prison will improve their chances of being successful, law abiding citizens when they are released, then we would suggest that this be done, even if it means adding more resources to the DCS budget, and even if it means finding a new way to provide direct counseling to those inmates while they are in segregation.

We would also like to particularly emphasize the point that what we are talking about here is providing counseling/therapy to inmates in segregation, and doing so ***without regard to whether those inmates are diagnosed with a major mental illness, or merely a behavioral issue***. We know, of course, that the offices of our Licensed Mental Health Practitioners in the community are filled with people who do not have a serious mental illness, but who nevertheless need to have ongoing counseling/therapy for what would be characterized as "behavioral health issues." So, as we see it, neither one's confinement to a segregation cell, nor one's diagnosis as not having a serious mental illness, should act as a barrier to their receiving useful therapy. And we would simply add the obvious point that this is something that should be done in some more functional, confidential way than by talking to the inmate through his/her cell door, a practice which is demeaning to the mental health professional, as well as to the inmate.

There is an ongoing debate among correctional authorities and the advocates of reform as to

whether, in fact, confinement in segregation for prolonged periods of time can actually lead to symptoms of mental illness, or aggravate the mental illness of individuals who were already suffering from a mental illness when they were sent into segregation. There are many experts who argue that the sensory deprivation and isolation from normal human contact that are the essence of solitary confinement can make a real difference, in terms of exacerbating the condition of those inmates who are already mentally ill. The United States District Court for the Southern District of Texas, in the case of *Ruiz v. Johnson*, 37 F. Supp.2d 855 (1999), has summarized this perspective in looking at the situation in Texas, by saying:

> the administrative segregation units of the Texas prison system deprive inmates of the minimal necessities of civilized life. While the court recognizes and appreciates the formidable task of those public servants saddled with the task of dealing with problematic, violent inmates, even those inmates who must be segregated from general population for their own or others' safety retain some constitutional rights. Texas' administrative segregation units violate those rights through extreme deprivations which cause profound and obvious psychological pain and suffering. ***Texas' administrative segregation units are virtual incubators of psychoses - seeding illness in otherwise healthy inmates and exacerbating illness in those***

> ***already suffering from mental infirmities.*** (emphasis added) *Ruiz v. Johnson*, 37 F. Supp.2d 855, at 861.

The idea that inmates who spend long periods in solitary confinement can deteriorate in terms of their mental health is supported by the findings of a significant body of experts who have looked at the issue and determined that mentally ill inmates can, and often do, get worse in segregation. For instance, the American Association of Community Psychiatrists has stated in a position paper that, in general terms, "conditions in jails and prisons exacerbate mental illness," and has also said:

> Because of vulnerability to other inmates, or inability to comply with regulations, mentally ill inmates are frequently housed in protective or punitive segregation, where the isolation and enforced idleness lead to further deterioration in their condition. Men- tally ill inmates are disproportionately sent to "super-maximum security units", where isolation and sensory deprivation make decompensation the rule. It is not surprising that the rate of suicide in prisons is twice that in the general population. In jails the rate is 9 times higher. (This publication can be found online at http://psychnews.org/pnews/99-02-05/prison.html.)

This conclusion was supported by the findings of Dr. Stuart Grassian, a board-certified psychiatrist and former faculty member of the Harvard Medical

School, who evaluated the psychiatric effects of solitary confinement in more than two hundred prisoners in various state and federal correctional facilities. Dr. Grassian reported in an article published in the *Journal of Law and Policy* that he saw inmates who had hyperresponsivity to external stimuli, difficulties with thinking, concentration, and memory, perceptual distortions, illusions, and hallucinations, panic attacks, overt paranoia, problems with impulse control, and "primitive aggressive fantasies of revenge, torture, and mutilation of the prison guards." Based on what he had observed, Dr. Grassian made the conclusion that ***"the harm caused by such confinement may result in prolonged or permanent psychiatric disability, including impairments which may seriously reduce the inmate's capacity to reintegrate into the broader community upon release from prison."*** (emphasis added) [Please see J*ournal of Law and Policy*, Vol. 22, p. 325 (2006); online at http://law.wustl.edu/journal/22/p325 grassian.pdf.]

Yet another expert who has looked at this issue extensively is Dr. Craig Haney, who is a professor of psychology at the University of California at Santa Cruz. Dr. Haney was a professional adviser in the *Ruiz v. Johnson* case, and has studied the psychological effects of solitary confinement for more than 30 years. In 2001, Dr. Haney authored a paper published by the United States Department of Health and Human Services (Assistant Secretary for Planning and Evaluation) dealing with the psychological impact of long-term incarceration. In that document, Dr. Haney said that:

> The psychological consequences of incarceration may represent significant impediments to post-prison adjustment ...The range of effects includes the sometimes subtle but nonetheless broad-based and potentially disabling effects of institutionalization prisonization, the persistent effects of untreated or exacerbated mental illness, the long-term legacies of developmental disabilities that were improperly addressed, or the pathological consequences of supermax confinement experienced by a small but growing number of prisoners who are released directly from long-term isolation into freeworld communities...Over the next decade, the impact of unprecedented levels of incarceration will be felt in communities that will be expected to receive massive numbers of ex-convicts who will complete their sentences and return home...(and) the high level of psychological trauma and disorder that many will bring with them. (See the complete text of Dr. Haney's paper online at https://aspe.hhs.gov/basic-report/psychological-impact-incarceration-implications-post-prison-adjustment#IV.)

As Dr. Haney has characterized it, ***"the residual effects of the post-traumatic stress of imprisonment and the retraumatization experiences that the nature of prison life may incur can jeopardize the mental health of***

persons attempting to reintegrate back into the freeworld communities from which they came." (Also, please see Dr. Haney's testimony before the United States Senate's Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights - June 19, 2012, Hearing on Solitary Confinement; online at http://www.judiciary.senate.gov/pdf/12-6-19Haney Testimony.pdf.) And, in the same context, it is worthwhile to emphasize that, in a policy statement issued in 2012, the American Psychiatric Association itself has concluded that:

> Prolonged segregation of adult inmates with serious mental illnesses, with rare exceptions, should be avoided due to the potential for harm to such inmates. If an inmate with serious mental illness is placed in segregation, out-of-cell structured therapeutic activities (i.e., mental health/psychiatric treatment) in appropriate programming space and adequate unstructured out-of-cell time should be permitted. Correctional mental health authorities should work closely with administrative custody staff to maximize access to clinically indicated programming and recreation for these individuals.

The American Psychiatric Association added the recommendation that "inmates with a serious mental illness who are a high suicide risk or demonstrating active psychotic symptoms should not be placed in segregation housing...and instead be transferred to an acute psychiatric setting for stabilization."

It must be noted that this perspective on the harmful effects of solitary confinement has been openly questioned by a study completed in cooperation with the Colorado Department of Corrections in 2010. (See *One Year Longitudinal Study of the Psychological Effects of Administrative Segregation*; online at https://www.ncjrs.gov/pdffiles1/nij/grants/232973.pdf) That study concluded that solitary confinement does not, in fact, cause mentally ill prisoners to get worse. However, the Colorado study has itself been heavily criticized by many experts, including by Dr. Grassian. [For a very recent article discussing the case of Sam Mandez, a Colorado corrections inmate who was apparently normal in mental health terms when he was first incarcerated, but who, after nearly sixteen years in segregation, is now "profoundly, indisputably mentally ill," see *Half a Life in Solitary: How Colorado Made a Young Man Insane*, by Andrew Cohen, Atlantic Monthly, November 13, 2013, found online at http://www.theatlantic.com/national/archive/2013/11/ half-a-life-in-solitary-how-colorado-made-a-young-man-insane/281306/.]

Dr. Haney's point about "the residual effects of the post-traumatic stress of imprisonment" helps to put the whole issue of the mental health implications of solitary confinement into a very different, and yet valid, frame of reference. If, in fact, prolonged confinement in segregation does lead to post-traumatic stress disorder that might "jeopardize the mental health of persons attempting to reintegrate back into the freeworld communities from which they came," then it is probably essential for our Department of Corrections system to provide even more attention to its long-term segregation inmates,

first to identify those inmates who are, or may be, experiencing this post-traumatic stress disorder, and then to address the effects of this post-traumatic stress disorder before releasing these potentially dangerous inmates into our unsuspecting and vulnerable communities. In fact, if treating these cases can reduce the risk that these inmates represent to society after their release, then that alone is well worth the commitment of resources involved.

Leaving aside the technical debate among the mental health experts, **we would suggest that so long as Nebraska's correctional officials continue to rely heavily on administrative segregation, and so long as there is even the remotest possibility that the highly dangerous inmates who are placed in segregation might decompensate and become more mentally ill, and perhaps even more dangerous, the State should certainly make those inmates a focal point of mental/behavioral health attention and treatment, which is not exactly what we see happening in Nebraska's correctional facilities today. The legitimate security goals of the Department of Correctional Services are achieved by the act of separating these dangerous inmates from others, and securing them in segregation cells. But having thereby separated those high risk inmates from the general population, surely the leadership of DCS would agree that there is no reason why those inmates should be treated as if they were lepers or outcasts, and left without total access to the range of programming and mental/behavioral health services that are**

made available to other inmates. On the contrary, if anything the inmates in segregation probably should be receiving far more in the way of mental and behavioral health services than most other inmates. To reiterate the key recommendation of the American Psychiatric Association, ***"if an inmate with serious mental illness is placed in segregation, out-of-cell structured therapeutic activities (i.e., mental health/psychiatric treatment) in appropriate programming space and adequate unstructured out-of- cell time should be permitted."***

In summary, the Ombudsman's Office would offer the following:

- It is probable that the Department of Correctional Services needs much more in the way of programming resources, if it is going to make serious progress in "rehabilitating" its inmate population, particularly those inmates who are most troubled and most dangerous. This would be particularly true in regard to adding programming resources in the areas of violence reduction and sex offender treatment. As for deciding what the need is, and what resources should be added, it is suggested that the most sensible approach to this would be to ask an independent expert to survey the situation in Nebraska's correctional system, and make recommendations as to the needs of our system. It is possible that the Department of Correctional Services may be able to obtain a grant to help pay for such a study, but it is

recommended that the Legislature insist upon having a role in vetting the specific expert/analyst.

- With regard to the programming that is offered in Nebraska's correctional facilities, it is suggested that the Department look into the possibility of developing therapy/counseling that is directly aimed at "gang deprogramming." In fact, the Nebraska corrections system may need to begin treating this "deprogramming-program" in much the same way that it treats existing drug abuse treatment efforts, that is, as a priory program that is based on giving participants new ways to think about how they live their lives, and new skills that will help them cope with the temptation to fall back into old "bad habits." This program: (1) should not compel the former gang member to be "debriefed," in the sense of his/her being required or expected to disclose facts about the gang that he/she had formerly been affiliated with; and (2) should include practical enhancements (educational and vocational training, for example) in the programming resources of the correctional system that might be necessary to allow this anti-gang program to provide the former gang members with meaningful opportunities of the kind that will help to lift up the self-esteem of those who might otherwise seek "status" through gang-

involvement.

- Because the segregation units in Nebraska's correctional facilities often contain some of the system's most troubled and dangerous inmates, it is suggested that the Department of Correctional Services take steps to immediately provide programming of all types to its segregation inmates. The Department should also develop a process for the identification of long-term segregation inmates who are, or may be, experiencing post-traumatic stress disorder, and to address the effects of this post-traumatic stress disorder before they are released from custody.
- The Department of Correctional Services needs to provide comprehensive ongoing mental health/ behavioral health therapy/counseling to the inmates in its segregation units. It is emphasized that this therapy/ counseling should be available not only to inmates who are identified as having a "serious mental illness," but also to those segregation inmates who are identified as having "behavioral" problems.
- Although there are differences of opinion on whether mentally ill inmates in segregation will "decompensate" due to the nature of their segregated environment, the Department of

> Correctional Services should take the "conservative approach," by confronting this risk directly, rather than simply hoping that decompensation will not occur. With this concern in mind, Nebraska's Department of Corrections should move forward to implement the recommendation of the American Psychiatric Association, and require its mental health staff to work closely with the agency's administrative custody staff to maximize access to clinically indicated programming and recreation for these individuals.

The Transition Question

Over the years, the Ombudsman's Office has, in its contacts with corrections leadership, repeatedly advocated for the idea that it is desirable to arrange for inmates, particularly for long-term inmates, to "transition" from institutional confinement to the community at large. The idea is that inmates will be more likely to be successfully reintroduced into the community outside of the prison walls, if they are gradually assimilated into that setting in a controlled, closely supervised way. In most cases, this can be done by moving the inmate in gradual steps first to minimum custody, then to community custody (work detail/work release), and then to parole. We believe that this strategy is not only advantageous for the inmate in question, but it is also desirable from the standpoint of the community, since it is one way that we can make it more likely that the inmate will be a law-abiding citizen after his/her release. And transition is a strategy that is, in fact, implicit in the structure of the corrections

system itself, with its obvious "step-downs" from maximum custody, to medium custody, to minimum custody, with its community corrections (work release) facilities, and ultimately with its availability (for some inmates) of a release on parole, where the inmate is actually reintroduced into the community, but subject to very close supervision.

If this idea of "transition" is a desirable strategy in general terms, then we believe that it is even more essential when dealing with cases (like that of Mr. Jenkins) where the inmate in question has been held in close and isolated confinement in a segregation cell for an extended period of time. In fact, by our calculations Nikko Jenkins spent approximately 58 months of his sentence in a DCS segregation cell, a period of time which, in the aggregate, amounted to nearly five years in segregation/isolation. Before the end of his sentence, Mr. Jenkins was in segregation continuously from July 19, 2011, until July 30, 2013, a period of just over two years. And, in fact, we know that there are DCS inmates other than Mr. Jenkins who have spent even longer periods of time in the extreme isolation of a segregation cell, and who would be likely to have a high degree of difficulty adjusting to life in the general population of a prison, let alone in adjusting to life in the community at large. In addition, as we have indicated, the inmates who are kept in segregation are not only isolated in terms of their being separated from other people, but also in terms of their being separated from access to needed programing. So, without any form of transition from segregation to a "normal life," these inmates are going through the shock of being released directly from an isolation cell to our streets, very often with

nothing having been done for them in the way of programming/rehabilitation.

This "transition issue" was discussed by Dr. Craig Haney in his 2001 paper published by the United States Department of Health and Human Services. In that document, Dr. Haney stressed the point that "no significant amount of progress can be made in easing the transition from prison to home until and unless significant changes are made in the way prisoners are prepared to leave prison and re-enter the freeworld communities from which they came." Dr. Haney urged that prison systems should "provide all prisoners with effective decompression programs in which they are re-acclimated to the nature and norms of the freeworld," and emphasized that "prisoners who have manifested signs or symptoms of mental illness or developmental disability while incarcerated will need specialized transitional services to facilitate their reintegration into the freeworld," programming which should include "pre-release outpatient treatment and habilitation plans." Dr. Haney also stressed that this process "must begin well in advance of a prisoner's release," and that "***no prisoner should be released directly out of supermax or solitary confinement back into the freeworld***." (See online at http://aspe.hhs.gov/hsp/prison2home02/Haney.htm#IV.)

While he was the Director of the Department of Correctional Services, Robert Houston took a very important step in this area. Mr. Houston supported the usage of segregation as a tool for maintaining order in the institutions, but he also recognized that it would be desirable at some point to transition long-term segregation inmates back into the prison's

general population in the hope that they would be able to succeed in that environment, without causing the problems that had gotten them sent to a segregation cell in the first place. The solution was to create a Transition Unit at the Penitentiary to provide a "neutral setting" where long-term segregation inmates could gradually become acclimatized to living among larger and larger groupings of people, and could receive transition programming to help them learn to cope with the pressures and difficulties of life in the prison's general population. We believe that it is highly desirable for long-term segregation inmates to go through this programming, although unfortunately that does not always happen, even though the Transition Unit was created for that very purpose.

Mr. Jenkins' situation is an example of a case where an inmate did not have the advantage of receiving either rehabilitative programming or transition programming before he was released to the community. As I have indicated, the Ombudsman's Office was struggling to have Mr. Jenkins promoted from his segregation cell and into the prison's general population, almost right up to the very point when he was finally discharged from custody on July 30, 2013. Based on our discussions with DCS officials, it was our understanding that Mr. Jenkins would first be moved from segregation at TSCI to segregation at the Penitentiary's Control Unit on March 15, 2013, and then, after 30 days, Mr. Jenkins was to be moved into the Penitentiary's Transition Unit for preparation to be released into the prison's general population. Of course, this idea was less than ideal, given the likelihood that Mr. Jenkins would be released in July, but it was the

best that we could hope for, given the short time that was left. It should be remembered, however, that back in February of 2012, the Department's own MIRT team had recommended that Mr. Jenkins be "considered for the transition program at NSP to allow time in GP (general population) prior to discharge next year." If this recommendation had been followed (which it was not), then Mr. Jenkins might have been able to receive some meaningful transition programming, and have a real opportunity to acclimate himself to life in a larger (if prison) society before his eventual release. As it is, we will never know whether that programming and transitioning from a segregation cell would have made a difference with Mr. Jenkins, but then that is the problem...we will never know.

Only about 350 inmates out of all the inmates in Nebraska's correctional system are serving some form of Life sentence. All of the rest of our inmates, a number that is somewhere in excess of 4,000 inmates, will eventually be released from confinement, where they will ultimately surface as our neighbors, our friends, our fellow employees, etc. Clearly, this implies that it will be in everyone's interest for all of our inmates to have the best possible chance to succeed after their release, which we know can best be achieved through following a "policy of transition," and by providing comprehensive, evidence-based programming (both during incarceration, and while on parole after release). And if this principle is true generally, then it is even more valid in the cases of segregation inmates who have spent vast quantities of time in isolation from virtually all social contact. With this in mind, **consideration should be given to tracking**

the fate of those inmates who are released from long-term segregation to measure their recidivism rate (which is apt to be high), and to see whether programming and a transition strategy makes a difference in the success of those inmates after their release. And, in any event, the Ombudsman's Office continues to believe that it is desirable for the Department to require the development of a detailed, individualized, and comprehensive transition plans/programming for <u>all</u> inmates who have spent prolonged periods of time in segregation.

The Sentencing/Good Time Question

In the wake of the charges brought against him, some issues have been raised about the sentencing of Mr. Jenkins and how his good time was handled while he was in the Nebraska correctional system. In fact, Mr. Jenkins was sentenced on three successive occasions, and each of the last two sentences was made to run consecutively, and added years to his term of incarceration. Mr. Jenkins' original sentence was in 2003 for two counts of Robbery, and one count of Use of a Weapon to Commit a Felony, and in that instance Mr. Jenkins' sentence was for an indeterminate term of from fourteen to fifteen years. In August of 2006, Mr. Jenkins was sentenced to a term of two additional years for one count of Assault in the Second Degree, a sentence which related to the assault that he had committed while an inmate at NCYF. In 2011 Mr. Jenkins was given an additional consecutive sentence of from two to four years for Assault on a Correctional Employee - Third Degree, a sentence which related to the instance where he assaulted his escort when he was in Douglas County on a Travel

Order to attend a funeral on December 17, 2009. In the aggregate, these sentences made Mr. Jenkins' total sentence a term of from eighteen to twenty-one years. In my experience, none of these sentences look unusual or extraordinary to me, in the sense of being either too lenient, or too harsh. Some judges might have given a more lengthy term, some less, but these sentences are within what I would consider the normal range, based upon what I have seen in looking at sentencing orders in the past (if anything, the first sentence of 14 to 15 years might seem to be somewhat long, given the youth of Mr. Jenkins at the time).

It is worth noting that there was at least one more instance during Mr. Jenkins' history in the Nebraska correctional system where Mr. Jenkins might have been given one additional sentence, but was not. On February 17, 2007, Mr. Jenkins and two other LCC inmates were involved in the assault upon a Native American inmate. In that case, it was alleged that Mr. Jenkins had struck the other inmate several times in the head, while one of the other assailants supposedly used a heavy padlock to bludgeon the victim. Unlike the situation in Omaha in 2006, Mr. Jenkins was not, to the best of our knowledge, charged with felonious assault in the 2007 case at LCC. In addition, it does not appear that Mr. Jenkins forfeited any good time in connection with that February 17, 2007, incident. (Mr. Jenkins did forfeit 45 days of good time on February 23, 2007, but records indicate that in that instance he was being punished for "tattoo activities.") To the extent that Mr. Jenkins was ever "punished" in connection with the February 17, 2007, incident, it would appear that the "punishment" for

that event was limited to his being classified to Administrative Confinement status, and placed indefinitely in segregation.

Like nearly all of the inmates in the Nebraska correctional system, Mr. Jenkins was given "good time" credits which substantially reduced his sentence as pronounced by the courts. (In addition, his term of confinement was also reduced by his being given credit for time served in jail prior to sentencing, as is allowable under Nebraska law.) Given the ultimate length of his sentence, if he had received all of his possible good time credits, it appears that Mr. Jenkins would have been able to discharge from custody perhaps as early as January of 2012. If all of his good time had been forfeited, then Mr. Jenkins would not have been subject to discharge until the end of his full maximum term (less jail credit), or sometime in 2024 (although an inmate that loses all of his/her good time is an *extremely rare* occurrence).

Nebraska's sentencing and good time laws have a long, and rather circuitous, history. The "modern era" of Nebraska's sentencing and good time laws goes back to 1969, and LB 1307 of that year. Even then, the sentencing laws in this state contemplated that most inmates would receive "indeterminate sentences," that is, sentences with a range that provided for a minimum term and a maximum term, as pronounced by the sentencing court. Good time credits are typically deducted from both the minimum and the maximum. LB 1307 (effective in August of 1969) was unusual in that it implemented an idea referred to as "mandatory parole." Typically, an inmate's sentences will provide for a parole eligibility date, that is, a date when the

Board of Parole may, in its discretion, choose to grant the inmate a parole. However, this was a decision that would always be within the Parole Board's discretion, and there are often situations where the Board of Parole will choose not to grant a parole to an inmate who is eligible (which is what happened in Mr. Jenkins' case). Consistently, throughout the decades, inmates' parole eligibility dates have been determined by subtracting good time credits from the inmates' minimum sentence. And that is how parole eligibility was set under LB 1307 of 1969. However, LB 1307 also provided for a "mandatory parole," which was a situation where the inmate had to be released into the community before the end of his/her sentence, but would be subject to parole supervision until he/she was finally discharged. The big advantage of a mandatory parole system is that it guarantees that all inmates who are released will have an opportunity to live in the community *under supervision* – that is, no one would be simply released into society cold, without supervision, as had happened in the case of Mr. Jenkins. (Of course, if the inmate on mandatory parole misbehaved while on parole status, then the parole could be revoked by the Board of Parole, in which case the inmate would be returned to custody, typically until the end of his/her maximum sentence.) Under LB 1307, the mandatory parole date of an inmate's sentence was set by subtracting good time from his/her maximum term, and the inmate would then finally be discharged at the point when he/she reached the end of his/her maximum term as set by the judge. The amount of good time allowed under LB 1307 was five days per month plus:

2 months per year for year-one of the sentence;

2 months per year for year-two of the sentence;

3 months per year for year-three of the sentence; and

4 months per year for year-four of the sentence, and for every year thereafter.

So, an inmate would receive what amounted to four months of good time credit on his/her sentence in the first year, and would eventually receive as many as six months per year after completing the third year of his/her sentence.

From the beginning there was always the understanding that the inmate could lose good time, if he/she was found to have violated the rules relating to behavior within the institution. Thus, good time credits were not irrevocable rights, in the sense that the credits could not be forfeited. On the contrary, many inmates could very well expect to lose a part, even a significant part, of their good time credits during the course of their stay in the corrections system, if they engaged in prohibited behavior. However, in 1974 the United States Supreme Court in the case of *Wolff v. McDonnell*, 418 U.S. 539, held that good time credits could be taken away from an inmate by the state's correctional authorities only after the state had provided certain minimal forms of Due Process, including notice of the charges being made, and an administrative hearing with a right for the inmate to be heard in his/her own defense.

The good time laws in Nebraska were changed effective August 24, 1975, by the adoption of LB 567 of that year. Under LB 567 the statutory amounts of good time allowed were unchanged, but the idea of mandatory parole was eliminated. As was the case with LB 1307, inmates' parole eligibility dates were to be determined by subtracting good time credits from the inmates' minimum sentence. However, LB 567 provided that henceforth good time reductions from the inmates' maximum sentence would be used to determine when the inmate would be discharged from custody. After 1975 and LB 567, Nebraska's good time and sentencing laws remained unchanged for nearly two decades, until the adoption of LB 816 in 1992. What LB 816 actually changed was the rate of good time credits – now inmates would earn good time credit at a rate of six months per year for *all years* of their sentence. The sentencing and good time laws were next changed by LB 371 of 1995. First of all, LB 371 created a new category of sentences, the "mandatory minimum" sentence, which in the case of certain offenses required the inmate to serve the full minimum sentence, without receiving any good time credits on the minimum. It also created the so-called "positive time" system for awarding good time to inmates in the Nebraska correctional system. Under LB 371, non-mandatory minimum inmates would still receive good time credits of six months per year in order to determine their parole eligibility date. However, instead of automatically receiving six months of good time for every year of their sentence for the purpose of setting their discharge date, the inmates were required to earn half of their good time for discharge-date purposes by actively participating in a "personalized program," which was to be developed for each inmate by the Department. There

were several problems with this system, however. For one thing, there were potentially concerns about fairness, and possible biases that might be involved in judging which inmates had done enough to earn their good time. In practice, there were also concerns about whether inmates with intellectual disabilities, including reading disabilities, would be able to meet the expectations of their personalized program. And, a system that requires meeting the expectations of a personalized program implies that there will be adequate programming resources in the correctional system to make that possible. However, as the population of the Nebraska correctional system went up, it was not at all clear that the system's programming resources were truly keeping up with the rapidly increasing demand, creating a shortage, and putting inmates in a Kafkaesque situation where they were expected to expose themselves to programming opportunities that did not exist.

The Nebraska good time laws were changed again in 1997 with the adoption of LB 364. What LB 364 (effective July 1, 1998) did, in effect, was return the system to one where good time was again awarded at a flat rate of six months per year of sentence, not only for parole eligibility purposes, but also for the purpose of setting the inmates' discharge dates. In other words, LB 364 dropped the LB 371 concept of "earning" good time, and went back to the old system of awarding good time "automatically," with the understanding that the inmate could lose his/her good time for breaking the rules of the institution, or if he/she intentionally failed to comply with the personalized plan, in which case the inmate could have disciplinary action taken, and might lose three months of good time per year. The most recent

change to Nebraska's good time laws came in 2011 in the form of LB 191. According to LB 191, an additional three days per month could be deducted from an inmate's maximum term, to determine the date when discharge from the custody of the state becomes mandatory, but only if certain conditions were met by the inmate. Specifically, an inmate's maximum term is to be reduced "by three days on the first day of each month following a twelve-month period of incarceration within the department during which the offender has not been found guilty of (serious acts of misconduct)." In addition, LB 191 good time is not subject to being forfeited by the inmate, or taken away by the Department.

When it comes to the practicalities of recording good time credits, it has always been the practice of the Department of Correctional Services to credit the inmates with their good time months "up front," and then subtract the inmates' forfeited good time piecemeal, as the misconduct cases are adjudicated over the years. The handling of the good time is done this way for a couple of reasons. First of all, it helps to give the inmates a set of clear numbers, that is, dates of parole eligibility and tentative discharge, so that they will know with some clarity what they have to lose, if they misbehave. And, if the good time is added in to the sentence calculation "up front," then the the inmate will have a sense that he/she has a lot to lose by not following the rules. Second, crediting the good time up front also helps the system to plan, with the Board of Parole, for example, having a sense of when it will have to be seriously looking at the offender because he/she is nearing parole eligibility. And so, while as a bookkeeping matter, the Department could have a process of adding the good

time credits in month-to-month increments, that would be a significant departure from the current system, and would diminish the advantages that I have just described.

With the arguable exception of the three days of good time added to the system via LB 191, the inmates are not expected to "earn" their good time by good behavior, however that might be defined. Instead, the system assumes that the inmate's good time is "vested" when he/she begins the sentence, although it is time that can be taken away from an inmate who misbehaves (except, of course, in the case of the LB 191 good time). As the Nebraska good time system has been handled by corrections officials over the years, it certainly was not about being lenient with inmates. Instead, it is all about giving corrections officials a way to try to manage inmates' behavior, mostly by giving them a powerful disincentive to misbehave. Basically, what the good time system is intended to do is to allow corrections officials to discourage their inmates from misbehaving by making it possible for the Department of Correctional Services to lengthen an inmate's sentence, if he/she breaks the rules. So the State's good time system, as the system functions today, is not about being lenient with inmates. On the contrary, it is all about empowering our corrections officials to maintain order in our prisons by giving them the discretion to add time to inmates' sentences.

When a judge in Nebraska sentences a defendant to an indeterminate sentence, for example, a term of from ten to twenty years, presumably he or she knows that through the application of Nebraska's good time statutes the sentence will translate in to

something nearer to a term of from five to ten years. But the sentence pronounced by the judge is both setting the absolute maximum of the sentence, and what, in effect, amounts to the absolute minimum of the sentence's perimeters, with the understanding that he or she is giving the Department of Corrections broad discretion to lengthen the inmate's sentence (at least, within a certain range), if the Department feels that doing so is justified because of the inmate's behavior. It is my sense that the Department places great value on having this authority, even though, since 1974 and *Wolff v. McDonnell*, they have had to provide minimal Due Process before taking the inmate's good time.

As the reader can see from this account, Nebraska's good time laws have been amended frequently over the years. What we have learned from all this is that, when contemplating further changes in the good time laws, two major points must be considered. First, laws amending the Nebraska statutes on how good time is credited cannot be made to apply retroactively. See *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983). Thus, all changes in the good time statutes are prospective only. The effect of this is that our corrections system now has what are, in effect, cohorts of inmates marching through their sentences, while serving their time under very different laws. All of this has made the system for accurately calculating our inmates' sentences into a somewhat complicated process. Second, it is very important to keep in mind that changes in our good time laws can have very significant effects (some of them foreseen, some unforeseen) on the size of the Nebraska prison population. This means that it is advisable to first

carefully calculate what the projected population impact will be with respect to any proposed change in our good time laws, particularly those changes that will reduce good time credits, and thereby lengthen sentences.

The Mental Health Services Question

Our access to Mr. Jenkins' files has given us a rare, if not unprecedented, opportunity to observe, in minute detail, how a correctional mental health system interacts with a deeply troubled inmate. In a 2006 report, the U.S. Bureau of Justice Statistics estimated that 56% of state corrections inmates had a mental health problem of some nature. The same report further indicated that as many as 15% of all state prisoners reported symptoms that met the (DSM-IV) criteria for a psychotic disorder, including signs of delusions "characterized by the offenders' belief that other people were controlling their brain or thoughts, could read their mind, or were spying on them," and/or hallucinations, including "reports of seeing things others said they did not see or hearing voices others did not hear." Clearly, Mr. Jenkins would have to be included in that 15% of prison inmates who *reported symptoms* that meet the criteria for a psychotic disorder (for instance, he has reported "hearing voices"). However, as to whether Mr. Jenkins, in fact, suffers from a serious mental illness, that seems to be less a matter of conjecture than a question of which expert you choose to agree with on the issue.

The record in this case clearly depicts a level of uncertainty, or dissonance, over the correct diagnosis of Mr. Jenkins' condition, and particularly over the issue of whether he has a serious mental illness. If

we look at the opinions expressed by the four psychiatrists who had the most comprehensive exposure to the question of Mr. Jenkins' diagnosis, we see a situation where different experts arrived at nuanced, but still very different, conclusions. Dr. Baker expressed the opinion that Mr. Jenkins' symptoms were "inconsistent and more behavioral/Axis II in nature," and that Mr. Jenkins was attempting to use his mental health symptoms "for secondary gain, including to avoid legal consequences in court for (his) recent behaviors." Dr. Moore said that it was his opinion that "there is the possibility that Mr. Jenkins does indeed have a psychotic illness, (but) I don't think this is a very good possibility," and that Mr. Jenkins' "major diagnosis is Antisocial Personality Disorder," with "doubt" concerning "the presence of psychosis." When Dr. Wetzel examined Mr. Jenkins, he said that his diagnosis was "Bipolar Disorder NOS, Probable; PTSD, Probable; Antisocial and Narcissistic PD (personality disorder) Traits; and Polysubstance Dependence in a Controlled Environment." Dr. Wetzel also said that when he examined Mr. Jenkins, there was "enough objective evidence of disruption in sleep cycle, mood and behavior to suggest an element of major mood disorder influencing the clinical picture." When Dr. Oliveto saw Mr. Jenkins on April 23, 2010, his diagnosis of Mr. Jenkins' condition was "Axis I-Schitzoaffective disorder vs. bipolar I; Axis II–Anti-social/Impulsive/ Obsessive." Later, on September 22, 2010, Dr. Oliveto gave a diagnosis of Mr. Jenkins' condition as being "Axis I-Schitzoaffective disorder vs. paranoid schizophrenia; Axis II-Antisocial/Obsessive/Impulsively dangerous to others/Explosive," and his Follow-up Notes described Mr. Jenkins as being "psychotically

obsessed with plot to kill him or set him up to kill others," and as being "psychotic, delusional." (Of course, it was also Dr. Oliveto who recommended that Mr. Jenkins should be transferred to the Lincoln Regional Center "before his discharge to stabilize him so he is not dangerous to others.")

As we have remarked earlier, it is possible for reasonable mental health professionals to differ in their diagnosis of the condition of the same patient. However, as we can see from the opinions expressed in Mr. Jenkins' case, the development of a firm psychiatric diagnosis for some individuals can sometimes be very difficult, as the doctors try to use their training and insights to penetrate the clouds and develop a clear picture of the patient's condition, and categorize that condition. And when multiple experts are involved, it is even possible to see an array of differing diagnoses falling on a "diagnostic spectrum," with a range that extends from – *No Serious Mental Illness,* to...*May Have a Serious Mental Illness, but Probably Not,* to...*May Not Have a Serious Mental Illness, but Probably Does,* to...*Has a Serious Mental Illness*. In fact, to a certain extent, we can see this "spectrum" developing in the diagnosis of Mr. Jenkins as proposed by Dr. Baker, Dr. Moore, Dr. Wetzel, and Dr. Oliveto. It would, I believe, be too dismissive of the skills and professionalism of the psychiatrists involved to say that the business of making a psychiatric diagnosis is "more art than science," but certainly the impression that a layperson gets from reading the various diagnoses of Nikko Jenkins is that our psychiatrists must be given a great deal of latitude when it comes to drawing their diagnostic conclusions, at least in some cases.

If a firm diagnosis of Mr. Jenkins' condition is elusive, there are certain elements of his case that are true beyond any dispute. The indisputable facts of Mr. Jenkins' case include the following:

1. Mr. Jenkins has a history of violence, including the crimes that got him sent to prison in the first place, and the violent acts that he engaged in after his incarceration, (a) his role in a "near riot" in the yard of NCYF on July 4, 2005; (b) his involvement with two other inmates in the assault of a Native American inmate at LCC on February 17, 2007; and (c) his assault on a DCS staff person who escorted him to a funeral in Omaha on a temporary Travel Order on December 17, 2009. In addition, it must also be noted that Mr. Jenkins was found to be in possession of a homemade weapon (a toilet brush sharpened to a point) concealed in his waistband at TSCI on January 26, 2009.

2. Mr. Jenkins consistently reported having psychotic symptoms, in particular, his often repeated statements about hearing the voice of an "Egyptian god" who wanted him "to harm others."

3. Mr. Jenkins repeatedly threatened/ warned/predicted that he would commit violent acts after he was released from DCS custody, including:

> On July 22, 2008, when Mr. Jenkins told Unit Manager Jason Hurt that "he's just going to randomly go to suburban houses and start killing people outside of North Omaha, maybe go to Tecumseh or Syracuse with his gang members and start killing people."

On July 31, 2008, when Mr. Jenkins spoke to Mr. Hurt about a "desire to kill the administration and other people when he gets out of prison."

On August 11, 2008, when Mental Health Practitioner Connie Boerner reported that Mr. Jenkins had "expressed having ongoing homicidal ideations and has made threats to hurt others once he is released from incarceration (and) went into detail as to how he would kill others, similar to the recent Von Maur shootings."

On January 15, 2009, when Mr. Jenkins spoke to TSCI Mental Health Practitioner Heidi Widner about "the life of crime that awaits him once he is out...(and) that his crimes and killing will not be limited to just his own kind."

On February 23, 2009, when Mr. Jenkins spoke with Ms. Boerner, and indicated that he "fantasizes of 'killing' others once he is released," and had stated that "he sees himself 'destined' to be a 'homicidal maniac.'"

On May 13, 2009, when TSCI Unit Manager Shawn Sherman submitted a Mental Health Referral reporting that Mr. Jenkins "claims to be hearing the voice of an Egyptian god... telling him to massacre children."

On December 3, 2009, when Mr. Jenkins reported to Dr. Baker that he was "hearing the voice of an Egyptian god who wanted him to harm others" (Dr. Baker added the observation that that Mr. Jenkins "is not an imminent danger to himself or others at this time," although just two weeks later he would assault a Corrections employee).

On December 28, 2009, when Mr. Jenkins sent a Health Services Request Form to Dr. Baker reporting that the "voice" in his mind was telling him to "hurt guards," and to "start war between good and evil."

On January 10, 2010, when Caseworker Howell reported in a Mental Health Referral that Mr. Jenkins had "exhibited increasingly aggressive behavior in the past week... claiming to hear voices telling him to injure staff."

On February 27, 2010, at the Douglas County Jail, when Licensed Mental Health Practitioner Denise Gaines spoke with Mr. Jenkins, and later reported that he had talked about the "horrific acts that the Egyptian god Opophus (sp.) wants him to inflict on Catholics, whites, and children."

On August 7, 2010, when Ms. Gaines again spoke with Mr. Jenkins and reported that he said that "Opophus is telling him that the day is coming soon that 'they will see,' (and)... Opophus

taking him over and him killing others once released from prison if he doesn't get some help."

On December 11, 2010, when Ms. Gaines reported that Mr. Jenkins seemed "scared about being released because of the violence that he is (through Apophis) inflict on people and police."

On March 25, 2011, when Ms. Gaines recorded that Mr. Jenkins "continued to express thoughts about doing murderous acts on society (i.e., killing/torturing nuns, children, etc.)."

On December 23, 2011, when Mr. Jenkins told Dr. Baker that he "feels he will hurt others when released back into the community."

On February 1, 2012, when Mr. Jenkins told Dr. Weilage that "he wants help and if he does not get it from us then his first thought when he gets out is that he needs to 'get some weapons.'"

On April 19, 2012, when Dr. Baker reported that Mr. Jenkins expressed "concerns about what he will do once he is released from DOC."

On January 15, 2013, when Mr. Jenkins said to Dr. Gibson that "he views everyone as 'prey' and followed-up with a number of violent images."

On January 19, 2013, when a nurse at TSCI reported having heard Mr. Jenkins saying that he was "afraid he will get out and 'rip someone's heart out.'"

On January 25, 2013, when Mr. Jenkins said to Dr. Gibson that, when he was released, he would "give in to 'apophis' who wanted him to kill 'man, woman and child' of 'every age group.'"

On March 7, 2013, when Mr. Jenkins made a statement to DCS social worker Kathy Foster in regard to the "intended violence that he will commit if he is discharged to the community," and told her that he "does not want to discharge to the community because he will kill people and cannibalize them and drink their blood." (Please note that Ms. Foster's notes from her meetings with Mr. Jenkins are incorporated in the Department's Mental Health Contact Notes.)

On March 14, 2013, when Mr. Jenkins met with Dr. Wetzel and expressed "repeated thoughts of harming other people in the form of cannibalism and 'waging war.'"

On April 5, 2013, when Ms. Foster, the social worker, met with Mr. Jenkins, and Mr. Jenkins "stated a couple of times that he is 'not kidding,' it will be bad' when he gets out."

> On April 30, 2013, when Ms. Foster had yet another meeting with Mr. Jenkins, and Mr. Jenkins told her "that when he gets out 'it will begin' and...made allusions to killing 'without prejudice.'"

4. Mr. Jenkins had repeatedly asked for/demanded that he be given treatment for his mental condition, including, if possible, through a transfer to the DCS Inpatient Mental Health Unit at LCC, or through a civil commitment to the Lincoln Regional Center.

Those of us who work in the Ombudsman's Office do not have the training to express an opinion on the mental health status of Nikko Jenkins, or of anyone else, for that matter. All that we can do, insofar as Mr. Jenkins' mental state is concerned, is to note that the diagnoses offered by the different psychiatrists in this case sound somewhat (perhaps even considerably) different, so much so, in fact, that we could say that there was "a difference of professional opinion" on the subject of Mr. Jenkins' mental health, and whether he suffers from a "serious mental illness." It also appears to us that the whole question of what Mr. Jenkins' correct diagnosis might be was something that, in an odd way, became a barrier to his getting treatment for his condition, whatever it might be. The record, in fact, suggests that a great deal of time was spent by the DCS Mental Health staff in arguing/ disputing/debating with Mr. Jenkins over the issue of whether he had a serious mental illness that justified his being sent to the Inpatient Mental Health Unit at LCC, or to the Lincoln Regional Center, when it might have made more sense to try to engage him in some kind of therapy beyond just prescribing

medications (which he typically would stop taking after a brief period of time), or to at least develop a long-term plan for trying to "reach" Mr. Jenkins.

The strict question of his diagnosis aside, we know that Mr. Jenkins repeatedly asked the DCS Mental Health staff to provide him with ongoing therapy to address his troubled condition. He requested to be transferred to the Inpatient Mental Health Unit at LCC, and even lobbied to be civilly committed to the Lincoln Regional Center. Examples of this are reflected in the following contacts:

> On March 27, 2009, Dr. Weilage visited with Mr. Jenkins, and reported that "he is interested in 'rehab' and the MHU (Mental Health Unit) at LCC."
>
> On December 18, 2009, in a conversation with Katherine Stranberg, a Mental Health Practitioner working at TSCI, Mr. Jenkins "reported that he wanted to go to the Inpatient Mental Health Unit (at LCC) because there he would be able to get the ongoing treatment he needed."
>
> On September 26, 2011, Dr. Baker reported that Mr. Jenkins was requesting "daily psychotherapy to help him cope," and was "very focused on wanting to be transferred to LRC and states he will only take meds if recommended if he is at LRC."
>
> On February 1, 2012, in a meeting with Dr. Weilage, Mr. Jenkins "specifically requested daily psychotherapy...stated (that) daily psychotherapy would help

with his hypomania, stabilize his psychosis, and help him deal with the grief of confinement," and said that "he would comply with medications, therapy, if transferred to LCC and comply with MHU expectations."

On March 23, 2012, Mr. Jenkins spoke with Mental Health staff at TSCI and "insisted that he needed 'intense psychotherapy' before he was released," and that the Mental Health staff should recommend that he "be placed in a psychiatric hospital immediately due to the high level of dis- tress he was experiencing."

On April 19, 2012, Dr. Baker spoke with Mr. Jenkins, and reported that Mr. Jenkins expressed "concerns about what he will do once he is released from DOC," and that he again said that he would like to be transferred to LCC or LRC for mental health treatment, and continued to "refuse all psychotropics including...until he can be transferred to LRC/LCC."

On May 15, 2012, Mr. Jenkins spoke with Mental Health staff at TSCI and "insisted that he was not receiving proper psychological/psychiatric/mental health treatment for his mental illness."

In early May of 2012, Mr. Jenkins addressed an Informal Grievance to DCS Director Robert Houston stating that he had an "emergency need of

medical treatment psychologically," and that he wanted to be approved to receive treatment at the "LCC mental health mod for (the) mentally ill." (It appears that Mr. Jenkins' grievance was ultimately routed to DCS Deputy Director for Institutions Frank Hopkins for a response.)

On January 10, 2013, Dr. Pearson spoke with Mr. Jenkins, and reported that he had stated "that he was 'psychotic' and needed transferred to the Lincoln Regional Center for care."

On January 16, 2013, Dr. Gibson met with Mr. Jenkins, and reported that Mr. Jenkins had ex- pressed "a belief that he should be hospitalized for psychiatric concerns (particularly being dangerous to others), as he will be released soon."

After Mr. Jenkins inflicted significant wounds to his face on January 18, 2013, a nurse at TSCI reported to Dr. Gibson that Mr. Jenkins had been "screaming about wanting psychiatric treatment, as he is reportedly afraid he will get out and 'rip someone's heart out.'"

On January 25, 2013, Mr. Jenkins spoke with Mental Health staff at TSCI and requested "hospitalization so that he does not harm other people."

> On February 17, 2013, Mr. Jenkins sent an Informal Grievance to TSCI Warden Fred Britten in which he said that he was "requesting psychiatric hospitalization for severe psychosis conditions of enragement episodes of my schizophrenia disease," and specifically referenced the Nebraska Mental Health Commitment Act.
>
> On February 19, 2013, Licensed Mental Health Practitioner Brandy Logston spoke with Mr. Jenkins, and reported that Mr. Jenkins told her that "he 'wanted it documented' that he was in need of 'emergency psychiatric treatment.'"
>
> On March 14, 2013, Mr. Jenkins told Dr. Wetzel that he was due to be released from prison in July, and that he "wants to be placed in a psychiatric hospital to stabilize for 'modern times.'"

In short, Mr. Jenkins was asking for help, and although there might perhaps be some doubts about his sincerity in that regard, there can be little reasonable doubt about the fact that he did have a dangerous history, and was expressing dire and dangerous ideas to the DCS Mental Health professionals...over, and over, and over. [When it comes to the question of Mr. Jenkins' sincerity, we should keep in mind Ms. Gaines October 8, 2010, Progress Notes, which include the observation that she "sincerely believes that this client wants help, but is giving up on anyone (the system) providing him with help."] With all of this in mind, it is difficult

to look at this case (indeed, very difficult to look at this case) and not feel that it might have made more sense to deemphasize the whole question of diagnosis, and concentrate instead on the verifiable facts – the inmate's actions, the inmate's history, the inmate's statements; in short, the inmate's dangerousness. And, having considered the obvious potential that Mr. Jenkins had for dangerous behavior, it would also have made better sense to have formulated a strategy of therapy that might have made a difference in regard to his future behavior, or that, at least, might have given the Mental Health staff a better sense of where he needed to go after he was discharged from DCS custody.

There can be little doubt that some of the mental health professionals who were aware of Mr. Jenkins knew, or should have known, that he was potentially dangerous. Even as early as July of 2008, Connie Boerner, part of the TSCI mental health staff, stated that Mr. Jenkins "is a very dangerous individual." On July 17, 2009, another TSCI mental health professional, in reporting on a conversation with Mr. Jenkins, expressed the opinion that Mr. Jenkins "appears to be at considerable risk for reoffending and for interpersonal violence." And, of course, both Dr. Oliveto and Ms. Gaines at the Douglas County Jail were not only very concerned about Mr. Jenkins' dangerousness, but were also very clear in their attempts to warn others about how dangerous Mr. Jenkins might be after release. On September 22, 2010, after he had examined Mr. Jenkins, Dr. Oliveto not only recorded his opinion that Mr. Jenkins' diagnosis included "schitzoaffective disorder vs. paranoid schizophrenia," but also said

Mr. Jenkins needed "transfer to LRC before his discharge to stabilize him so he is not dangerous to others." These observations, together with Ms. Gaines' own observations of Mr. Jenkins while in her care, resulted in the December 1, 2010, letter that Ms. Gaines addressed to the Nebraska Board of Parole in which she advised the Board that Mr. Jenkins had been evaluated by Dr. Oliveto, who was recommending that Mr. Jenkins should be "transferred to Lincoln Regional Center for treatment before being discharged (from the correctional system) for 'stabilization so he is not dangerous to others.'" Later on in Mr. Jenkins' period of incarceration, on March 4, 2013, Dr. Baker met with TSCI psychologist Dr. Pearson to propose that Mr. Jenkins "be seen by Dr. Wetzel for a second opinion," so that Dr. Wetzel could "assess (Mr. Jenkins) for dangerousness risk," due to her concerns about "his dangerousness to the community upon release."

In a sense, many of these issues - Mr. Jenkins' mental health, his history of asking for treatment of his mental health condition, and the fact that his "serious history of mental illness...inhibits his ability to be rehabilitated" - were pulled together in the sentencing Order signed by Douglas County District Judge Gary B. Randall on July 11, 2011. Noting that Mr. Jenkins had "requested treatment for his mental health issues," and that "the record...would support the Defendant's request," the Order signed by Judge Randall included what was an extremely unusual statement: "The Court therefore recommends to the Department of Correctional Services that Defendant be assessed and treated for issues regarding his mental health." Of course, this was only a

recommendation, subject to the informed judgment of the Department's Mental Health staff as to whether it was to be implemented, or not. In fact, we know that Mr. Jenkins was subsequently evaluated by the DCS Mental Illness Review Team (although that did not happen until February of 2012). And Mr. Jenkins was evaluated by Dr. Wetzel at Dr. Baker's suggestion, but that did not happen until March of 2013. We would also note that Mr. Jenkins was returned to TSCI on July 19, 2011, and that on February 1, 2012, Dr. Weilage recorded that Mr. Jenkins had been "seen by licensed Mental Health staff for evaluation and/or monitoring on 10 occasions" since having returned to TSCI. It is probably best left to the reader to decide whether this history of "10 occasions" reflected a meaningful execution of Judge Randall's recommend-dation regarding assessment and treatment of Mr. Jenkins.

As we have sifted through the deep drifts of records and documents relating to this case, one of the most insightful and impressive remarks/ recommendations concerning Mr. Jenkins' situation that we have seen was the following note written by Dr. Wetzel:

> Long-term strategies recommended for this patient include development of a rapport and trust to enhance participation in psychiatric care, ongoing development of objective evidence supporting - - or not supporting - - the presence of major mental illness and the possibility of further psychological formal testing to help clarify (the) diagnostic picture.

While others in DCS seemed to be invested in the idea that Mr. Jenkins did not have a serious mental illness, Dr. Wetzel obviously kept an open mind on the subject. Dr. Wetzel also offered a practical plan for how the Department's Mental Health staff might approach Mr. Jenkins' situation in the future. The key word in Dr. Wetzel's recommendation, in our opinion, is the word "trust." When we read many of Mr. Jenkins' comments, as recorded in the documents discussed in this report, we get the sense that the DCS Mental Health staff were distrusted by Mr. Jenkins and were seen by him as being an extension of the TSCI security staff. (There is much less of this to be found in the records of Mr. Jenkins' stay at the Douglas County Jail.) In its 2012 Position Statement on Segregation of Prisoners with Mental Illness, the American Psychiatric Association noted that "(p)hysicians who work in U. S. Correctional facilities face challenging working conditions, dual loyalties to patients and employers, and a tension between reasonable medical practices and prison rules and culture." Certainly, we can appreciate how powerful and challenging this "tension" can be, and clearly we would agree with the idea that it is important that the DCS Mental Health staff be trained and counseled to struggle against succumbing to this "tension," so that the Department's mental health professionals can accomplish both the image, and the reality, of being separate and independent of the agency's security staff. It should go without saying that the DCS Mental Health staff are not employed in the system for the purpose of advancing/validating the agenda of the agency's security staff. On the contrary, they are there to serve the inmates who are their patients and, by serving those patients, to

advance the larger interests of the community in having more stable, law abiding, and "civilized" men and women released into society, when the day of an inmate's release finally arrives. All of this comes down, in our estimation, to having good leadership and, as we see it, the quality of the current leadership of the DCS Mental Health component should be evaluated through the prism of this case, no matter how painful that might be.

In summary, the Ombudsman's Office would offering the following:

- In evaluating the inmates who come into contact with the DCS Mental Health component, the Department's Mental Health staff should place a high priority on identifying inmates who are, or may be, dangerous, so that those inmates can: (1) be given special attention in terms of providing them with treatment/therapy; and (2) be reevaluated for presence of a serious mental illness as their discharge date approaches, so that informed decisions can made as to whether those inmates should be referred to the civil commitment process.
- The DCS Mental Health component should place a high priority on finding effective ways to develop a positive rapport and sense of trust with the patients that it serves, in order to enhance the inmates' participation in their own mental health/behavioral health care.

- In light of the American Psychiatric Association's observation that physicians who work in correctional facilities face "dual loyalties to patients and employers, and a tension between reasonable medical practices and prison rules and culture," the Nebraska Department of Correctional Services should seriously consider whether it would be desirable, as a way of protecting/guaranteeing the independence of its mental health professionals, to privatize the Department's entire mental health component.

The Civil Commitment Question

As indicated at a previous point in this report, in early 2013 Mr. Jenkins contacted the Johnson County Attorney requesting a civil commitment proceeding to have himself committed to hospitalization under the Nebraska Mental Health Commitment Act (Neb. Rev. Stat. §§71-901 thru 71-963). On March 11, 2013, Mr. Richard Smith, the Deputy Johnson County Attorney, wrote to Mr. Jenkins acknowledging the receipt of letters from Mr. Jenkins, "as well as materials provided by (his) mother and (his) fiancée" regarding Mr. Jenkins' mental health. Mr. Smith's letter explained that in order to file a mental health board petition the County Attorney would "need to hear from a mental health expert who can testify as to mental illness and dangerousness." Mr. Smith's letter indicated that he expected the Department to evaluate whether Mr. Jenkins was "fit to be released," or whether "further inpatient commitment to treat (his) mental illness" was needed. Mr. Smith also related that when DCS

provided "copies of its recommendation...a determination will be made about whether a mental health petition is appropriate." Of course, as we now know, by the time that a mental health commitment proceeding might have been pursued by the Johnson County Attorney in Mr. Jenkins' case, Mr. Jenkins had already been moved out of Johnson County to NSP.

Under Neb. Rev. Stat. §71-921(1), "any person who believes that another person is mentally ill and dangerous may communicate such belief to the county attorney," and "if the county attorney concurs that such person is mentally ill and dangerous...he or she shall file a petition," as provided in Neb. Rev. Stat. §71-921(3), including a "statement that the beliefs of the county attorney are based on specific behavior, acts, attempts, or threats which shall be specified and described." Following the filing of that petition by the county attorney, Neb. Rev. Stat. §71-924 provides that "a hearing shall be held by the mental health board to determine whether there is clear and convincing evidence that the subject is mentally ill and dangerous as alleged in the petition." According to Neb. Rev. Stat. §71-925(1), "the state has the burden to prove by clear and convincing evidence that (a) the subject is mentally ill and dangerous and (b) neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment...would suffice to prevent...harm." Since the clear standard for a civil commitment is that the person in question is both mentally ill and dangerous, the Nebraska Mental Health Commitment Act includes specific definitions of those two concepts. In that regard, Neb. Rev. Stat.

§71-907 provides that "mentally ill" means "having a psychiatric disorder that involves a severe or substantial impairment of a person's thought processes, sensory input, mood balance, memory, or ability to reason which substantially interferes with such person's ability to meet the ordinary demands of living or interferes with the safety or well-being of others." And according to Neb. Rev. Stat. §71-908 "mentally ill and dangerous person" means "a person who is mentally ill...and because of such mental illness...presents: (1) A substantial risk of serious harm to another person or persons within the near future as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm; or (2) A substantial risk of serious harm to himself or herself within the near future as manifested by evidence of recent attempts at, or threats of, suicide or serious bodily harm or evidence of inability to provide for his or her basic human needs." The burden of proof in civil commitment proceedings is on the county attorney who has filed the petition and, as indicated above, requires clear and convincing evidence that the person in question is both mentally ill and dangerous. However, the standard for the county attorney in deciding to go forward with a civil commitment proceeding is "probable cause to believe that the subject of the petition is mentally ill and dangerous."

As we have indicated, the Ombudsman's Office is not qualified to determine whether Mr. Jenkins, or anyone else, has a mental illness. The same, of course, can be said of a county attorney. This is why the standard for the county attorney is "probable cause," that is, a reasonable belief "that the subject of

the petition is mentally ill and dangerous." What we are left with then, insofar as Mr. Jenkins' case is concerned, is this question: Could a reasonable person (i.e., the county attorney), after looking at the records in this case, conclude that Nikko Jenkins could be proven to be mentally ill and dangerous by clear and convincing evidence? We believe that the answer to that question is...Yes, a county attorney could so conclude. In that regard, we would emphasize the following points:

1. Mr. Jenkins has a history of violence, including the crimes that got him sent to prison in the first place, as well as a series of violent actions that he engaged in after his incarceration.

2. Mr. Jenkins has an extensive history of dangerous/homicidal ideations communicated to DCS staff - beginning in 2008, at the very latest, and continuing up until April of 2013, there were numerous times when he repeatedly threatened/warned/predicted that he would commit violent acts following his release from DCS custody.

3. The record shows that that in addition to his contacts with the Johnson County Attorney's office, Mr. Jenkins also repeatedly told DCS staff that he wanted to be civilly committed to the Lincoln Regional Center, and that he did so at a point in his sentence when his ultimate discharge from DCS custody was only a few months away, which is hardly "normal" behavior for an inmate who is hungering for freedom after many years of incarceration.

4. While some psychiatrists expressed skepticism that Mr. Jenkins was "mentally ill," Dr. Eugene Oliveto diagnosed Mr. Jenkins on September 22, 2010, and concluded that his condition was

"Schitzoaffective disorder vs. paranoid schizophrenia," and it was based upon this diagnosis that Dr. Oliveto made the recommendation that Mr. Jenkins needed to be transferred to "LRC before his discharge to stabilize him so he is not dangerous to others."

In fact, when we stand back and consider everything that we have seen in the large volume of records relating to this case, the one sentence that we repeatedly return to is in Dr. Oliveto's Physician's Orders of September 22, 2010 – **"*Needs transfer to LRC before his discharge to stabilize him so he is not dangerous to others.*"**

We do not have the ability to decide whether Mr. Jenkins suffers from a mental illness, but then we do not need to do that - our question here is whether the Department of Corrections' mental health staff should have referred Mr. Jenkins' case to a county attorney for a possible mental health commitment proceeding. We believe that the Department should have done so. And we believe that the Department should have done so regardless of whether its own doctors had doubts about whether Mr. Jenkins' was, in fact, mentally ill. The case, as outlined above, was enough to take the matter to the county attorney. It is possible, of course, that the county attorney could have decided against filing civil commitment proceedings, but then at least the Department would have done its duty by bringing the matter to the proper authorities to allow them decide whether to go ahead with a civil commitment or not, as the case may be. It is possible that, even if the county attorney decided to file civil commitment proceedings, the board of mental health might have decided against commitment. We would point out,

however, that §71-924 of the Mental Health Commitment Act provides that the board of mental health "shall inquire of the subject whether he or she admits or denies the allegations of the petition," and that "if the subject admits the allegations, the board shall proceed to enter a treatment order pursuant to section 71-925." In other words, if there had been a civil commitment proceeding filed in Mr. Jenkins' case, and if he persisted in asking to be committed to the Regional Center, then that alone could have been sufficient for the board to order him to be committed.

We would add that it is by no means unusual for the Department of Correctional Services to present cases like this one to the county attorney for possible civil commitment proceedings. In fact, we have recently been informed that in the last year the Department of Corrections has referred eleven inmates to the county attorneys for consideration as possibly mentally ill and dangerous individuals. (Please note that these numbers would not include individuals who were referred under LB 1199 as possible Dangerous Sex Offenders.) And so we are left with the disturbing image of eleven other inmates being referred to a county attorney for possible civil commitment...but not Nikko Jenkins. **With all of this in mind, we would strongly recommend that the Department of Correctional Services establish a comprehensive process for identifying those inmates who should be referred for a possible civil commitment, with the final decision being placed in the hands of a high-ranking <u>layperson</u> in the Department (i.e., not a mental health professional), so that the final referral decision can be made based upon: (1) the**

evaluations of the mental health professionals; and (2) the practicalities of the case, including, in particular, an evaluation of the potential "dangerousness" of the individual involved.

Conclusion

Sadly, I am well aware that there is nothing in this report for the families of the victims of Mr. Jenkins' alleged crimes. There are no answers here that can give them comfort, or that can ease their pain, or that can explain in cool, rational terms why their loved ones were lost. As investigators and systems analysts, all that we can do is investigate and analyze, and the truly big questions - about fate and bad fortune, the unpredictability of life, grief, loss, gratuitous violence, the shadowy depths of the human psyche, and the sometimes all-too-thin veneer over human nature that we refer to as "civilization,"- are all matters that are far beyond our reach and scope. As far as this report is concerned, in the end, all that we really have to offer is the truth, at least as truth is reflected in the records of Mr. Jenkins' adult incarceration. In the second half of this report we have offered our own impressions and observations from our review of the records, but fundamentally we respect the abilities of the the readers themselves to arrive at their own conclusions, and that is why we have gone to such great lengths to include so much minute detail in this report – to allow the reader to reach his/her own conclusions.

Obviously, one of the most important questions that we are confronted with in this case is the issue of what diagnostic label should be put on the condition of Nikko Jenkins. As we have said

earlier, the Ombudsman's Office is not qualified to make diagnoses of the mental condition of inmates. But that does not mean that we simply "defer to the experts." Over the years, we have been involved in cases of DCS inmates (often inmates who had been held in segregation for long periods of time) who had, or appeared to have, serious mental health issues that could not be adequately addressed in the isolation of a segregation cell. Although the Ombudsman's Office is not qualified to arrive at a medical diagnosis of the condition of these inmates, we nevertheless have always felt that it was better to err, if at all, on the side of getting these inmates into treatment, or to at least ask that the inmates in question be fully evaluated by the DCS professionals for possible mental health treatment. Mr. Jenkins' situation was one of these cases.

On occasions in the past, when the Ombudsman's Office has criticized the Department of Correctional Services, we have been accused by the Department of "Monday morning quarterbacking " But that is not the case here – in this case we had repeatedly told the Department what we thought should be done, urging that Mr. Jenkins be transferred to (or be given a review preparatory to a transfer to) the Inpatient Mental Health Unit at the Lincoln Correctional Center. And, as he steadily neared his discharge date, we also urged that Mr. Jenkins receive some transition programming at NSP. But the results were that Mr. Jenkins spent the last two years of his sentence locked up in a segregation cell, receiving nothing in the way of mental health/behavioral health therapy, treatment, or programming. Of course, these were not decisions that the Ombudsman's Office could make. In the end,

all that we are legally allowed to do is to make our recommendations, and to be persistent when we see something that we feel needs to be addressed. In this case, we were very persistent.

As early as September of 2008, Deputy Ombudsman for Corrections James Davis advocated for a review of Mr. Jenkins' condition, which resulted in arrangements being made (through Dr. Mark Lukin and Mr. Wayne Chandler) for an evaluation to determine whether Mr. Jenkins might be suitable for a transfer to the DCS Inpatient Mental Health Unit at the Lincoln Correctional Center...but a transfer to LCC never happened. Then, in November of 2011, Sherry Floyd, a friend of Mr. Jenkins, contacted the Ombudsman's Office with concerns that Mr. Jenkins was not receiving mental health services that he needed at TSCI. In follow-up, Assistant Ombudsman Jerall Moreland sent an email to Dr. Pearson which emphasized that Mr. Jenkins had been diagnosed while at the Douglas County Jail as being Bi- polar, with both PSTD and schizophrenia. Mr. Moreland also told Dr. Pearson that he had seen a court order, signed by District Judge Randall, that indicated that the Judge believed that Mr. Jenkins "has a long and serious history of mental illness," and that Judge Randall was recommending that Mr. Jenkins receive "treatment for his mental health issues." The email from Mr. Moreland pointed out that "Mr. Jenkins will be available for release in 2013," and again suggested that there be an evaluation of Mr. Jenkins to determine whether it might now be appropriate for him to be transferred in order to receive mental health services at the Mental Health Unit at LCC. This evaluation, as we know, was carried out in February of 2012...but a transfer to LCC never

happened.

Although these first two evaluations did not result in Mr. Jenkins being transferred to the LCC Inpatient Mental Health Unit, the Ombudsman's Office made one last attempt along those lines through a letter sent to Dr. Randy Kohl on March 4, 2013. In that letter, Assistant Ombudsman Moreland pointed out again that Mr. Jenkins had spent a great deal of time in segregation, and was due to be discharged soon. Noting that "it appears that the Courts and (the mental health staff at the jail in) Douglas County would agree to the presence of psychosis," although the DCS staff had "doubts in that regard," Mr. Moreland pointed out that there was at least a consensus that Mr. Jenkins had behavioral issues, and that "we all want to help Mr. Jenkins get better before he is released into the community." With this in mind, Mr. Moreland suggested that Mr. Jenkins be considered for transfer to LCC segregation "for the purposes of receiving needed behavioral therapy," with a goal of later transferring Mr. Jenkins to OCC, if he should improve. What in fact happened was that Mr. Jenkins was transferred from TSCI into segregation at the Penitentiary's Control Unit and, although he was later moved into the Penitentiary's Transition Unit, Mr. Jenkins never actually received even the transition programming that had been proposed.

Clearly, one of the most prominent issues raised by this case is concerned with how the Department of Corrections should handle cases where it may be necessary for an inmate who is about to be discharged from custody to be referred to the county attorney for possible civil commitment proceedings. This is not an unusual step for the

Department to take - in fact, we are told that DCS has referred eleven such cases to county attorneys for possible civil commitment in recent months. However, in Mr. Jenkins' case this was not done, presumably because several of the Department's "experts" had concluded that Mr. Jenkins was not really a case of mental illness. Nevertheless, considering the clear signs that Mr. Jenkins was "dangerous," and that he was likely to continue to be dangerous following his release from custody, we believe that his case should have been designated for a civil- commitment referral. This is true particularly when we realize that, in fact, there was one psychiatrist, Dr. Eugene Oliveto, who had concluded that Mr. Jenkins was a case of "schizoaffective disorder vs. paranoid schizophrenia."

There are no real heroes in this story, but there are some individuals who should be acknowledged for being perhaps more insightful, and certainly more circumspect, than others might have been. The list, as we see it, of those who must be acknowledged in a positive light include:

- Dr. Eugene Oliveto, who diagnosed of Mr. Jenkins' condition as "Schitzoaffective disorder vs. paranoid schizophrenia," and who also made the recommendation that Mr. Jenkins needed to be transferred to "LRC before his discharge to stabilize him so he is not dangerous to others." It is regrettable, to say the least, that this recommendation was not followed.

- Denise Gaines, who worked conscientiously with Mr. Jenkins during the many months while he was at the Douglas County Jail, and who was so deeply concerned about the potential that Mr. Jenkins might be dangerous that she wrote a letter to the Nebraska Board of Parole to alert the Board to the fact that Dr. Eugene Oliveto had made the recommendation that Mr. Jenkins be "transferred to the Lincoln Regional Center for treatment before being discharged (from the correctional system) for 'stabilization so he is not dangerous to others.'"
- Judge Gary Randall, who was concerned enough about Mr Jenkins that he took the unusual step of including a paragraph in Mr. Jenkins' sentencing order that acknowledged that Mr. Jenkins had been asking for "treatment for his mental health issues," and had "a long and serious history of mental illness which inhibits his ability to be rehabilitated," and who therefore recommended that the Department of Correctional Services see to it that Mr. Jenkins "be assessed and treated for issues regarding his mental health."
- Dr. Martin Wetzel, who evaluated Mr. Jenkins on March 14, 2013, and then recommended the implementation of some "long-term strategies" for the management of Mr. Jenkins' case, to include the "development of a rapport

and trust to enhance participation in psychiatric care, ongoing development of objective evidence supporting - - or not supporting - - the presence of major mental illness and the possibility of further psychological formal testing to help clarify (the) diagnostic picture."

- Johnson County Attorney Julie Smith, and Deputy Johnson County Attorney Richard Smith, who, in response to letters from Mr. Jenkins asking that he be civilly committed, took the issue seriously, contacted the "psychologists with the Department of Corrections," and indicated they were waiting for more in the way of psychological evaluations before finally deciding whether to move forward with civil commitment proceedings. Unfortunately, Mr. Jenkins was removed from the Johnson County Attorney's jurisdiction before this situation could be taken forward to fruition.

- Dr. Norma Baker, who, while she had earlier concluded that Mr. Jenkins' condition was "more behavioral/Axis II in nature," nevertheless was concerned enough about the case to recommend the securing a second opinion on Mr. Jenkins case for "verification of absence or presence of mental illness due to his previous history of major mental illness diagnosis by other psychiatric providers," with her primary concern being her ongoing worries about Mr. Jenkins'

potential "dangerousness to the community upon release." It was this concern that would eventually prompt Dr. Wetzel's evaluation of Mr. Jenkins in March of 2013.

- DCS Social Worker Kathy Foster, who did a very capable, conscientious job during the last few months of Mr. Jenkins incarceration in trying to get him to focus on his impending transition into the community, and who attempted to connect Mr. Jenkins with needed Social Security and community mental health resources.

If there are others who are conspicuous for being excluded from this list, for instance, the leadership of the DCS Mental/Behavioral Health Services component, then their exclusion should not be interpreted as an oversight.

It is not our role in this matter to adjudicate issues of "fault" in this case. We can never know with any degree of certainty what might have happened with Mr. Jenkins, if he and his case had been managed differently by the Department of Corrections. We cannot know whether he would actually have been committed to the Lincoln Regional Center, if his case had been taken before a Board of Mental Health. We cannot know whether he would have acted differently, had he received more in the way of mental health and/or behavioral health treatment and therapy. We cannot know whether his condition might ultimately have been different, if he had not spent so many long months in segregation. Questions like those are imponderables, and we do

not now have the power to negotiate that labyrinth of "what if's." All that we do know is that the many crimes that Mr. Jenkins is now being accused of are bone-chilling, and that the result, if he is, in fact, guilty of those crimes, is not a situation where we can look at the Department's mental health system, and say that the Department did everything that they might have done, in terms of their handling of Mr. Jenkins, particularly with regard to the treatment of his mental health and/or behavioral health situation. And, in fact, we would not say that even if Mr. Jenkins had done nothing wrong after his release, because we believe that his was a case where the circumstances clearly called for the inmate in question to receive meaningful therapy, treatment, and/or programming, something that would have cost the State very little in comparison to the potential benefits that might have been returned, if Mr. Jenkins had succeeded in living a law abiding life in the community after his release.

As we look at the multiple lessons of this case, and consider the operation of the DCS mental health system on the fundamental level, the one thing that we continue to come back to is the warning of the American Psychiatric Association (stated in its 2012 Position Statement on Segregation of Prisoners with Mental Illness) that those "physicians who work in U.S. Correctional facilities face challenging working conditions, dual loyalties to patients and employers, and a tension between reasonable medical practices and prison rules and culture." What the Association is, in effect, saying here is that the mental health professionals who work in prison settings are apt to face some significant challenges, in terms of maintaining their high standards of professionalism

in settings where their patients are "objectified," by security staff, and are sometimes treated more as "risk-factors" than as individual human beings, with unique personalities, and (often severe) mental disabilities that need to be addressed. Our prisons are not run by mental health professionals; they are run by wardens and security staff who will often have agendas that are not wholly consistent with the values that we would normally associate with mental health professionals - values like compassion, service, and resourcefulness. The challenge then is to sustain those values, and maintain high standards of professionalism, in a setting where they may be seen by those in charge as being inconsistent with, or even inimical to, the basic operational goals of the institution. Aside from our suggesting that consideration be given to privatizing the Department's mental health component as a way of guaranteeing the independence of its mental health professionals, we are not able to offer much in the way of addressing this issue. What we can say, however, is that much of this will come down to the quality of the leadership of the DCS Mental Health component, and its ability to insist upon the need for having standards of professionalism that are not compromised just because the mental health practice in question happens to be going on in a prison.

One of the more disturbing impressions created by a review of the records in this case is the definite opinion that the attention to Mr. Jenkins' mental health/behavioral health issues provided at the Douglas County Jail was better, and perhaps even much better, than that provided to Mr. Jenkins while he was at TSCI. Dr. Oliveto not only diagnosed Mr. Jenkins' condition, but also had the foresight to,

very early on, emphasize the issue of Mr. Jenkins' dangerousness, ultimately recommending that Mr. Jenkins be transferred "to LRC before his discharge to stabilize him so he is not dangerous to others." In addition, we note that Licensed Mental Health Practitioner Denise Gaines worked with Mr. Jenkins during the nearly seventeen months that he was at the Douglas County Jail, and closely monitored his condition until he was finally returned to TSCI on July 19, 2011. Ms. Gaines was enough concerned about Mr. Jenkins' condition that she authored a letter addressed to the Nebraska Board of Parole in which she informed the Board that Dr. Oliveto had made the recommendation that Mr. Jenkins be transferred to the Lincoln Regional Center for treatment before being discharged by the State. We understand that Ms. Gaines' involvement in Mr. Jenkins' case included many instances when she talked one-on-one with Mr. Jenkins about his condition. This, we believe, is how it should be when institutional mental health staff is dealing with an inmate as troubled as Mr. Jenkins, but we see very little of this when we look at the records of his stay at TSCI. There, intervention by the mental health staff seems to have too often consisted of brief visits with Mr. Jenkins at his cell door to make sure that he was still oriented to reality, and was not suicidal, etc. It is hard to imagine that these cell-door-visits, some of which might be justifiably described as "perfunctory," were of any real value in treatment terms. The mental health staff at TSCI should have been doing more than this with Mr. Jenkins (and perhaps with a number of other inmates at the facility, as well), and the fact that more along these lines did not happen probably has to be put down to a lack of good leadership within the DCS mental

health component. In short, someone in a position of authority should have insisted on a better performance by the staff at TSCI, but failed to do so.

For a number of years, Dr. Randy Kohl has been the DCS Deputy Director for Health Services, and in our opinion he has done an excellent job in moving the Department's health services system forward, and making it one of the best around – far better than it was before he took over the job. But Dr. Kohl is neither a psychiatrist, nor a psychologist, and when it comes to matters of DCS behavioral health and mental health services, Dr. Kohl must rely upon his subordinates to see that the DCS system meets its goals of providing the best possible care and treatment to the estimated 56% of DCS's inmate who have a mental health problem of some nature, and to the estimated 15% who have reported symptoms that meet the accepted criteria for having a psychotic disorder (estimates are based on the 2006 report of the U. S. Bureau of Justice Statistics). Much the same could also be said about former Director Houston, who had the foresight to create the Department's new Inpatient Mental Health Unit, but was neither a psychiatrist, nor a psychologist, and thus had to rely upon others to make the system work as he would have wished. Based on the way in which Mr. Jenkins' case was managed, both Dr. Kohl and Director Houston have the right to wonder whether they were well served by their subordinates in this instance.

As for the DCS administrators generally, particularly those at TSCI, their role in this case was most prominent when it came to the decision to keep Mr. Jenkins in a situation where he was locked up in a segregation cell, and thus isolated from

programming. By confining Mr. Jenkins to a segregation cell for the last two years of his sentence, from July 19, 2011, when he was returned to TSCI from Douglas County, to July 30, 2013, when he was discharged, we can say that they did make certain that he would not harm anyone else who was living in or working in the institution. However, their job of managing Mr. Jenkins was not complete with that accomplishment alone. Insofar as Mr. Jenkins was concerned, making the institution safe was necessary, but it was not sufficient, and if any of the administrators at DCS thought otherwise, if they somehow supposed that all they needed to do was keep the employees and inmates in the facility safe from Mr. Jenkins, then they were wrong to think that...very wrong to think that.

"Treatment," "therapy," "rehabilitation," call it whatever you will, it is wrong, and, given the possible consequences in Mr. Jenkins' case, grievously wrong, to separate those inmates placed in segregation from access to programming and treatment that will help them to have more self-control, and to make better decisions when they are eventually released into the community. Our corrections administrators have a responsibility not just to make their institutions safer, but to make our streets safer as well. And this means that they have a duty to see to it that the inmates assigned to segregation, who are often our most seriously troubled and dangerous individuals, are not thereby isolated from the programming and mental health treatment that might make them into better citizens on the outside...in our communities and our neighborhoods. The more that we learn about criminal thinking and recidivism, the more clear it

becomes that money spent on programming and mental health services in our correctional facilities is an investment. Hopefully, we will always have a Department of Correctional Services that understands the importance of this investment, and that also understands that the Department's basic responsibility to promote "safety and security" does not end at the prison gate.

Respectfully submitted,

Marshall Lux
Ombudsman

DEPARTMENT OF CORRECTIONAL SERVICES

SPECIAL INVESTIGATIVE COMMITTEE

(LR 424 - 2014)

REPORT TO THE LEGISLATURE

December 15, 2014

INTRODUCTION

The Department of Correctional Services Special Investigative Committee (Committee) was established by the Legislature in response to the 2013 murders committed by former inmate, Nikko Jenkins (Jenkins). The murders occurred within a month of Jenkins' July 30, 2013, release. LR 424 was introduced to examine the circumstances surrounding Jenkins' incarceration and release. The investigation into the Jenkins matter included gathering records and taking testimony concerning the amount of time Jenkins spent in segregated housing while incarcerated, what, if any, mental health treatment and programming Jenkins received, the amount of good time taken away and restored, Jenkins' transition from segregation to the community and why he was not civilly committed prior to his release.

The circumstances of Jenkins' confinement and release led the Committee into the broader examination of the Department's use of segregation and the availability of mental health treatment within the institutions that make up the Nebraska Department of Correctional Services (NDCS).

As the Committee prepared to look into the Jenkins matter, the Omaha World-Herald broke a story concerning the failure of the Department of Correctional Services to follow the holding of the Nebraska Supreme Court in the case of *State v. Castillas*, 285 Neb. 284 (2013). Fortunately, LR 424 was broad enough to provide the Committee with authority to investigate this and related issues within the Nebraska Department of Correctional Services.

The composition of the Committee was established by the Executive Board of the Legislature which appointed Senators Lathrop, Seiler, Mello, Krist, Chambers, Schumacher and Bolz. The Committee has been chaired by Senator Steve Lathrop and Senator Les Seiler has served as Vice Chair.

To aid in its investigation, the Committee, pursuant to Neb. Rev. Stat. §50-406 and 407 (Reissue 2010), issued subpoenas to secure documents from agencies including the Nebraska Department of Correctional Services, the Governor, the Governor's Policy Research Office, and Douglas County Corrections (DCC). The Committee received tens of thousands of pages of documents in response to the subpoenas, requiring countless hours of review by the Committee and legislative staff. The Committee conducted hearings throughout the interim during which the current and former Directors of the Nebraska Department of Correctional Services, Governor Dave Heineman, Parole Board Chairperson Esther Casmer and various experts and other individuals testified before the Committee. With few exceptions, each of the witnesses were subpoenaed to testify pursuant to Neb. Rev. Stat. §50-406 and 407

and with few exceptions, all were placed under oath.

By conducting this investigation, the Legislature is discharging its responsibility to provide oversight of the Executive Branch of government. The Committee has, however, remained mindful of the seriousness of the occasion where the Legislature forms a Special Investigative Committee to examine the inner workings of an agency under the exclusive control of the Governor. In the end, it is incumbent upon this Committee to provide a candid and blunt report concerning the dysfunction at the Nebraska Department of Correctional Services and the Governor's role in the specific problems examined. This report is not intended to embarrass the administration or any employee or former employee of the Nebraska Department of Correctional Services. Rather, the report provides a candid assessment as a starting point for reforms that must be undertaken to restore the public's confidence in the Nebraska Department of Correctional Services. This report was adopted unanimously by all members of the Committee.

NIKKO JENKINS

Nikko Jenkins' murder spree provided the initial reason the LR424 Special Investigative Committee was established. His rampage was followed by a report from the Ombudsman's office which provided the first hint to the Legislature that something was amiss at the Department of Correctional Services.

The Ombudsman's report provided a disturbing account of Jenkins' confinement and ultimate release. The report was dismissed by the Governor as an example of the Ombudsman "being

soft on crime."

Notwithstanding the Governor's comments, public interest remained high in the Jenkins murders and how this mentally disturbed inmate was allowed to be released directly from a long stretch of segregation[1] with virtually no mental health treatment, no rehabilitation programming and bypassing obvious opportunities for civil commitment.

Our understanding of Jenkins begins with his early years and takes us through the unbelievable circumstances of his confinement and release. What follows is an account of one inmate's experience which ultimately documents a total failure of leadership and a textbook example of the administration of state government at its worst.

Pre-confinement History

Jenkins' early years gave a preview of the problems which followed. As Dr. Eugene Oliveto, contract psychiatrist with DCC, testified: "My three 'bads' worked out for this guy perfectly: Bad genes, bad environment, bad family, and bad environment and bad culture. I mean he's a product of all that..."[2]

Dr. Oliveto described Jenkins' childhood in this way:

> He had a terrible childhood. He was terribly abused and mistreated by an alcoholic psychopathic father, so...and his family history showed that. He also

[1] For further explanation on segregated housing at NDCS, see page 24

[2] Exhibit D at 14

> had used...some street drugs when he was younger, and he was in trouble since age 7....His family is beyond dysfunctional. Ok? In fact, his mother and sister are both in jail, too, so. And if you look at this history, it's solidly anti-social and he had a psychosis of childhood that evolved with his anti-social personality because he obviously did anti-social things even in his childhood and adolescence. He blossomed, which most anti-social personalities do when testosterone kicks in at 12 or 13. Then he became a dangerous anti-social personality, a street thug. He was in either the Crips or Bloods. He was feared by everybody, because I talked to people that knew him on the streets. This guy was considered dangerous by people that...on the streets.[3]

The consequences of what Dr. Oliveto described as Jenkins' "three bads" were evident in Jenkins' early years. As the Ombudsman explained in its report:

> Nikko Jenkins has a history of involvement in the criminal/juvenile justice system that goes back at least to when he was seven years old, and was first placed in foster care by the State. In fact, even before he was first sent to prison in 2003, Nikko Jenkins had been incarcerated in the Douglas County

[3] Exhibit D at 10-12

> Juvenile Detention Center multiple times. As a juvenile, Mr. Jenkins had multiple placements in group homes, and was also placed in the Youth Rehabilitation and Treatment Center in Kearney for about six months beginning in August of 2001, when he was 14 years old.[4]

Jenkins' first mental health evaluation was done when he was very young. Dr. Jane Dahlke, a psychiatrist, treated Jenkins in 1995 when he was 8 years old. Jenkins was evaluated after demonstrating increasingly aggressive behavior towards people and making statements of self- harm. Following eleven days of evaluation at the Access Center at the Richard Young Hospital, Dr. Dahlke diagnosed Jenkins with Oppositional Defiant Disorder and Attention Deficit Hyperactive Disorder. Dr. Dahlke also expressed the opinion that Jenkins fit the current criteria for a diagnosis of childhood Bipolar Disorder.[5] The basis for this diagnosis was his acts of aggression (taking a gun to school and chasing his sister with a knife) and his suicidal and homicidal threats.[6]

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[4] Exhibit A at 1

[5] In 1995, mental health providers were not diagnosing children with some mental illnesses, including bipolar disorder, because it was believed that such illnesses did not appear until later in teenage years. This belief has been abandoned by the psychiatric profession. Accordingly, mental health providers are now diagnosing young children with these mental illnesses, including Bipolar Disorder. (Exhibit P at 30-56)

[6] Exhibit P at 30-56

Unfortunately, the recommendations and placements imposed by juvenile court did not have a rehabilitative effect. Instead, Jenkins continued his criminal behaviors resulting in a prison sentence beginning in 2003.

Confinement Circumstances

1. Offenses and Sentences

In 2003 at age 17, Jenkins was convicted of two counts of Robbery and one count of Use of a Weapon to Commit a Felony. For these convictions, Jenkins was sentenced to an indeterminate term of 14-15 years. He was initially placed at the Nebraska Correctional Youth Facility (NCYF). While at NCYF, Jenkins was involved in a "riot" and charged with Assault in the Second Degree for assaulting another inmate. In 2006, Jenkins was convicted of this offense and sentenced to an additional two years. This sentence would be served consecutive to his prior sentence.

On June 8, 2007, Jenkins was transferred to the Tecumseh State Correctional Institution (TSCI). While under the custody of TSCI, Jenkins was allowed to attend a family funeral in Omaha. He was accompanied by a corrections officer whom he assaulted in an escape attempt on December 17, 2009. As a result, Jenkins was charged, convicted and sentenced to an additional two to four year consecutive term for Assault of a Correctional Employee in the Third Degree.

As a result of the various convictions, Jenkins' cumulative sentences increased to 18-21 years.

2. Facility Placements and Time in Administrative Segregation

Jenkins served approximately 60% of his incarceration in 23 hour a day segregation.[7] NDCS transferred Jenkins to several facilities with varying degrees of security levels. While Jenkins was placed in segregation prior to 2007 for short periods of time (five days and 40 days for example), the long segregation stretches began when he was transferred to TSCI on June 8, 2007. The timeline at right and the chart below depicts Jenkins' incarceration placement and segregation history.

[7] Exhibit A at 5

Timeline of Nikko Jenkins Facility Placement and Segregated Housing Status

- Nov. 2003: Enters NCYF
- July 2005: Placed in NCYF segregation for 40 days
- Dec. 2005: 5 days segregation at NCYF
- Feb. 2006: Transferred to LCC
- April 9 – April 24, 2006: LCC segregation
- April 24 – May 9, 2006: DCC for Court Proceedings
- May 9 – 11, 2006: LCC segregation
- June 15 – Aug. 31, 2006: Transfer to DCC
- Aug 31, 2006: Transferred back to LCC
- Oct. 26, 2006: Transferred to OCC
- Jan. 4 – Jan 26, 2007: Segregation at OCC
- Feb. 7, 2007: Transferred to LCC
- Feb. 17, 2007: Placed in segregation at LCC
- June 8, 2007: Transferred to TSCI, immediately placed in segregation
- June 8, 2007 - December 4 2008: Remained in continuous segregation
- Jan. 26, 2009: Returned to segregation
- Jan. 26 – December 17, 2009: Continuous segregated status at TSCI
- Dec. 17, 2009: Incident / escape attempt at grandmother's funeral
- Dec. 17, 2009 – February 13, 2010: segregation at TSCI
- Feb. 13 2010– July 19, 2011: Transferred to DCJ (primarily General Population)
- July 19, 2011: Transferred to TSCI, immediately placed in segregation
- July 19, 2011 – March 15, 2013: Continuous segregation at TSCI
- Mar. 15, 2013: Transferred to NSP placed in segregation
- Mar. 15 – July 30, 2013: Segregation at NSP
- July 30, 2013: Released from prison.

Facility Abbreviations

NDCS: Nebraska Department of Correctional Services

NCYF: Nebraska Correctional Youth Facility

LCC: Lincoln Correctional Center

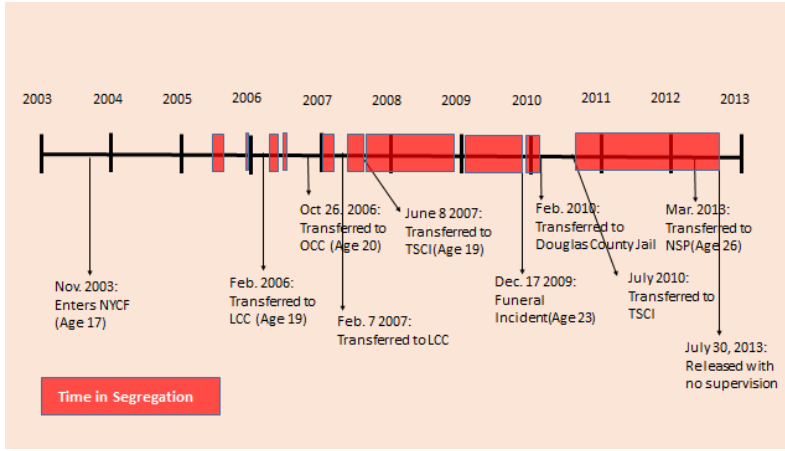
DCC: Douglas County Corrections

DCJ: Douglas County Jail

OCC: Omaha Correctional Center

TSCI: Tecumseh State Correctional Institute

NSP: Nebraska State Penitentiary



3. Good Time Lost

Jenkins' total sentence range was 18 to 21 years. Such a sentence range would have provided Jenkins with 10 1⁄2 years or 126 months of available good time. Jenkins lost 555 days of good time for misconduct ranging from assault to tattoo activity. Thirty days were later restored for a total of 525 days or 17 1⁄2 months of lost good time. Notwithstanding a long list of misconduct activity that might have provided the basis for additional lost good time, Jenkins was discharged early with a benefit of 108 1⁄2 months of good time awarded.

4. Mental Health

The Committee reviewed thousands of mental health related documents. The documentation included Jenkins' diagnoses, evaluations, mental health notes, Jenkins' numerous requests for treatment, and emails concerning the same. While it is impractical to detail each piece of documentation, the Committee believes it is important that readers have a clear picture of Jenkins' diagnoses as well as the treatment and services not offered to Jenkins. Accordingly, the following pages outline the most

relevant information concerning Jenkins' mental health status while incarcerated.

a) Diagnoses, Evaluations and Mental Health Notes

Jenkins received mental health evaluations while incarcerated with NDCS and DCC. On July 30, 2009, Dr. Natalie Baker, a contract psychiatrist with TSCI, met with Jenkins for the first time and performed a psychiatric evaluation. Dr. Baker diagnosed Jenkins with both Axis I and Axis II diagnoses. An Axis I diagnosis refers to a primary psychiatric disorder like Bipolar Disorder, while Axis II refers to personality related disorders.[8] Dr. Baker's diagnosis was an Axis I Psychosis NOS (not otherwise specified, meaning that she believed he had a mental illness, but it did not exactly fit the criteria for a specified diagnosis), possible Schizo-Affective Disorder, Bi-Polar Type, probable PTSD, R/O Bipolar Affective Disorder, with significant Axis II personality traits.[9] Jenkins complained of auditory hallucinations and expressed a desire for help.[10] Dr. Baker believed Jenkins was paranoid.[11] Dr. Baker referred Jenkins to mental health (NDCS psychologists and therapists) for work on his trauma and anger issues. However, Jenkins received no treatment from mental health.[12] Dr. Baker also wanted a Mental Illness Review Team (MIRT)

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[8] Exhibit D at 11

[9] Exhibit K at 18-19

[10] Exhibit D at 109-110, 116-117 and Exhibit K at 18-19

[11] Exhibit D at 111

[12] Exhibit D at 299-300 & 410

evaluation.[13] Dr. Baker recommended medication management; specifically, Risperdal. Jenkins was initially compliant with the medication regimen but expressed paranoia that the medications prescribed would poison him.[14]

Dr. Baker next met with Jenkins on October 8, 2009. At that time, Jenkins was medication compliant. Jenkins consistently complained of auditory hallucinations. Jenkins seemed calmer on medication, as he was less paranoid, and had fewer racing thoughts.[15] The medication appeared to have a positive effect, which supported Dr. Baker's diagnosis, a diagnosis that Dr. Baker did not change.[16] Dr. Baker increased Jenkins' medication for Risperdal and continued the prescription for Depakote.[17]

Jenkins transferred to DCC on February 13, 2010, following his attempted escape and assault of a correctional employee. Dr. Baker did not treat Jenkins again until after his July 19, 2011, return to TSCI. While at DCC, Jenkins was treated by Dr. Eugene Oliveto, psychiatrist, and Denise Gaines, licensed therapist.

Dr. Oliveto first saw Jenkins on March 3, 2010. Jenkins described auditory hallucinations starting at age seven. At the time of Dr. Oliveto's 2010 evaluation, the hallucinations were telling

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[13] Exhibit D at 117

[14] Exhibit D at 120

[15] Exhibit D at 120-123

[16] Exhibit D at 120-123

[17] Exhibit D at 122 and Exhibit K at 24-25

Jenkins to kill people. Dr. Oliveto believed these statements. Dr. Oliveto diagnosed Jenkins with Axis I diagnoses of Schizo-Affective Disorder or Schizophrenia, Psychotic Disorder, PTSD, and Axis II diagnoses of Antisocial Personality Disorder and Sociopathic Personality Disorder. Dr. Oliveto noted that Jenkins was a danger to others and ordered a forensic evaluation and placement at LRC to adequately treat his multiple psychiatric problems. Like Dr. Baker, Dr. Oliveto prescribed Risperidone and Depakote. Jenkins was not consistent with the medication treatment.[18]

Dr. Oliveto continued to meet with Jenkins during his incarceration at DCC. His diagnosis did not change. He continued to recommend a forensic evaluation and placement at LRC. Dr. Oliveto believed Jenkins needed intensive long-term treatment in a therapeutic environment like Lincoln Regional Center (LRC). Jenkins neither received a forensic evaluation, nor was placed at LRC.[19]

Denise Gaines, therapist with DCC, first met with Jenkins on February 19, 2010. Gaines met with Jenkins often, sometimes weekly, because his symptoms appeared intense and he had difficulty regulating his mood and behavior. Gaines described her meetings with Jenkins as a "typical counseling session."[20] Jenkins began discussing Apophis, an Egyptian god, on February 27, 2010, and complained that he heard voices. Jenkins stated to Gaines that he would kill people when released, statements that

[18] Exhibit D at 7-23

[19] Exhibit D at 20-27

[20] Exhibit D at 91

Gaines believed Jenkins would act on. These delusions remained consistent. Also consistent was Jenkins' paranoia about taking medications. Despite this paranoia, Jenkins did appear less intense and calmer when medicated. Had she believed that Jenkins was feigning mental illness, she would have discontinued therapy. Ultimately, Gaines agreed with Dr. Oliveto's diagnoses, and believed that Jenkins wanted treatment for these illnesses, and that Jenkins was afraid to return to NDCS.[21]

Because of her concerns, on December 1, 2010, Gaines wrote the parole board. She shared Dr. Oliveto's diagnoses and recommendation that Jenkins be treated at LRC. Gaines recommended mental health treatment at a facility, and if paroled, mental health treatment as a parole condition. This was the only time in Gaines' career that she had written such a letter.[22]

After Jenkins' return to TSCI following his conviction in Douglas County for assault, Dr. Baker made a referral for a psychological evaluation to clarify whether Jenkins suffered from an Axis I mental illness and/or Axis II personality disorders and/or whether he was malingering (faking). Dr. Melinda Pearson, TSCI Psychologist, responded to the referral. She indicated that Jenkins presented in a manner inconsistent with self-reported symptoms and that he refused psychological testing.[23]

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[21] Exhibit D at 66-96

[22] Exhibit D at 81-83

[23] Exhibit K at 64

A Mental Illness Review Team (MIRT) report requested by Dr. Baker, was completed on February 8, 2012. MIRT found a lack of evidence for an Axis I diagnosis, but a preponderance of evidence of Axis II pathology. It noted that additional information should be gathered. The report noted that transfer to the mental health unit was not warranted. The report recommended that Jenkins continue to work through the segregation levels and to consider Jenkins for the transition program at NSP prior to discharge.[24]

Meanwhile, Dr. Baker continued to meet with Jenkins until his transfer to NSP. Dr. Baker's diagnosis remained unchanged despite MIRT's findings.[25] In fact, at the beginning of 2013, and at the same time Jenkins' pleas for help became more desperate and his behavior more bizarre, Dr. Baker became extremely concerned with Jenkins' mental health. On January 31, 2013, Dr. Baker noted that Jenkins was a significant risk to others, and currently appeared mentally ill. She additionally cautioned that a civil commitment may be needed.[26]

Four days later Jenkins was once again seen by Dr. Baker. Dr. Baker's note from the February 4, 2013, meeting is remarkable in many respects. The evaluation comes at a time when Jenkins is within six months of his mandatory discharge date and the evaluation would appear to be thorough including not only the doctor's observations but the observations of Jenkins' behavior by other TSCI

[24] Exhibit L at 103-115

[25] Exhibit D at 136

[26] Exhibit D at 144-146 and Exhibit L at 174

staff. Dr. Baker's notes are also remarkable for the fact that she once again makes specific findings necessary to support a civil commitment.[27]

Dr. Baker's notes from the February 4, 2013, evaluation would ultimately be withheld by Dr. Mark Weilage[28] as he responded to requests for information from both the Johnson County Attorney who was contemplating a civil commitment of Jenkins, as well as the Ombudsman's office who was concerned about Jenkins' impending release.

Dr. Baker's notes from the February 4, 2013, evaluation indicate that Jenkins continued to report: "difficulties with mental health issues, anger and self-harm behaviors."[29] At the time of the evaluation, he was on 15 minute checks for suicide. Jenkins had cut himself in the face and refused to allow medical staff to remove his sutures. He reported the cut to his face was "a declaration to war."[30] He had reported to medical staff that he intended to "eat the hearts of women, men and children" upon his release.[31] At the time he was requesting emergency psychiatric treatment on a daily basis. Ten days earlier he had reported to a staff nurse that "he will drink his own semen for neuro-stimulators to increase his serotonin levels and to decrease his emotional rage."[32] Custody staff were reporting that he was not sleeping. He was

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[27] Exhibit L at 175-177

[28]

[29] Exhibit L at 175

[30] Ibid

[31] Ibid

[32] Ibid

also observed to be compulsively exercising while naked. Staff also reported that he was loud and agitated and verbally threatening others.[33]

At the time of the evaluation, Jenkins reported racing and obsessive thoughts. He also reported auditory hallucinations regarding Apophis where he was instructed to attack people. He described himself as "the alpha leader of Apophis."[34] He also described night terrors "where he will sacrifice people and dreams of cannibalism."[35] Dr. Baker's assessment and diagnosis on this occasion, as it was on previous occasions, was as follows:

> Psychosis NOS
>
> Possible Bipolar Affective Disorder with psychotic features vs. Delusional Disorder grandiose type vs. Schizoaffective Disorder bipolar type vs. malingering
>
> Probable PTSD
>
> Patient with strong anti-social and narcissistic traits
>
> Relational problems NOS
>
> Polysubstance dependence (Cannabis; "WET," alcohol)
>
> Adjustment Disorder[36]

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[33] Exhibit L at 175-177

[34] Ibid

[35] Ibid

[36] Exhibit L at 176

The doctor's notes then reflect the following concerns:

> ...However, patient does have a history of Bipolar Affective Disorder as well as a significant history of violence and assaultive behaviors. This provider is concerned regarding the patient being released from this facility directly from segregation into the community as he is directly threatening harm to others once he is released. He also has had recent self-harm behaviors and is not allowing Medical to remove the sutures. Again, staff has also reported that the patient does not appear to be sleeping as well at night and is excessively exercising. [Patient] also has appeared more agitated overall, again, with continued flight of ideas, grandiosity, verbally threatening, and recent plan status....Patient currently appears mentally ill as well as an imminent danger to others. Patient will possibly require civil commitment prior to being released to ensure his safety as well as the safety of others.[37]

Finally, Dr. Baker's notes reflect that she had expressed her concerns to Dr. Weilage who was "also planning to see the patient soon and determine further treatment and housing options."[38] She also suggested a second opinion evaluation by a

[37] Exhibit L at 176-177

[38] Exhibit L at 177

psychiatric nurse or psychiatrist.[39] Notwithstanding Dr. Weilage's representation that he would conduct an additional evaluation of Jenkins, no such evaluation appears to have been done. This represents the last evaluation of Jenkins by Dr. Baker.

Jenkins was transferred to the Nebraska State Penitentiary on March 14, 2013. One day prior to his transfer to NSP, Jenkins was seen by NDCS psychiatrist, Dr. Martin Wetzel. Dr. Wetzel's evaluation was completed pursuant to Dr. Baker's request for a second opinion. At the time of the evaluation, Dr. Wetzel reported:

> He states that he is maintaining his purity by avoiding artificial laboratory compounds (i.e., medication). He states he is developing his own compounds. Patient reports he has been snorting his semen in his left nostril on a daily basis, and drinking his own urine daily for the last two weeks as his own method of nutritional supplementation.[40]

The doctor also noted, "[p]atient reports that he has nightmares every night. He states he jumps up and checks the window eight times a night. He denies napping, denies feeling sleepy. He says he dreams about cannabis (sic), and human sacrifice. Staff has reported the patient is indeed up in the night much of the time."[41]

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[39] Exhibit L at 175-177

[40] Exhibit L at 221

[41] Ibid

He also reported by way of a past history that he began hearing voices at age nine. He also reported that at the time of the evaluation "he hears auditory hallucinations that he is a prophet."[42] He also reported to the doctor that he was due to be released from prison in July and wanted to be placed in a psychiatric hospital.[43]

Dr. Wetzel's assessment:

Bipolar Disorder NOS,

Probable PTSD,

Probable Antisocial and Narcissistic PD Traits

Polysubstance Dependence in a Controlled Environment

The doctor observed that Jenkins:

> presents with a very dramatic flair, yet there is enough objective evidence of disruption in sleep cycle, mood and behavior to suggest an element of major mood disorder influencing the clinical picture . . . . Long-term strategies recommended for this patient include development of a rapport and trust to enhance participation in psychiatric care, ongoing development of objective evidence supporting -- or not supporting -- the presence of major mental illness and the possibility of further psychological formal testing to help

[42] Exhibit L at 222

[43] Exhibit L at 223

clarify diagnostic picture.[44]

During Jenkins' time at NDCS, he received wholly inadequate mental health treatment. He was offered, at different times, medications which he, more often than not, refused to take due to his paranoid belief that he was going to be poisoned by way of the medications.

The record reflects that there are a number of occasions in which psychologists employed by NDCS concluded that Jenkins had behavioral issues and a personality disorder rather than a major mental illness. These opinions appear to be in direct conflict with the opinions of three psychiatrists (Oliveto, Baker and Wetzel) who concluded Jenkins suffered from mental illness.

b) Jenkins' Timeline of Appeals for Mental Health Care and Treatment and Threats to Harm Others

The timeline is not exhaustive. Rather, it is intended to illustrate the volume and nature of Jenkins' pleas for mental health care and his threats to harm others upon his release:

Timeline:[45]

- January 5, 2006: Jenkins stated "that if the admin want to trick off my time, I'll give them something to remember me by... I might be in seg, but they will remember me."[46]

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[44] Exhibit L at 224

[45] See Exhibits K and L for documents detailing the timeline events

[46] Exhibit K at 3

- February 10, 2006: Jenkins stated that he has anger toward people and will act on it once out of prison.
- November 2, 2007: Jenkins claimed he will attack innocent people when he returns to North Omaha. Therapist claimed Jenkins has no psychopathology and was a poor candidate for mental health intervention.
- August 1, 2008: Jenkins claimed he will harm others when released.
- September 26, 2008: Jenkins fantasized about hurting others. He requested more contact with mental health staff. The author noted antisocial traits and that he was a possible psychopath.
- January 15, 2009: Jenkins stated that segregation was making him worse. Jenkins stated that the loudest sound is that of innocent blood and that when someone innocent is killed, everyone stops to listen. He claimed to be seeking vengeance and change and that he wanted to be the one to educate the world about the injustices of the system and about the making of a criminal mind. He stated that after he was done, he wanted people to read his file and know how the system had failed him. He did not have a chance at rehabilitation. The system was broken and it was the "worst thing possible for him to have been thrown in the hole for two years."[47]
- February 9, 2009: Jenkins stated that segregation was making him worse.

[47] Exhibit K at 7

- February 23, 2009: Jenkins reported fantasies of killing once released. Jenkins stated that segregation has made him feel rage and that others would be responsible when he kills.
- March 27, 2009: Jenkins requested to be rehabilitated and transferred to the mental health unit.
- May 13, 2009: Jenkins stated that if anything happened when he got out it would be the administrations' fault for not helping him.
- June 21, 2009: Jenkins requested medication.
- August 2009: In a letter written when he was 23, Jenkins stated that he believed he had a mental illness, that he heard voices, and that his mental health was declining. He noted "the public always asks, what could have been done." He requested help for rehabilitation and that the "hole" was not the answer.[48]
- September 21, 2009: Jenkins mentioned Apophis, an Egyptian god, and that he cannot sleep.
- November 17, 2009: Jenkins said that the Egyptian god was helping him plan the perfect crime and that the evil was getting stronger while in segregation.
- December 2, 2009: Jenkins discussed the Egyptian god, lack of treatment, and his desire to be transferred to the mental health unit.
- December 2, 2009: Jenkins requested transfer to LCC's mental health unit.

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[48] Exhibit K at 20-21

- December 16, 2009: Jenkins discussed the Egyptian god, lack of treatment, and his desire to be transferred to the mental health unit.
- December 17, 2009: Jenkins' version of the assault at his grandmother's funeral and escape attempt: stated Apophis took control.
- December 18, 2009: Noted that Jenkins discussed the Egyptian god and requested transfer to the mental health unit.
- December 28, 2009: Jenkins requested medication.
- January 1, 2010: Jenkins requested medication.
- January 19, 2010: Jenkins mentioned the Egyptian god.
- January 27, 2010: Jenkins requested help for his mental health.
- February 3, 2010: Jenkins mentioned the Egyptian god.
- February 4, 2010: Jenkins discussed the Egyptian god and that he had been denied mental health care.
- July 23, 2011: Jenkins requested transfer to the mental health unit at LCC.
- August 31, 2011: Jenkins claimed he was becoming more unstable, requested treatment, and had concerns with his release.
- September 28, 2011: Jenkins asked to be placed at LRC. He also complained of hearing voices that tell him to hurt others.

- October 31, 2011: Jenkins discussed the Egyptian god. Discussed a "vague" harm to others and stated he was not receiving treatment.
- November 27, 2011: Jenkins requested mental health treatment.
- December 4, 2011: Jenkins claimed he had not had a therapy session since returning to TSCI from DCC.
- December 26, 2011: Jenkins requested mental health treatment before release.
- December 31, 2011, Baker psychiatric note: Jenkins requested transfer to LRC and complained of the lack of mental health treatment. He claimed he would hurt others when released. He complained of auditory hallucinations (Egyptian god) and vague visual hallucinations (sees spirits).
- On January 8, 2012: Jenkins requested mental health treatment before release.
- January 22, 2012: Jenkins was worried about his release and asked for treatment.
- January 27, 2012: Jenkins claimed that he was slipping into psychosis.
- January 29, 2012: Jenkins requested mental health treatment.
- March 22, 2012: Jenkins discussed the Egyptian god and requested therapy.
- March 23, 2012: Jenkins discussed the Egyptian god. He claimed he suffered from auditory hallucinations and requested treatment. The

therapist provided materials on distress management.

- April 19, 2012: Jenkins asked for help and stated he was deteriorating.
- April 19, 2012, Baker psychiatric note. He wanted to be transferred to LRC.
- April 28, 2012: Jenkins threatened to harm himself in the shower. He again stated that he was not getting the help he needed.
- On May 2, 2012, Jenkins cut his face with a shelf and stated to the guard "look what Apophis told me to do." Jenkins again stated that his mental state is deteriorating, that medication does not help and that he is not getting proper treatment. It appears from a photo that Jenkins used his blood to write "Apophis evil Nikko" on the wall.
- May 2, 2012: Jenkins stated that he was getting worse and the Egyptian god told him to cut his face.
- May 15, 2012: Jenkins requested treatment.
- July 2, 2012, Baker psychiatric note. Jenkins discussed Apophis and auditory hallucinations.
- August 22, 2012: Jenkins discussed ideas of an Egyptian god.
- November 28, 2012: Jenkins discussed the Egyptian god and stated that lives will be lost upon his release. It was noted that Jenkins expressed paranoia. It was also noted that Jenkins proposed a possible safety risk.

- December 3, 2012: Jenkins requested a therapy session. The response is that he will get one the following week if time and resources permit.
- December 12, 2012: Jenkins stated that being in segregation was causing further mental deterioration and he was not receiving proper mental health treatment.
- January 13, 2013: Jenkins stated he will reach it his mandatory release date ("jam out") soon and will eat the hearts of women and children.
- January 14, 2013: Jenkins stated that Apophis wanted him to harm himself.
- January 15, 2013: Jenkins requested psychiatric hospitalization.
- January 16, 2013: Jenkins requested psychiatric hospitalization and therapy. Claimed he was deteriorating.
- January 16, 2013: Jenkins requested to be hospitalized.
- January 18, 2013: Jenkins requested to see mental health. On this same date he used a floor tile to cut his face. He claimed that he was having a psychotic episode and had been requesting treatment. He had also been in isolation for 18 months. Three inmates wrote reports regarding the event. All three stated that Jenkins had been requesting help for his mental illness. One stated that Jenkins made requests throughout the day, but was ignored.

- January 19, 2013: Jenkins wanted psychiatric help. He explained that he would get out in 5 1⁄2 months and if he does not get help he will rip someone's heart out of their chest when he is on the outside.
- January 20, 2013: Jenkins wanted emergency psychiatric treatment.
- January 22, 2013: Jenkins wanted emergency psychiatric treatment.
- January 23, 2013: Jenkins wanted emergency psychiatric treatment.
- January 24, 2013: Jenkins wanted emergency psychiatric treatment.
- January 25, 2013: Jenkins requested hospitalization so that he would not harm others. He claimed that the Egyptian god wanted him to kill a man, a woman and a child upon release.
- January 26, 2013: Jenkins wanted emergency psychiatric treatment.
- January 27, 2013: Jenkins wanted emergency psychiatric treatment.
- February 8, 2013: Jenkins claimed he was deteriorating.
- February 11, 2013: Jenkins requested treatment.
- February 12, 2013: Jenkins asked for mental health treatment.
- February 14, 2013: Jenkins filed an informal grievance and requested to go to LRC for treatment or a civil commitment. The response was that his needs were being met.

- February 15, 2013: Jenkins stated that he was declining and asked Dr. Pearson to help with a civil commitment.
- February 16, 2013: Jenkins filed an informal grievance and requested to go to LRC for treatment. The response was that it did "not meet the criteria which governs emergency grievances."[49] This was one of many denials of assistance based upon a failure to make his request on the proper form.
- February 17, 2013: Jenkins filed an informal grievance and requested a civil commitment. The response was that it did not meet the criteria for an emergency grievance.
- February 19, 2013: Jenkins requested therapy.
- March 5, 2013: Jenkins requested mental health treatment and to be civilly committed.
- March 7, 2013: Jenkins stated he does not want to discharge because he will kill and cannibalize and drink blood. He mentioned the Egyptian god and requested treatment.
- March 8, 2013: Jenkins requested emergency psychiatric treatment.
- March 14, 2013: Jenkins requested mental health treatment.
- March 20, 2013: Jenkins requested help and stated that his mental health was deteriorating.

[49] Exhibit L at 183

- March 23, 2013: Jenkins filed an informal grievance stating that he was not getting the proper mental health treatment. The response was that his request did not meet the criteria for an emergency grievance.
- March 26, 2013: Jenkins requested to meet with mental health to discuss his discharge.
- March 26, 2013: Jenkins requested to be put back on medication.
- April 5, 2013: Jenkins requested mental health treatment.
- April 10, 2013: Jenkins requested psychiatric treatment.
- April 10, 2013: Jenkins commented that he was concerned that he will harm others when discharged.
- April 28, 2013: Jenkins requested mental health treatment. Dr. Elizabeth Geiger, NSP Psychologist, responded that he was being seen by mental health.
- April 30, 2013: Jenkins stated that when he gets out, "it will begin." He made allusions to killing without prejudice.[50]
- May 7, 2013: Jenkins requested mental health treatment. He stated he will bring death and destruction.

[50] Exhibit L at 230

- May 23, 2013: Jenkins filed an informal grievance stating that he was not getting the proper mental health treatment. The response was that his request did not meet the criteria for an emergency grievance.

The Committee observes that Jenkins' pleas appeared to intensify in January 2013, six months before his July 30, 2013, discharge date. Not only did Jenkins request therapy, but he additionally made the extreme appeal to be civilly committed, a process normally reserved for involuntary treatment.[51] The Committee cannot imagine a reason why Jenkins would make such a request a mere six months before freedom, unless he truly wanted treatment. NDCS' position that his request was for secondary gain, is, in this Committee's opinion, absurd.[52]

Circumstances of Release

The circumstances of Jenkins' release is, in many ways, a colossal failure related to the circumstances of this confinement. Jenkins spent 60% of his incarceration in segregation. During the time he was in segregation, he exhibited bizarre behavior and threatened, upon his discharge, to go on a murderous rampage. His pleas for mental health care and even for his own civil commitment are well documented. Notwithstanding all of this, NDCS remained determined to keep Jenkins in segregation where he was assured of receiving no programming

[51] The Committee expresses concern that inmates seeking mental health treatment are denied assistance for purely technical reasons.

[52] Exhibit D at 218-219

and no meaningful mental health treatment.

On a number of occasions, staff psychologists at TSCI papered Jenkins' file with opinions that he was Axis II, not Axis I. These opinions provided the rationale for leaving Jenkins in segregation rather than transferring him to the mental health unit which required a diagnosis of mental illness as a condition of placement.

As the calendar turned from 2012 to 2013, and Jenkins mandatory discharge date appeared on the horizon, concern began to mount over Jenkins' discharge. At the very same time as Jenkins was approaching his mandatory discharge date, his threats and pleas for help began to intensify. These threats and pleas ultimately led to the February 4, 2013, evaluation by Dr. Baker. Dr. Baker's evaluation, by almost any standard, provided the necessary medical evidence to support a civil commitment of Jenkins.

On February 25, 2013, the Johnson County Attorney contacted NDCS for the purpose of determining whether there was medical evidence to support a civil commitment of Jenkins to the Lincoln Regional Center.[53] On the same day, the Ombudsman's office made contact with NDCS at the behest of Senator Ernie Chambers who expressed significant concerns about Jenkins' release directly from segregation to the public at large.[54] In both instances, management at NDCS tapped Dr. Mark

[53] The Committee acknowledges the efforts made by Richard Smith, Deputy Johnson County Attorney, to gather the information necessary to file a civil commitment.

[54] Exhibit L at 185-191

Weilage to serve as the point man in dealing with the Johnson County Attorney and the Ombudsman's office as it related to their respective concerns regarding Jenkins.[55]

On February 25, 2013, at 2:55 p.m., Dr. Cameron White, Behavioral Health Administrator at NDCS e-mailed Dr. Mark Weilage. The subject of the e-mail was "Nikko Jenkins' Follow-Up". White indicated there were two things that came up regarding Jenkins. First, Jerall Moreland [from the Ombudsman's office] phoned. Second, that Rick Smith, Deputy County Attorney from Johnson County phoned. "Apparently, Jenkins and his family are trying to petition for Jenkins to be committed post-incarceration..." The e-mail instructed Dr. Weilage to contact Deputy County Attorney Smith to discuss the efforts of Jenkins and his family to have him committed.[56] On February 27, 2013, Smith forwarded to Dr. Weilage nine pages of documents handwritten by Nikko Jenkins. Nearly half of the documents are written in some geometrical form with content that is indiscernible or nonsensical. There are also pages which appear to be an attempt by Jenkins to prepare a petition for his own civil commitment. The petitions include his representations that he is an elite warrior of the great serpent Apophis and that he intends to wage the War of Revelations upon the earth. At a very minimum Jenkins communicated to the Johnson County Attorney not only his interest but his willingness to be civilly committed.[57]

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[55] Exhibit D at 21- & 216

[56] Exhibit L at 185

[57] Exhibit L at 191-200

Rather than provide the County Attorney with Dr. Baker's report which would provide necessary documentation for a civil commitment, Dr. Weilage stated to Smith that NDCS staff would continue to monitor, evaluate and treat Jenkins' mental health.[58]

Smith never received a civil commitment request for Jenkins from NDCS. Dr. Weilage was aware of Jenkins' pleas for help, his claims that he would kill people and self-mutilation activities.[59] This information was not provided to Smith. More importantly, Dr. Weilage was also aware of Dr. Baker's February 4, 2013, report.[60] Dr. Weilage never provided Dr. Baker's reports to Smith.[61] In testimony before the Committee, Dr. Weilage admitted that he withheld Baker's report.[62]

Dr. Cameron White testified that he was troubled that Dr. Weilage did not find a mental illness, especially considering Jenkins' behaviors.[63] Dr. White also testified that he would have expected Dr. Weilage to provide relevant information to the Johnson County Attorney from Jenkins' mental health file.[64]

A similarly disturbing sequence of events unfolded in Dr. Weilage's dealings with the Ombudsman's office who requested a meeting for the

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[58] Exhibit L at 255

[59] Exhibit D at 203 & 212-214

[60] Exhibit D at 212 & 215

[61] Exhibit D at 220

[62] Exhibit D at 312

[63] Exhibit D at 397

[64] Exhibit D at 344-346

purpose of discussing a transition plan for Jenkins and Nikko Jenkins' mental health status.[65] After several e-mails and at least one meeting cancellation by NDCS, the Ombudsmen, Jerall Moreland and James Davis, finally met with NDCS staff on March 20, 2013. This meeting was set up by Larry Wayne, NDCS Deputy Director and those present included members from the Ombudsman's office (Moreland and Davis), Wayne, Dr. Weilage, Kathy Foster (NDCS social worker), Sharon Lindgren (NDCS legal counsel) and, for a brief period, then-Director Robert Houston. The Ombudsman's office expected to discuss Jenkins' mental health and a transition plan, and Larry Wayne knew this to be the case. Even though the Ombudsman's office had a release from Jenkins, Sharon Lindgren began the meeting by advising the Ombudsmen that Jenkins' mental health was "off the table."[66] In retrospect, Wayne testified that he believes Jenkins' mental health should have been discussed. Once again, Dr. Weilage did not share any of Jenkins' bizarre behaviors with the Ombudsmen during this meeting, the bizarre behavior to have included self-mutilation, writing on his cell wall with his own blood, snorting his own semen and drinking his own urine. He did not share Dr. Baker's February 4, 2013, report. As a consequence, the Ombudsman's office was not aware of Dr. Baker's February 4, 2013, report. Dr. Weilage acknowledged in testimony that Dr. Baker's report should have been provided to the Ombudsman's office. Dr. White testified that Dr. Weilage should have shared Dr. Baker's report. White does not know

[65] Exhibit L at 185-190

[66] Exhibit E at 16

why Dr. Weilage did not share the report.[67]

Both Jerall Moreland and James Davis, the Ombudsman staff who attended the March 20, 2013, meeting with Dr. Weilage and others, testified before the Committee. They both believed that had they been provided with a copy of Dr. Baker's February 4, 2013, assessment, they would have advocated for Jenkins' civil commitment.[68]

It is the considered opinion of the Committee that the decision by Dr. Mark Weilage to withhold Dr. Natalie Baker's February 4, 2013, report resulted directly in the failure of Jenkins to be civilly committed. Not only did Dr. Weilage admit to withholding the report, Dr. Cameron White, testified that the decision to withhold the report was wrong.[69]

The Committee struggles to understand why Dr. Mark Weilage would withhold Natalie Baker's report from both the Johnson County Attorney and the Ombudsman's office. Dr. Weilage was aware of Jenkins' bizarre behaviors. He also understood that the Johnson County Attorney was trying to make a judgment as to whether or not Jenkins should be civilly committed.

The simplest explanation is that there was a turf war at the Department of Correctional Services which had tragic consequences. The NCDS staff psychologists at TSCI seemed determined to discredit the opinions of Dr. Eugene Oliveto and Dr. Natalie Baker, both contract psychiatrists. What is

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[67] Exhibit D at 240-242, 312, 357 & 367 and Exhibit E at 14, 15-19, 22, 92, 98 & 103

[68] Exhibit E at 23

[69] Exhibit D at 312 & 356-357

less clear to the Committee, but certainly a realistic explanation, is that the Department of Correctional Services did not facilitate or cooperate in Jenkins' civil commitment because the Lincoln Regional Center was not equipped to safely house and treat a person demonstrating the dangerous propensities that Nikko Jenkins was demonstrating during the period of his confinement at TSCI. Regardless of the reasons, Dr. Mark Weilage breached his professional responsibility in not sharing Dr. Baker's report with the Johnson County Attorney and the Ombudsman's office, and he did so, in this Committee's opinion, deliberately. What's more, the failure to provide the information necessary to support a civil commitment directly resulted in the tragic death of four individuals in Omaha.

Conclusion

The Committee's conclusions concerning Nikko Jenkins should not be interpreted as a defense of his behavior. As far as the Committee is concerned, Jenkins should be held accountable through the criminal justice system for his murderous rampage. On the other hand, this Committee has been called upon to determine to what extent did the circumstances of Jenkins' confinement and release contribute to, or provide an opportunity for, Jenkins to commit these tragic murders.

It is the conclusion of the Committee that both the conditions of Jenkins' confinement as well as the withholding of Dr. Baker's report set the stage for a mentally ill Nikko Jenkins to be released into the community to make good on his promise to murder.

Jenkins' long-term incarceration in segregation would appear to be based on NDCS's

concern for staff safety and for the general order of the institution.[70] While the Committee recognizes the importance of keeping NDCS staff safe, Jenkins' experience at the Douglas County Correction Center suggests that he was capable of serving time in the general population with appropriate mental and behavioral health care.[71] It was Jenkins' long-term confinement in segregation which exacerbated his mental health problems, prevented him from receiving mental health treatment and any form of rehabilitative programming and, very simply, made him more angry and disturbed.

By the time Jenkins approached his last six months of incarceration, his behavior became more threatening and bizarre and his pleas for mental health treatment more desperate. It is particularly troubling that Dr. Weilage, a psychologist employed by the Department of Correctional Services, would refuse to provide a psychiatric evaluation to the Johnson County Attorney to facilitate the civil commitment of a clearly dangerous but willing Nikko Jenkins. The failure of Dr. Weilage to provide Dr. Baker's report to both the Ombudsman's office and the Johnson County Attorney is strongly condemned by the Committee.

SEGREGATED CONFINEMENT AT NDCS

The use of segregation is one of those practices in the Department of Correctional Services which, to the lay person, sounds like a common sense tool for maintaining order within a penal institution. In practice, the use of segregation is problematic in

[70] Exhibit E at 171

[71] Exhibit A at 15

many respects. The problems associated with the overuse of segregation include inordinate expense, its overuse for inmates generally and the mentally ill inmates in particular.

Inmates who are incarcerated in segregation often times find themselves there for long stretches of time. Initially, they are placed in segregation for one rule violation or another. Their terms are frequently extended for violations of rules, some of which are minor in comparison to the punishment of additional time in isolation.

Defining Segregation

Segregated confinement is a broad category of housing prisoners in a manner that separates them either individually or in certain subgroups from other members of the prison community. In its most sweeping definition, it includes all inmates that are not housed in "general population." Given this broad grouping of segregated confinement, the day-to-day reality for prisoners in one type of segregation will be very different from another type. In the more 'locked down' types of segregated housing, inmates will spend between 22 and 23 hours a day in a concrete cell that may measure 9 by 18 foot in the newer prison, to as small as the "Control Unit" at the Nebraska State Penitentiary that measures 9 feet by 7 feet.[72] This type of segregated housing, is also referred to as "restrictive housing," "special management" and by inmates and others as "solitary confinement" and "the hole."

It is important to note that although the public and inmates often refer to "solitary confinement,"

[72] Exhibit P at 57

according to the Audit Report "(s)olitary confinement, as it is defined in DCS regulations, deprives an inmate of any audio and visual contact with other inmates or staff. . . Although allowed by law to use solitary confinement for disciplinary purposes and for purposes of institutional control, NDCS officials said they no longer use solitary confinement under any circumstances."[73]

For inmates kept in the more locked down forms of segregated confinement, inmates are normally allowed one hour of out of cell exercise, often in a small chain-link fence cage at least 5 days a week, and one 15 minute shower at least three times a week.[74] For inmates in less restrictive forms of segregated housing, particularly protective custody, inmates may have communal meals, day room and outdoor recreation.

Prison officials believe that segregated confinement is an important tool for correctional departments to maintain order and safety in secure facilities such as prisons and jails. Experts agree that some degree of segregation and isolation is necessary for a prison to operate in a safe and secure manner, but some experts and prisoner advocates believe that administrative segregation is often overused, and can be harmful for the mental wellness of inmates. There is a changing perspective among prison administrators on the use of restrictive housing, as Rich Raemisch, the Executive Director of the Colorado Department of Correctional Services testified before a US Senate subcommittee on

[73] Exhibit R at 11-12

[74] Exhibit P at 62-63

February 25, 2014, that his "experiences in law enforcement have led (Raemisch) to the conclusion that Administrative Segregation has been overused, misused, and abused for over 100 years. "The Steel Door Solution" of segregation . . . either suspends the problem or multiplies it, but definitely does not solve it. If our goal is to decrease the number of victims inside prison, and outside prison . . . then we must rethink how we use Administrative Segregation, especially when it comes to the mentally ill."[75]

Different types of Segregation

There are different types of segregated housing that are important to understand. The various types have very different characteristics. For example, in the case of protective custody, an inmate's experience should be relatively similar to an inmate in general population, while an inmate in intensive management almost never leaves his cell, even showering and exercising in his cell space.

NDCS refers to inmates who are housed separately from the general population as "special management inmates." Inmates may be placed in segregation through two distinct processes: 1) as part of the classification process, which determines where inmates will be housed based on the level of security required and other factors, and 2) through the disciplinary process as a sanction for certain types of offenses.

NDCS regulations identify five categories of special management inmates: 1) Disciplinary Segregation; 2) Death Row; 3) Court-Imposed Segregation; 4) Immediate Segregation; and 5)

[75] Exhibit P at 77-83

Administrative Segregation, which includes four subgroups (see table below).

Categories of Special Management Inmates

Types of Segregation for Special Management Inmates
Disciplinary Segregation Temporary separation from the general population due to violation of institution rules.
Death Row Separation of inmates from the general population due to a sentence of death.
Court-Imposed Segregation Temporary separation from the general population as ordered by a court; usually no longer than 48 hours.
Immediate Segregation Temporary separation from the general population pending another event, e.g., investigation of a conduct violation, misconduct hearing, classification hearing, inmate safety, etc.
Administrative Segregation (AS) 1) Administrative Confinement (AC) Inmates separated from the general population because they are considered a threat to other inmates and/or staff. 2) Intensive Management (IM) Most restrictive status, for inmates considered to be an immediate threat to other inmates and staff. 3) Protective Custody (PC) Confinement of an inmate for an indefinite period of time to protect the inmate from real or perceived threat of harm by others. 4) Transition Confinement Confinement of an inmate in a structured transition program.

Source: AR201.05and DCS Staff[76]

[76] Exhibit R at 12

Disciplinary Segregation, Court Imposed Segregation and Immediate Segregation are either court or committee ordered, or are temporary measures that are intended to be of short duration. In general, these classifications have a finite time period. Death Row is also a small population (currently 11 in Nebraska), who are housed separately from other inmates.

The administrative segregation classifications, on the other hand, can be relatively open ended, lasting for potentially the entirety of an inmate's sentence. Of the segregated population, those who are classified under Administrative Segregation are by far the largest portion. All of the Administrative Segregation categories are recommended by a Unit Classification Committee, which are reviewed and referred to the Warden of the institution. The Warden approves the assignments to, continuation of, or removal from all administrative segregation. According to testimony provided by Robert Houston, the former Director of Nebraska's Department of Correctional Services, inmates held in AS are reviewed every four months to determine whether or not they should remain in this classification.[77]

The Unit Classification Committee is supposed to conduct formal reviews of the status for each AS inmate every seven days for the first 60 days. After that, reviews are to take place every two weeks. Written notice is to be provided for any classification hearing on the inmate's placement, continuation or removal from administrative segregation. An initial hearing shall be made after 45 days in IM, AC, or involuntary PC. Additional hearings are to be held at

[77] Exhibit B at 71-72

least every four months after the inmate's first 45 day review.

The Department of Correctional Services shared the number of inmates in each type of segregation on a single day. It should be noted that some inmates may be classified in more than one type of confinement, for example an inmate might be on disciplinary segregation as well as protective custody.

Total number of inmates in Restrictive housing on November 17, 2014	629
Administrative Confinement (AC)	153
Immediate Segregation (IS)	118
Disciplinary Segregation (DS)	91
Protective Custody (PC)	310
Death Row (DR)	11
Intensive Management (IM)	4

Administrative Confinement: The second largest classification within Administrative Segregation is AC. These inmates are kept in locked cells alone for 22 to 23 hours a day, and for inmates at the Special Management Unit housing block at TSCI they are permitted one hour of recreation in a separate cage that has one wall that is open to the outdoors, otherwise the floor and ceiling are concrete and the other chain link barrier faces inside the facility. Additionally inmates are permitted one fifteen minute shower at least three times a week. All meals are consumed in their cell, alone. Recently, TSCI began a program for inmates on AC status to have group sessions with a psychologist and other inmates while shackled to the floor, but otherwise in

the same room with no barrier dividing the inmates from each other or from the mental health professional. Beyond this, very few programs are offered for these inmates regardless of what their individualized plans are. Inmates are seen by mental health professionals occasionally at the door to their cell, with little to no privacy for therapy. It should be noted that Jenkins spent most of his time in segregation classified as Administrative Confinement.

Intensive Management: The most extreme form of segregation is intensive management. IM inmates essentially never leave their cells, a small recreational cage that has one chain link wall exposed to the outdoors built into one side of their cell, and they are permitted up to one hour of exercise in that space, and a shower stall is included on the other side of the cell. Intensive Management inmates are housed at the Special Management Unit at TSCI. As AC inmates are, IM inmates are seen by mental health professionals occasionally at their cell door.

Transition Confinement: Inmates who are being transitioned out of segregated confinement either to general population or protective custody are normally placed on TC housing for the duration of the program to re-socialize and prepare for the day to day realities for inmates in general population.

Protective Custody: The largest group of people in segregation are classified as Protective Custody, it is also the classification most unlike the others. Unlike other types of classification, many inmates in protective custody choose to be there, as they fear for their physical well-being. This can be

due to the nature of their crime (for example, sex offenders), if their crime was of a high profile nature, or because they are leaving or refusing to join a gang. PC is not intended to be a punishment, and it is not uncommon for inmates to remain on PC for years. Most PC inmates aren't separated from every other inmate, they are able to interact and socialize within their smaller PC group, have outdoor yard time together and dine together. PC inmates are in cells with a cellmate, locked down for most of the day, according to one inmate's correspondence with Senator Lathrop's office, for 20 1⁄2 hours a day.

Problems Associated with Segregation

In some ways, Jenkins might serve as a case study on the evils of segregation. As former Director Houston observed, "we can't continue to have Administrative Confinement. That doesn't mean that there's going to be a change tomorrow or the next day or even the year. But it has to change. We have a legal responsibility to separate the individuals from the general population, but at the same time we have a responsibility to that individual to attend to their mental health issues, their substance abuse issues, their social issues, and so forth, as best we can. And although I can say very definitely that Nebraska is doing as good as anybody in the country, it's still not good enough."[78]

Former Director Houston is correct inasmuch as he has called for change in the use of segregation. On the other hand, Nebraska is not doing as "good as anybody in the country". There are certainly other states that have recognized the need for reform. In

[78] Exhibit B at 77

that respect, Nebraska has yet to recognize the full measure of the problems associated with segregation as well as the necessity of joining the movement to bring about reform to this form of punishment which some regard as a form of torture.

While Jenkins may have served as an example of one inmate's experience with segregation, the Committee took testimony from Rebecca Wallace to understand a broader perspective on segregated housing. Ms. Wallace is a staff attorney with the American Civil Liberties Union (ACLU) of Colorado and testified that Colorado is one of a handful of states who chose to collaborate with advocacy groups to take a fresh look at the practice of using segregation and bring about necessary reforms.

As Ms. Wallace testified, segregation is often justified as a form of punishment for the "worst of the worst."[79] The general notion that the most violent criminals who are too dangerous to be in general population make up the entire population of the segregation is not true. While segregation certainly involves many of the most violent inmates who cannot be safely placed into the general population, the reality is that in those systems that rely heavily on segregation, the cells are filled primarily with prisoners who are mentally ill, those who are cognitively disabled and the habitual minor rule violator. In reality, Wallace testified that it is only a very small percentage of the prisoners who are so violent, dangerous and incorrigible that they must be isolated long term from all other prisoners.

[79] Exhibit G at 86

The movement towards segregation grew in the 1990s. That was a direct result of a philosophical movement away from rehabilitation and towards punishment. It developed as the tough on crime movement swept the country.

The reality of the country's experience with segregation demonstrates that it is a failed approach when applied to the greatest share of those confined to segregation.

As Ms. Wallace observed, the number one goal of the Department of Correctional Services should be to protect the public. The reality is 97% of prisoners incarcerated at NDSC are ultimately released to the public. Because segregation involves no rehabilitative purpose or effect, many of these individuals will be released directly from segregation to society without any rehabilitation whatsoever. The result, all too often, is the exposure of the public to individuals who are at least as dangerous, and in most cases, more dangerous, than they were at the time of their confinement.

Segregation is also an inefficient use of taxpayer dollars. Placing an individual in segregation is one of the most expensive ways to hold a prisoner inasmuch as the prisoners occupy a single cell by themselves and, when transported, require the attention of two or more guards at a time.

There are also considerations regarding the humane treatment of inmates. Segregation involves the most severe form of punishment short of death. It can not only exacerbate mental illness but often times causes inmates who are otherwise healthy to experience mental illness as a result of their isolation. Finally, and perhaps more concerning, is

that vulnerable populations are disproportionately housed in segregation. Typically those inmates who have a particularly difficult time conforming to prison rules or who are at risk of mistreatment by other prisoners find themselves in segregation.

Ms. Wallace also shared that the American Psychiatric Association opposes the use of segregation for more than fourteen days because of its detrimental effects on mental health. Clinical impacts of isolation, even on healthy people, include:

- Hypersensitivity to stimuli
- Perceptual distortions
- Hallucinations
- Revenge fantasies
- Rage, irrational anger
- Lack of impulse control
- Severe and chronic depression
- Apathy
- Decreased brain function
- Self-mutilation
- Suicide

In fact, the consequences of segregation on the mentally ill can be devastating. Ms. Wallace noted the obvious, that human beings need social interaction and at least some productive activities to ground themselves in reality. For prisoners with mental illness in solitary confinement it's not uncommon to see bizarre and extreme acts of self-injury and suicide to include compulsively eating

flesh, smashing their heads against the wall, swallowing razors, eating feces and attempting to hang themselves. And in Nebraska, as we have learned in the case of Jenkins, as with many other states that utilize segregation, there is no meaningful mental health care in segregation. It is, very simply, an environment which makes therapeutic treatment of mental illness nearly impossible.

Finally, Ms. Wallace testified that every court to consider the issue of segregation as a form of punishment has found that placing inmates in long term solitary confinement is cruel and unusual punishment in violation of the United States Constitution. In fact, one federal judge noted that "placing prisoners in solitary was the mental equivalent of putting an asthmatic in a place with little air to breathe."[80]

Nebraska's experience has not been much different than the experience described by Ms. Wallace. In Nebraska, inmates in all types of segregation are unable to participate in any regular programs, except for GED and similar education courses, even if they are required as part of an inmate's individualized plan. This includes protective custody inmates, and is particularly concerning for those individuals on that status. Programs and treatments are available only to general population inmates. This includes sex offender programs, violence reduction programs and drug abuse programming. As a result, protective custody inmates cannot receive programs that would allow

[80] Exhibit G at 92-93 and 83-113 for Ms. Wallace's entire testimony

for them to parole, and they thereafter have to choose between risking grave injury by joining general population or to remain in segregation, potentially until they reach their mandatory discharge date. Once these inmates reached their mandatory discharge date, they will be released to society with no supervision, and having had none of the programming that is recommended to them.

In most cases, counseling services are, in practice, an occasional stop at the door by a member of the mental health staff. Regulations require that a personal interview is to be made for any inmate in segregation who has been there for more than 30 days, and if segregation continues for an extended period, mental health assessments must be done at least every three months.[81] Inmates are expected to discuss their mental health through cell doors, where other inmates in the unit are often in earshot. Dr. Stacey Miller, former TSCI Psychologist, who testified before the Committee, shared her concern. Dr. Miller testified that merely checking at the door is not therapy, explaining that though she would attempt to meet severely mentally ill inmates more often, the practice was to meet with an inmate once a month which, in her opinion, did not meet the standard of care.[82]

Ms. Wallace shared the experience of Colorado which, like Nebraska, found itself at a crossroads as it relates to the use of segregation as a tool within the Department of Correctional Services. Ms. Wallace described the tragic homicide of the Director

[81] Exhibit P at 142 & 152

[82] Exhibit G at 57, 59-61 & 69-71

of the Department of Correctional Services, Tom Clement, in Colorado who was murdered on his own front porch by an inmate who was discharged directly from segregation into the community. After the death of Director Clements, Colorado had, as Ms. Wallace explained, a decision to make regarding the use of segregation. Would Director Clements' homicide be cause for Colorado to double down on the use of segregation or make reforms with an eye towards rehabilitation and improving public safety. Colorado chose reform.

In many ways, Nebraska finds itself at the same crossroads. Will Jenkins' murderous rampage be a call for the expanded use of segregation or will policymakers use this experience as an opportunity to reform the use of segregation.

Ms. Wallace testified concerning the reforms in Colorado. The process of reforming the use of segregation in Colorado has not been without its setbacks. On the other hand, the experience in Colorado demonstrates that many of those committed to segregation are there unnecessarily and with thoughtful reforms, Nebraska could experience significant reductions in the numbers of inmates committed to segregation, with the result being a safer Department of Correctional Services and improved public safety.

The first principle for Colorado in its reform was to remove from isolation those prisoners who suffered from mental illness. The reality is many of the mentally ill once committed to segregation have a difficult time "earning" their way back to the general population. Most of them, because of their mental

illness, behave in such a way that they continue to be recommitted to segregation for minor rule violations.

Colorado examined their data as it relates to the use of segregation. As the Legislative Performance Audit Review Committee concluded, Nebraska has not done well with data collection.[83] Nebraska must necessarily begin collecting meaningful data concerning those inmates assigned to segregation so that policy decisions can be made regarding reforms to the practice of using segregation.

Wallace made some recommendations for segregation reform in Nebraska. The first thing suggested was an immediate assessment of NDCS' segregated population. Wallace suggested a determination of those with mental health needs and an examination of the length of stay in solitary confinement. Wallace also suggested that NDCS bring in an outside consultant to evaluate the classification policies.

Perhaps the one recommendation emphasized the most by Wallace was the necessity of having NDCS led by a reform minded director. The Committee regards this as central to bringing about reform in the use of segregation.

Finally, Wallace recognized the importance of providing for a mental health unit for the mentally ill. Too many of the inmates in NDCS suffer from mental illness. Far too many are committed to some form of segregation with little or no chance to receive meaningful mental health care and little or no

[83] See Exhibit R

chance to return to the general population.[84]

The Committee is particularly appreciative to Ms. Wallace for her insight into the problems caused by the overuse of segregation and an overview of her state's thoughtful effort to reform the practice.

MENTAL HEALTH TREATMENT

The examination of Jenkins' confinement has brought into question the extent to which inmates receive mental health treatment from NDCS. The problem with mental health treatment at the Department of Correctional Services necessarily requires an understanding as to why the population of mentally ill at NDCS is growing. That inquiry, in turn, brings us to an overview of mental health treatment in the State of Nebraska generally.

To fully understand the growth in the population of mentally ill inmates at NDCS, the Committee invited Dr. William Spaulding to testify on November 25, 2014. Dr. Spaulding has been a Psychology Professor with the University of Nebraska since 1979 and, in that capacity, has been involved with the policies and the implementation of evidence-based practices in Nebraska. The history of mental health treatment in Nebraska begins in the 1970's when the national movement to deinstitutionalize mental health treatment reached Nebraska. This movement resulted in patients moving from state hospitals (regional facilities) to community treatment facilities. Southeast Nebraska, was, in many ways, better suited to deal with the transition of patients from the regional centers as it

[84] Exhibit G at 83-113 for Rebecca Wallace's testimony

had at its disposal the Lancaster County Mental Health Center. In 1982, Dr. Spaulding assisted with the development of a state of the art treatment and rehabilitation unit at the Lincoln Regional Center (LRC). LRC received grants which provided the ability to do pioneering research. This, in turn, allowed the LRC to keep up with new technologies and treatment resulting in a successful rehabilitation program that "[discharged] some of the most disabled and chronically institutionalized patients..."[85] This pioneering treatment program continued from the 1990's through 2004.

It appeared the first wave of deinstitutionalization was a success in Nebraska. However, this mental health renaissance, if you will, did not last.

In 2004, the Legislature passed LB 1083, a mental health reform bill. LB 1083 was designed to reduce dependence upon state hospitals and place patients in the least restrictive environment. Beds were reduced in these hospitals (regional centers) as care was to be provided in community based settings. Nationally, state hospitals were reducing beds by 40%. In Nebraska, a more aggressive approach was adopted and beds were reduced by 60-70%. LB 1083 also delegated state-level mental health planning to each of six regions. The intent was to transfer the state resources from the state run facilities to the communities in order to provide care that was once available in the state institutions. While this was an admirable goal, the resources devoted to community based care proved inadequate.

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[85] Exhibit G at 5

As an aside, a great deal of planning and expert-professional resources went into planning the successful implementation of LB 1083. Unfortunately, many of the best concepts to come out of the planning were abandoned in the legislative process that resulted in the final version of LB 1083. Best treatment practices which once guided LRC's state of the art treatment, reverted back to 1960's standards. LRC's rehabilitation program closed in 2009 resulting in the use of more restraints and seclusions, and patients staying for longer periods of time. Discharge rates decreased and waiting lists for beds increased. Unhappy mental health professionals left the state and the regions were left with minimal resources to care for the mentally ill. The promise of community based care did not occur as LB 1083 contemplated, and many of the mentally ill were left untreated. Not surprisingly, those community based providers who did serve the mentally ill were unwilling or unable to serve the most chronically ill who were in most need of help.

With insufficient community resources, many of the mentally ill wind up in "mental health ghettos" or in the corrections system.[86] There are 10 times as many mentally ill individuals in prison than in our state hospitals. In fact, the largest mentally ill population can be found in Douglas County Corrections with 21% of its population identified as mentally ill. According to Spaulding, we are "using the correctional system as a reaction to the degradation of the mental health system."[87] The state now finds itself without the promised

[86] Exhibit G at 9

[87] Exhibit G at 20

community resources and without a secure facility (i.e. LRC) that has the capacity for and the evidence-based treatment available to care for the most dangerous and mentally ill.[88]

Many of the mentally ill who are incarcerated end up in segregation. Segregation, which should be used as a method to incarcerate the most violent inmates, has turned into a method of managing the mentally ill.[89] Mentally ill inmates account for 10 to 15% of TCSI's segregation population, yet no meaningful mental health treatment is provided.[90] The segregation environment itself can cause a mentally ill inmate to decompensate and a psychotic illness to emerge in a healthy inmate.[91] Mentally ill inmates may lose touch with reality, engage in self-injury, eat their own flesh and attempt to commit suicide.[92] Healthy inmates can experience a hypersensitivity to stimuli, hallucinations, revenge fantasies, rage, anger, depression, apathy, suicide and/or suicide attempts, and self-mutilation.[93]

Dr. Stacey Miller testified to the problems faced by the mentally ill once they are confined at NDCS. Miller testified that 40% of the population at TSCI suffer from a mental illness. Yet this population of inmates is served by only five mental health professionals.[94] The result is predictable.

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[88] Exhibit G at 2-53 for William Spaulding's testimony

[89] Exhibit G at 86-89

[90] Exhibit G at 58-59

[91] Exhibit G at 67 & 91

[92] Exhibit G at 91

[93] Exhibit G at 90

[94] Exhibit G at 64

Those incarcerated at NDCS facilities such as TSCI receive wholly inadequate mental health care. The problem is even worse for those confined to segregation. For inmates in isolation, they are routinely deprived of meaningful mental health care. What mental health care they receive takes the form of conversations through the door which fail entirely as a therapeutic environment.

Dr. Miller suggested that a lack of programming played a role in the inadequacy of mental health care.[95] The result is that an individual who might, for example, need anger management programming, turned to the mental health care system within TSCI when proper programming alternatives are unavailable.

The Committee's evaluation of mental health care in Nebraska generally and within NDCS in particular, was certainly not exhaustive. The evidence received by the Committee, however, suggests that much more needs to be done to provide adequate levels of community based mental health care. This care must be provided not just to prevent the ultimate incarceration of the mentally ill, but to provide for a significant portion of the state population which suffers from some form of mental illness.

The Committee is of the opinion that a more exhaustive examination of the availability of mental health care in Nebraska must be undertaken by the Legislature. In the meantime, the Committee is comfortable concluding that the state must have a secure state of the art facility for the dangerously

[95] Exhibit G at 54-82 for Dr. Stacey Miller's testimony

mentally ill. The inability of the Lincoln Regional Center to accept Nikko Jenkins for a competency evaluation is clear evidence that a facility capable of providing care and treatment and conducting forensic examination of the dangerously mentally ill must be established and maintained by the State of Nebraska.

It is also the judgment of the Committee that the resources available to inmates within NDCS are wholly inadequate. These resources include programming and mental health treatment. The NDCS must not only punish the incarcerated but provide some measure of rehabilitation. This rehabilitation cannot happen within NDCS until adequate programming is available and mental illnesses are appropriately treated. The failure to devote adequate resources to programming and mental health treatment will result in the compromise of public safety and additional expense as the unrehabilitated reoffend and return to NDCS.

OVERCROWDING

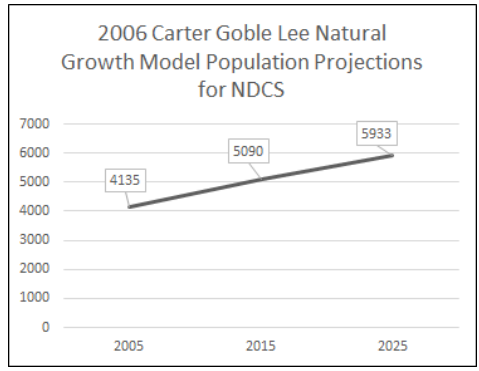
The Committee's work was broadened as the Committee became aware of the full extent of the dysfunction at the Department of Correctional Services. It is the Committee's judgment that overcrowding in the institutions of the Department of Correctional Services and the lack of adequate resources were central to most, if not all, of the remaining scandals that plagued this agency of the Executive Branch of the state government. As a consequence, an understanding of the capacity issues is an appropriate place to begin the balance of the Committee's report.

The stage for overcrowding was set by a generation of policymakers who responded to the public's call to get "tough on crime". This resulted in a wave of legislation which turned many misdemeanors into felonies, increased sentence lengths for offenders, saw the increased prevalence of mandatory minimum sentences and habitual offender statutes. This get "tough on crime" legislation was responsible for an increased number of convicted offenders being sentenced to a period of confinement to NDCS, which ultimately led to the increase in the corrections' population that set the stage for the overcrowding that followed.

In October 2006, a strategic capital facilities master plan was completed for NDCS. This report was prepared by Carter Goble Lee, an internationally recognized expert in developing such facility master plans. This plan followed a 1997 plan that was a comprehensive assessment of the current and future needs of NDCS. Historically, the state had followed previous master plans, including building the work ethic camp in McCook and a new correctional facility in Tecumseh after the 1997 plan recommended doing so. The 2006 Carter Goble Lee report, like previous capital facility master plans, projected the growth in inmate population, the number of additional beds necessary to provide for the growth in inmate population and estimates on the cost of capital construction as well as the annual operation costs. The report laid out two separate scenarios. The more alarming set of numbers assumed a significant increase in population following sentencing changes in the law regarding methamphetamine. The conservative approach referred to in the report as the "natural growth

estimates" projected the growth in population and the need for additional capacity based upon historical incarceration figures.

The projections under the more conservative "natural growth" projections are as follows:

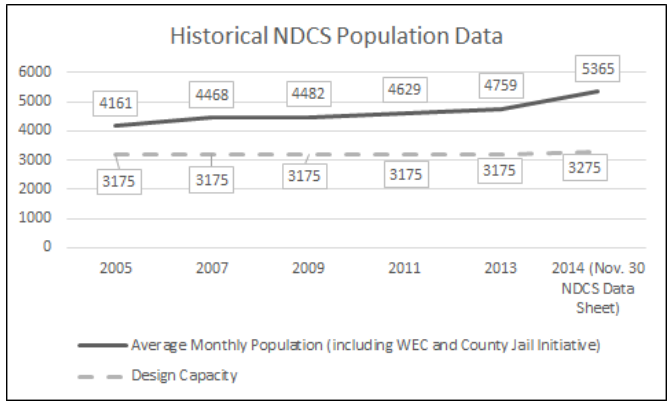


The projections and the recommendations of the Carter Goble Lee report included the following observation in the July 2006 draft regarding the importance of developing additional capacity:

> Clearly, the State cannot expect to accommodate the level of growth expected even under the Natural Growth Model without a significant expansion of bed spaces. For the past ten years, the ADP has increased, on average, 135 inmates per year. Simple math indicates that if the 862 FY07-09 bed spaces recommended in this plan are not occupied until 2009, the population will have increased by at least another 300 prisoners to be added to the 700 that currently exceed the new recommended "operational capacity" of 3,704. The need for funding the Phase I plan is apparent. The State,

> unfortunately, does not have a history of funding alternatives to incarceration, but even if this trend was reversed overnight, the current facilities are well beyond the ability to offer reasonable conditions of confinement, much less treatment-focused incarceration.[96]

This report prepared for the Governor's office and the Department of Correctional Services proved to be an underestimation of the actual NDCS inmate population. Below is a chart of the historical overcapacity of NDCS from 2005 to present.



The recommendations of the Carter Goble Lee report were presented to the Governor's office in 2006.[97] The Governor elected to not follow the

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[96] Exhibit N at 20

[97] When Director Houston was asked whether he had ever presented the report to Governor Heineman, he told the Committee "I did not present it to him," never advocated for the findings in the report and that he never had a conversation with the Governor about the findings. (Exhibit B at 39-40) When the Governor appeared before the Committee, he stated that he remembered having a number of conversations with Houston regarding the recommendations of the Carter Goble

recommendations of the report. In fact, since the report was presented to the Governor, the Executive Branch never sought an appropriation to develop the additional capacity recommended in the report. The consequences of this decision were predictable.

While the 2006 Master Plan was never implemented in the years that followed it is clear that overcapacity led the Governor's office to reconsider the recommendations in the Carter Goble Lee report on a number of occasions. Talking points from a November 7, 2007, meeting, between Director Bob Houston and the Governor's Chief of Staff Larry Bare show that severe overcrowding was discussed and that an attachment to the talking points was the 2006 Master Plan.[98]

In May 2009 Robert Bell from the Governor's Policy Research Office sought "realistic cost estimates related to prison construction" from Director Houston. In the email Bell wrote, "I also think that you have said in the past that your need is at the lower custody levels, so I would like an estimate of a new minimum/medium facility." He also asked for the costs of adding beds at TSCI and any other facility construction costs.[99] As a result, a May 7, 2009, memorandum from Houston to Bell was submitted and was "partly based on the 2006 Strategic Capital Facilities Plan, as prepared by Carter Goble Lee." The memorandum provided the costs of adding 256 beds to the TSCI, adding a 250 bed housing unit at the Community Corrections

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Lee report. (Exhibit F at 20-21)

[98] Exhibit P at 6-7

[99] Exhibit P at 1

Center-Lincoln (CCC-Lincoln), and a new 900 bed multiple custody facility. The total costs were approximately $150 million.[100]

In the fall of 2009 through 2010, there was activity by the Department of Correctional Services to prepare a proposal to present to the Governor for additional capital construction based upon the 2006 Carter Goble Lee report. Like all of the previous attempts, this discussion concerning the need for capital construction to address capacity issues did not culminate in an appropriation request by the Governor's office. Nor did the Department of Correctional Services or the Governor ever advocate for resources to build additional capacity.

Finally, on March 14, 2012, a meeting between Bob Houston and Governor Heineman took place that addressed prison capacity and, once again, updated figures on building the additional capacity recommended in the 2006 Carter Goble Lee report. Director Houston prepared an outline for the meeting which included the obvious, but important observation: "NDCS must reduce its population or increase its capacity." The outline proposed three different options for the Governor's consideration. The options were labeled "No Cost Options", "Low Cost Options", and "Build Capacity". The "Build Capacity" option presented the Governor with the updated cost figures on adding 1,300 beds to the capacity of NDCS. This "Build Capacity" option involved capital construction proposed in the 2006 Master Plan by Carter Goble Lee. The "No Cost Options" were a variety of strategies intended to move inmates out of the Department of Correctional

[100] Exhibit P at 2-5

Services institutions in a shorter time span. The "Low Cost Options" involved minimal expenditures and band-aid approaches to deal with overcrowding.[101]

In his testimony before the Committee, Governor Heineman acknowledged that all three options were presented and he elected to go with the "No Cost Options."[102] In reality, the administration had already begun implementing many of the "No Cost Options." It is important, nevertheless, to recognize that a deliberate decision was made by the administration to not build additional capacity and, instead, pursue "No Cost Options."

It is the implementation of the various "No Cost Options" that became the subject of the various scandals investigated by this Committee.

At no time did the administration propose building more capacity. No appropriation request was ever made to the legislature by the Department of Correctional Services nor the Governor's office. What's more, the Director insisted in meetings with Senators that the numbers were manageable. Clearly that was not the case. In short, the decision to not follow the recommendations of the Carter Goble Lee report was the Governor's alone and it follows that the resulting overcrowding and its related consequences were of his own making.

As will be evident in the sections that follow, overcrowding began to drive the administration at NDCS, like a principle of physics NDCS could not escape. The Department of Correctional Services

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[101] Exhibit N at 41-42

[102] Exhibit F at 43

began to be controlled by two simple principles: First, expedite the movement of inmates out the prison gates and, second, keep those prisoners released from returning to the Department of Correctional Services.

The demands of these two principles were, in the Committee's judgment, the moving force in the issues which will be the subject of the balance of this report:

- Parole
- Re-entry furlough program
- Temporary alternative placement
- Good time
- Good time not revoked to parole violators
- Administration's response to the miscalculation of sentences that include a mandatory minimum.

Reentry Furlough Program

The primary tools employed by the administration to reduce overcrowding were parole and the Reentry Furlough Program (RFP). Parole, of course, is a long-standing tool available to the Department of Correctional Services to move suitable candidates from incarceration to the community where they will be supervised to ensure their success upon release.

Esther Casmer, Chairperson of the Parole Board, testified that historically, candidates were presented to the Parole Board after completing their recommended programming. However, in 2008 the lack of sufficient resources, and the pressure from

overcrowding began to change this traditional model of parole. Instead of having inmates complete their programming prior to being presented to the Parole Board, inmates were presented to the Parole Board for their consideration who had completed little or no programming. Casmer attributed this to the lack of available programming which was, obviously, a resource issue. In around 2008, the model which required inmates to "earn" their parole was replaced with a model that called for inmates to secure their programming once they had been released to the community. As Casmer observed, we had people who were sentenced for substance abuse who were discharged without ever having received any substance abuse treatment.[103]

As Casmer noted, this change in the "parole model" was the direct result of insufficient resources devoted to programming inside the Department of Correctional Services as well as the demand to move prisoners in an effort to alleviate overcrowding.[104]

The result was predictable. Many of the inmates who had been paroled lacked sufficient resources to secure the programming on the outside. This reality led to a change in policy which was the result of the second principle which controlled NDCS: keep prisoners released from returning to the Department of Correctional Services. The result was a willingness to overlook parole violations and a "leniency" characterized by a willingness to grant second and third chances to parolees who were not in

[103] Exhibit G at 120-124

[104] Exhibit G at 122

compliance with their post-release treatment plan.[105]

Like the changes in parole, the RFP program was a product of overcrowding and a primary tool in the "No Cost Options." This program was developed by the Department of Correctional Services through a set of administrative procedures which were, in the Committee's opinion, developed outside the law with no opportunity for the public or the Legislature to weigh in.

Perhaps the first observation to be made about the Reentry Furlough Program was that the development of the regulations for this program should have been in compliance with the Administrative Procedures Act. Notwithstanding the Attorney General's remarks to the contrary, the Committee feels strongly that the Administrative Procedures Act governs the creation of this program and the manner in which it was developed by the Department of Correctional Services was outside of the law.

Not only was the RFP program developed outside of the law, but its implementation reflects the pressures of overcrowding. Esther Casmer's testimony gave important insight to the development of this program. Initially, the concept was developed by Director Houston who, along with Ms. Casmer, presented the concept to the District Court Judges in Douglas County. The District Court Judges apparently were skeptical of furlough programs after a bad experience some years earlier. When the RFP program was presented to the Douglas County District Court Judges, both Houston and Casmer

[105] Exhibit G at 146-147

assured the District Court Judges that the program would be available to "non-violent offenders" only.[106] In fact, the initial administrative regulations reflected this criteria.[107]

The first regulations intended to control the RFP program were adopted in 2008. Those regulations set forth generally the terms and conditions of the RFP program and provided specifically that the program would exclude "violent offenders."[108] Inmates released on the RFP program required Parole Board approval.

There were several iterations of the administrative regulations issued on nearly an annual basis. Each of those versions of the RFP regulations provided for an exclusion of violent offenders until 2012 when the exclusion was absent from the administrative regulations for a period of approximately six months.[109]

During the period of time that violent offenders were excluded from the RFP program, no less than 162 inmates convicted of violent offenses

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[106] Exhibit G at 150-153

[107] Exhibit N at 56A and 56B

[108] Exhibit N at 56A and 56B

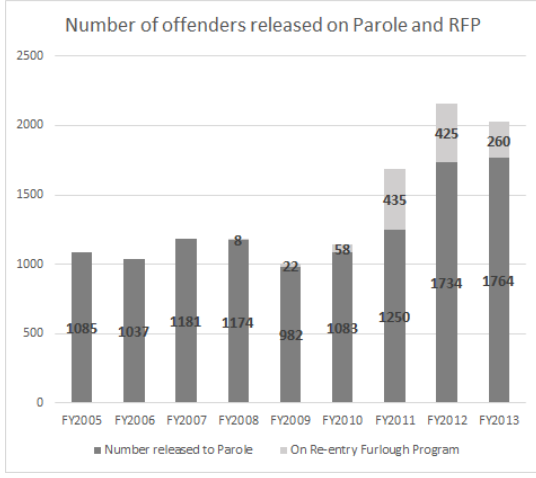
[109] Exhibit T at 30-31. After the Governor's appearance before the Committee, an employee of the Department of Correctional Services presented to the Committee Chair a Director's "Policy Directive" purportedly issued in 2010 which removed the exclusion of violent offenders from the RFP regulations. The Committee observes that this information was not provided in response to subpoenas. Furthermore, the "Policy Directive" was never incorporated into subsequent versions of the regulation except for a six month period in 2012. Moreover, the "Policy Directive" was never shared with Casmer. (Exhibit G at 158)

that included murder, first degree assault, terroristic threats and the like were placed on the Reentry Furlough Program.[110]

The Committee regards the creation of the RFP program outside of the law as a clear response to the pressures of overcrowding.

Once the Reentry Furlough Program was established, the RFP program and parole became the primary tool of the Department of Correctional Services in its attempt to alleviate overcrowding through "No Cost Options."

The numbers provide, perhaps, the strongest evidence of the influence of overcrowding on parole and the RFP program. The graph below illustrates the significant increase in the use of parole and the RFP program as means of moving inmates out the door and into the community and thereby providing some measure of relief to the overcrowding crisis.



[110] Exhibit O at 56K-56N

While the graph shows the precipitous increase in the use of parole and the RFP program, the testimony of Ms. Casmer demonstrates that pressure was applied to the Parole Board to make these numbers a reality.

Casmer testified that at one point she was provided with a quota of 168 inmates per month who needed to be moved through the Parole Board and placed into the community.[111] She testified that this was done in an effort to alleviate overcrowding. Casmer testified that historically they had moved approximately 100 people per month through parole, and this quota would have significantly increased the number of people discharged to the community.[112]

Casmer testified concerning the pressure. She indicated that at one point she and fellow board member Jim Pearson, had a meeting with Larry Bare at which point in time Bare advised Ms. Casmer "don't be concerned about losing your jobs for paroling people; be concerned about losing your jobs for not paroling people."[113]

Casmer also testified about conversations she had with the then Director of the Department of Correctional Services, Bob Houston. Casmer testified that Houston would appear in her office two or three times a week. These visits generally involved Houston advising Casmer that he was having regular

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[111] Exhibit Q at 69-70 describes meeting minutes of NDCS executive staff from July 19, 2011, where Houston stated "we need to be recommending at least 191-200 to BOP (Board of Parole) each month."

[112] Exhibit G at 132-135

[113] Exhibit G at 142

conversations with Mr. Bare concerning overcrowding. Casmer felt that these visits by the Director were direct pressure upon the Parole Board to place more inmates into the community.[114]

Casmer felt uncomfortable with a number of the placements that she approved. More concerning for Ms. Casmer, however, was the fact that the lines between Corrections and the Parole Board were becoming blurred.[115]

The Parole Board was established to serve as an independent gate keeper for public safety. As established, the Parole Board is to take inmates tendered by the Department of Correctional Services and determine whether they are suitable candidates for parole. This role can be performed only when the Parole Board stands alone as a separate agency. In contrast to the Parole Board's role as an independent gate keeper, Casmer felt that the lines between the Department of Correctional Services and the Parole Board were being blurred as a direct result of the pressure from the administration to have the Department of Correctional Services and the Parole Board "cooperate" in moving inmates into the community as a means of alleviating overcrowding.[116]

It is the Committee's considered opinion that the establishment of the RFP program was a direct result of overcrowding. Furthermore, that the program was established outside of the law inasmuch as NDCS failed to promulgate regulations in

[114] Exhibit G at 132, 139-140

[115] Exhibit G at 148

[116] Exhibit G at 140

compliance with the Administrative Procedures Act. The Committee also concludes that the pressure applied to the Parole Board, and the attempt to use the Parole Board as a means of alleviating overcrowding, has a potentially dangerous consequence to public safety. Throughout the exhibits received from the Department of Correctional Services, there are a number of references to paroling higher risk inmates in addition to the number of inmates who were paroled with little or no programming.[117] The committee feels strongly that the RFP program should be abandoned and, to the extent it may have merit as a tool for the Department of Correctional Services, should be re-established through the legislative process. The Committee also believes that the Parole Board must be re- established as a truly independent gatekeeper with public safety being its only consideration in the evaluation of those presented for approval.

Good Time

Good time changes were listed among the "No Cost Options" which were to be implemented rather than develop additional capacity at NDCS.

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[117] To assist with moving more inmates into parole and the RFP program a list of candidates for parole and the RFP program was developed under the leadership of Rex Richard, who was in charge of the Reentry Furlough Program and would later be appointed to the Parole Board by Governor Heineman. The Committee reviewed many documents that discussed the use of the list to alleviate overcrowding and found that as part of developing this list many treatment recommendations, including substance abuse recommendations, Clinical Sex Offender Review Team recommendations, and Clinical Violent Offender Review Team recommendations, were changed which then resulted in changes to Institutional Progress Reports (IPR) for inmates. (Exhibit Q at 170-171)

Since 1969, Nebraska has had some form of good time law on the books. The intent of these laws has been to create incentives for inmate good behavior, on the assumption that inmates will want to be released from prison as early as possible. The primary good time law most inmates in the Nebraska Department of Correctional Services are serving under is a law from 1992 authored by Senator Ernie Chambers, a member of this Committee. The law provides for six months of good time per year granted at the beginning of an inmate's sentence. Inmates can lose good time if they engage in rule violations, but the act of losing the time must be done in a manner that is consistent with due process, including hearings and opportunities for the inmate to challenge the decision to remove good time. See Neb. Rev. Stat. §83-1,107 (Reissue 2014).

As Senator Chambers said during testimony in front of the Committee on October 29, 2014:

> You were convicted by a court, you were sentenced here to pay a debt to society, and if no place else you're going to start on the same footing here. And it depends on how you conduct yourself as to how it goes. So you have six months of good time in your account. If you want it to stay there, then you behave yourself. And every time you do something that you shouldn't do, understand you're drawing down your account. But that's up to you. And by starting out on a positive note where you have something of value to hold onto, if it's improperly taken from you then you can challenge or appeal it

> because there are standards by which that's to be done.[118]

Chambers said during the hearing that he wrote the good time law because he was concerned that creating an 'earned' good time structure would necessarily make the distribution of such time arbitrary.

> But if you come there with nothing, it's like trying to prove a negative to say that they should be granting me good time but they won't. How am I going to prove it? Everything is arbitrary. It's based on the whim of whoever the grantor is. So it's fairer, it's less discriminatory, it places more responsibility and control in the hands of each of those persons who has been sentenced and virtually thrown away by society, to say you're going to start here with something of value and you determine whether you keep it or not.[119]

While the discussion of whether or not to change the existing statutory framework surrounding good time was a frequently discussed political issue for the election cycle, another related issue is how much good time is regularly taken away from inmates who misbehave. Legislative Bill 191 was passed in 2011 at the request of the Heineman Administration and it liberalized the use of awarding of good time. The Committee's research and subpoenaed documents revealed that between 2005

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[118] Exhibit F at 209

[119] Ibid

and 2012, the average number of good time days taken away from inmates dropped drastically from 41.4 days in 2005 to 6 days in 2012. (See Good Time Chart). This occurred despite no appreciable change in the number of inmates earning misconduct reports for poor behavior. The Heineman Administration could have taken away good time from inmates but chose other options. The decision to do so was directly related to overcrowding according to former Director Houston who testified that the decision by the Department to not take away good time was done to ease overcrowding.[120]

In a September 24, 2013, Omaha World Herald article, it was reported that over a period of five years, inmates had been punished for over 92,000 infractions, yet good time was removed in only five percent of the cases.[121] The article also notes that "(f)rom 2005 to 2011, prison records show, (Nikko) Jenkins was written up at least eight times, for refusing to submit to a search, aggravated assault on a corrections officer, three episodes of using threatening language, two episodes of "tattoo activities" and creating a weapon out of a toilet brush. A judge sentenced him to four more years for his assault. For all his transgressions, prison officials took away just under 18 months of good time credit, including three months for the assault."[122]

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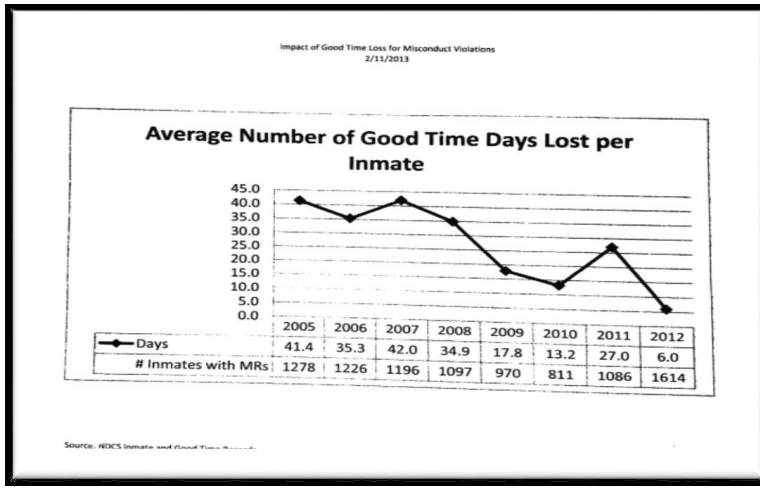
[120] Exhibit B at 162

[121] Exhibit P at 124-128. Even after the Governor made good time a public issue, NDCS still did not use all of its authority to take away good time. (Exhibit F at 190-191)

[122] Exhibit P at 124-128



Good Time Chart[123]

With respect to the Governor's proposal regarding earned good time, the Committee finds that while the notion of earned good time may sound appealing, the proposal suffered from three separate problems: 1) programming is not available for inmates and they would be given credit for sitting on waiting lists; 2) that if the goal of this approach was to lengthen the stay of violent offenders the NDCS does not have the physical capacity to do so; and, 3) even individuals at the NDCS had specific concerns about the proposal.[124]

It is the conclusion of the Committee that the liberalization of the good time law, done at the request of the administration was in direct response to overcrowding. Similarly, the decision by NDCS to take less good time away from inmates who have violated rules within the institution was likewise directly influenced by overcrowding. Such was the

[123] Exhibit Q at 172

[124] Exhibit O at 66

testimony of Director Houston when he appeared before the Committee. The conclusion is also supported by common sense.

Good Time and Revoked Parole

For a period of time, good time was awarded for time spent on parole to parolees who violated their parole and were returned to the Department of Correctional Services. This practice, which was directly contrary to statutory law, presents yet another example of the pressures created by overcrowding and the willingness of individuals to respond to that pressure by establishing policies outside of the law.

Prior to October 2010, in those circumstances in which a parolee violated their parole, the process of revoking one's parole also included revoking good time earned (two days per month) while on parole. This changed in 2010 in a process that required the torturing of the statutory language to secure additional good time credit for parole violators. The process of making this change involved Larry Wayne, Kyle Poppert, Records Administrator, as well as Director Houston. The Committee has reviewed various e-mails but we pick up the trail with an e-mail Kyle Poppert sent to a group of NDCS employees:

> The Director and the Parole Board reviewed the policy and statute regarding the two days per month of earned good time while on parole. Traditionally this reduction has only been awarded upon successful completion of parole. The Director and the Parole Board have decided to grant

the reduction for the number of months on parole prior to revocation.[125]

Poppert included a spreadsheet with 110 inmates initially affected by this change. The spreadsheet included their names, parole dates, number of months between parole and revocation, the new number of good time days they would get under this policy change, their old tentative release date and their new tentative release date. The total number of good time days earned by these inmates as a result of the new "interpretation" of the statute was 2,164 days, or an average of about 20 days per inmate. One inmate received 140 good time days.[126]

In a January 20, 2011, e-mail to a number of NDCS employees, Poppert shared the change in policy: "Angela had a question regarding awarding parole good time while an offender is on abscond status. We will award good time while an inmate is on abscond status." He later wrote, "The director wanted me to remind everyone that these time calculations must be a top priority."[127]

This tortured interpretation of statutory law would not last long, but it was clearly motivated by overcrowding. In an interview with Lieutenant Frank of the Nebraska State Patrol, Angela Folts-Oberle volunteered that this practice was due to overcrowding. Folts-Oberle is a Records Manager with the Department and when she discussed this practice, she said: "...So what they decided to do, and I know this was due to overcrowding, was well, even

[125] Exhibit P at 8

[126] Exhibit P at 9-12

[127] Exhibit P at 26

though they're revoked, we're going to go ahead and give 'em parole credit for the time they were out." She later said, "That was something all of us disagreed with because we did not think that that was what the law intended, but when your legal team reviews it, your Director okays it, ya know, you move and you give everybody parole...we went through and gave everybody parole credit if they'd been out on parole." When asked by Lieutenant Frank if that was "strictly an overcrowding issue" she replied, "I truly do, yes."[128]

In testimony before the Committee, Jeannene Douglass, former NDCS Records Manager, discussed the impact overcrowding had on decision making within NDCS. Regarding this particular practice, Douglass said, "...there was one instance where they...I was directed to...I, we records managers were directed to continue to give an inmate...a parolee, once his parole was revoked, we were still supposed to credit their sentence with the parole good time which would bring their discharge date earlier. I knew that was wrong by statute, but I was ordered to do it so I had to do it."[129]

Even Kyle Poppert had to acknowledge the change in policy that contradicted the statute was driven by the pressures from overcrowding. In his interview with the Nebraska State Patrol, Kyle Poppert was asked by Lieutenant Frank, "Has there been any pressure on you or anybody else that you're aware of to try to eliminate the overcrowding by doing some of this stuff or...?" Poppert responded by

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[128] Exhibit P at 21-22

[129] Exhibit C at 155-157

saying, "Well, yes. I mean I think that there have been clear goals to do everything we can to eliminate overcrowding, but all legal ways of doing things...For example, we used to take, be pretty liberal about taking away good time for parole violations and the public's perception is is we just stop taking away parole good time, just to deal with temporary overcrowding issue."[130]

Ultimately the practice would be reversed as a result of an Attorney General's opinion. In August 2014, the Attorney General's office reviewed the practice and concluded that the interpretation by individuals of the Department of Correctional Services which permitted good time credit for those who violated their parole was not authorized by law. Thereafter, the practice terminated.[131]

Sentence Miscalculation and the Post-*Castillas* Response

The miscalculation of the Tentative Release Date (TRD) for inmates serving a sentence which includes a mandatory minimum was ultimately clarified in the Nebraska Supreme Court decision of *State v. Castillas*, 285 Neb. 284 (2013). The failure of the Department of Correctional Services to recognize the importance of the *Castillas* opinion and to apply its holding to the calculation of inmate sentences was the subject of a great deal of testimony. The Committee is tempted to conclude that the failure to timely apply the *Castillas* opinion to calculations at the Department of Correctional Services was yet another symptom of overcrowding. In fact, it is hard

[130] Exhibit P at 23

[131] Exhibit P at 24-25

to imagine how an opinion of such importance to the Department of Correctional Services could be passed around various players at NDCS without its holding ultimately changing policy unless overcrowding played a role. In the end, the Committee is unable to state definitively that overcrowding was behind the failure to timely implement the *Castillas* opinion only because none of the witnesses who appeared before the Committee were willing or able to offer testimony that would lead directly to that conclusion. The same, however, cannot be said for the response by the administration and the Department of Correctional Services to the ultimate discovery that the failure to conform NDCS policy to *Castillas* led to the early discharge of 306 inmates. The response, in the Committee's opinion, was directly related to overcrowding as will be more fully explained below.

To fully understand the issue, some historical background is in order.

On August 28, 1996, Assistant Attorney General Laurie Smith-Camp (now Federal District Court Judge in Omaha) authored an Attorney General Opinion regarding the application of the good time statute to mandatory minimum sentences. Smith-Camp concluded that an inmate can neither be paroled nor discharged prior to serving the mandatory minimum portion of a sentence. This opinion did not include a discussion as to how to correctly calculate the TRD.[132]

The opinion from the Attorney General's office was followed by a memorandum authored by Ron Riethmuller, former NDCS Records Administrator.

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[132] Exhibit I at 1-3

The Committee generally regards Riethmuller as credible and particularly competent on the subject of sentence calculations. On September 28, 1996, Riethmuller sent a memorandum to all records staff, Harold Clarke, former Director of Corrections, Larry Tewes, George Green, NDCS legal counsel, Laurie Smith-Camp, and Manuel Gallardo. This was the first pronouncement of how NDCS would calculate the parole eligibility date (PED) and the TRD when mandatory minimum sentences were involved. The memorandum indicated the calculations were to ensure compliance with the August 28, 1996, Attorney General Opinion and to ensure that inmates would serve their mandatory minimum sentences before parole eligibility or discharge.[133]

For many years, the Attorney General Opinion and the memorandum of Ron Riethmuller served as the gold standard on the issue of the application of good time statutes to mandatory minimum sentences.

In the years between Riethmuller's 1996 memorandum and the 2013 *Castillas* opinion, there were a number of e-mails that passed among individuals at the Department of Correctional Services as well as from individuals outside the Department of Correctional Services (for example, District Court Judges) expressing some measure of confusion relative to the application of the good time statute to the tentative release date for inmates serving a mandatory minimum sentence. There were also two opinions from the Nebraska Supreme Court which, arguably, might have led to a change in policy had the Department of Correctional Services solicited

[133] Exhibit I at 4

an opinion from the Attorney General's office. *See State v. Kenney*, 265 Neb. 47 (2002) and *State v. Kinser*, 283 Neb. 560 (2012).

In any case, clarification of the issue was provided in the February 8, 2013, Nebraska Supreme Court opinion of *State v. Castillas*, 285 Neb. 174 (2013). In *Castillas* the Court clarified how to calculate the mandatory discharge date when a mandatory minimum is part of the sentence. The court concluded that the good time statute only applied to that portion of the sentence served after the mandatory minimum had been served. The Court explained that once the mandatory minimum portion of the sentence was served, an inmate must serve one-half of the remaining maximum sentence.

What followed the *Castillas* opinion was the subject of a good deal of testimony. The *Castillas* opinion was handed down by the Nebraska Supreme Court on February 8, 2013. On that date, Jim Smith with the Nebraska Attorney General's office instructed Assistant Attorney General Linda Willard to send the *Castillas* opinion to the Department of Correctional Services.[134]

Thereafter, the *Castillas* opinion moved about various offices of the Department of Correctional Services, as best the Committee can determine, in the following manner:

February 8, 2013, emails between Willard, Douglass, Green, and Poppert. 9:41 AM, Willard shared *Castillas* with Douglass. Willard stated that she wanted to make sure the NDCS' calculation

[134] Exhibit C at 16

method was in accordance with the opinion.[135] 11:48 AM, Douglass responded that the Court was correct regarding PED calculation, but incorrect regarding TRD.[136] 1:19 PM, Willard responded: "Note that the Supreme Court said the district court was wrong in how they calculated. If you are doing it differently than what the Supreme Court said is the "correct" way to calculate, do you decide to stay with the "right" way or go with what the Supreme Court said is the correct way?"[137] 1:41 PM, Douglass responded: "wouldn't the right thing to do be to continue the way we have always done it because it, too, was tried and tested. I don't know. It would be a real mess to have to go back in and recalculate everyone who has mandatory minimum sentences. What do you think??"[138] There was no further email response from Willard. 2:09 PM, Douglass then emailed Green and copied Poppert and Willard. She attached the previous emails between she and Willard along with the *Castillas* opinion. There was handwriting on the case, presumably Douglass' writing, indicating a "no" when the Court discussed how to calculate TRD.[139] Douglass explained that Willard supported her decision to continue with their calculation instead of following the Court's directive. She noted that the inmate would serve less time under their calculation and that "it would serve the Director's desires, as well, to not increase our population any more than

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[135] Exhibit J at 142

[136] Exhibit J at 141

[137] Ibid

[138] Ibid

[139] Exhibit J at 160

we must."[140]

Willard testified that she did not agree with Douglass to continue NDCS' practice.[141] After Douglass' email, Willard attempted to call Green to explain her position. Green was not available, so Willard spoke with Sharon Lindgren and explained that she did not agree to ignore *Castillas*.[142] Willard testified that, at some point, she spoke with Green and explained the *Castillas* decision. Willard explained to Green that NDCS' TRD calculation was wrong. After the phone call, Willard had the impression that NDCS would "get on it."[143]

February 17, 2013, email from Poppert to Douglass and Ginger Shurter, NDCS Records Manager. Specific to *Castillas*, Poppert requested an explanation of the NDCS' current TRD calculation policy when mandatory minimums are involved to provide to Green. Specifically, Poppert asked for the current practice, the expected practice under *Castillas*, and why Douglass believed the current practice was the proper course. Poppert stated that he believed the Court was misinterpreting the previous cases. Poppert further stated in the last sentence, "our current efforts to reduce our inmate population has nothing to do with how we apply good time laws. The law is the law and we will act accordingly."[144] On February 19, 2013, Douglass forwarded Poppert's email to Mickie Baum, Records

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[140] Exhibit J at 140-162

[141] Exhibit C at 31

[142] Exhibit C at 31-32

[143] Exhibit C at 33-36

[144] Exhibit J at 164

Manager, with the comment "thought you might get a kick out of this email from KP. Specially the last sentence!!!"[145]

February 19, 2013, John Freudenberg with the Attorney General's office, emailed the *Castillas* case to Kathy Blum, NDCS legal counsel.[146]

March 11, 2013, email from Douglass to Poppert and Green. Douglass was asked by Poppert for something in writing explaining the NDCS' policy on sentencing calculation. See February 17, 2013, email above. Douglass sent Riethmuller's 1996 memo in response.[147]

September 30, 2013, email from Takako Johnson, Staff Assistant at NSP, to Kevin Wilken. Johnson asked if a PED can be later than a TRD. Wilken answered that a mandatory minimum was involved and that the PED was later than the TRD "to ensure that he serves the entire mandatory minimum and is not paroled before he has served the entire 15 year mandatory minimum."[148]

October 22, 2013, email from Colby Hank, Team Leader from the Diagnostic and Evaluation Center, to Angela Folts-Oberle and Fred Britten, TSCI Warden. Hank relayed that he had listened to an inmate's phone call and the inmate claimed that his TRD was calculated incorrectly and he is getting out 3 years earlier than he should. Folts-Oberle

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[145] Ibid

[146] Exhibit J at 165

[147] Exhibit J at 167-169

[148] Exhibit J at 170-171

responded that the calculation was correct.[149] This particular inmate was on the list of inmates that needed their sentences recalculated after the June 15, 2014, Omaha World-Herald story.

October 31, 2013, email concerning a sentence review meeting. Those in attendance were Poppert, Blum, Jeff Beaty, Mickie Baum, Green, Lindgren, Shurter, and Nikki Peterson. Several items were discussed including *Castillas*. It is noted that NDCS' practice was different than *Castillas*. The belief was that there was a need to clarify what the Court's intention was before NDCS acted. The conclusion was that NDCS had been "performing calculations our current way for years. We are now aware of this situation, we will act when we are specifically told our current way is wrong and it needs to be changed."[150]

May 9, 2014, email from Dawn Renee Smith, NDCS Legislative & Public Information Coordinator, to Jen Rae Wang, Director of Communications with the Governor, Robert Bell with the Policy Research Office, and Sue Roush with the Governor's Office. Smith explained that she received a call from Todd Cooper with the Omaha World Herald. An inmate in community custody went to court on a pass. Based on his sentence, the judge was surprised to see him. Apparently, Cooper was in the courtroom. NDCS' calculations resulted in a PED after the TRD. Cooper told Smith that he believed all judges assumed the mandatory minimum was subtracted from the maximum term for calculating TRD.[151] This is what

[149] Exhibit J at 173-174

[150] Exhibit J at 175-178

[151] Exhibit J at 179-181

started the paper's investigation.

June 15, 2014, Omaha World-Herald publishes its story concerning sentence miscalculation. The Omaha World-Herald investigation revealed NDCS' faulty TRD calculation method. A calculation resulting in sentence breaks of anywhere from six months to fifteen years, the early release of inmates (some of whom were back in prison for new crimes) and the release of inmates before parole eligibility. The story reported that Director Kenney would consult with the Attorney General to determine if mistakenly released inmates would be brought back.[152]

The Committee finds that Green and Poppert were equally culpable for the miscalculation debacle. A U.S. Department of Justice Report (DOJ), commissioned by NDCS, found that Poppert did not know how to calculate release dates, instead relying on subordinates for guidance, and rarely attended training sessions on how to properly calculate sentence lengths.[153] "This is perhaps the reason why he failed to grasp the magnitude of [*Castillas*] and waited for an answer instead of aggressively pursuing a response from the legal department."[154] Poppert is only now receiving the proper training. Instead of taking responsibility for his part of the miscalculation debacle, Poppert instead blames Douglass, a subordinate, who may have made ill-advised remarks regarding *Castillas*, but was not responsible for ensuring NDCS followed *Castillas*.

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[152] Exhibit P at 109-113

[153] Exhibit S at 4, 5 & 8

[154] Exhibit S at 8

Poppert also points to Green as a primary culprit. While the Committee agrees that Green is culpable, it does not absolve Poppert. The DOJ report noted that "an experienced record office person would have questioned the directions and sought clarification."[155] Poppert did not do this. The Committee agrees with DOJ's conclusion: "[Poppert] has to be the strongest advocate for all matters relating to sentence computations. Sometimes that requires continuously following up with the legal department on matters relating to the record department. If needed follow the chain of command to alert the Deputy Director and Director of the situation. In this instance, he was not an advocate nor did he fully understand the magnitude of the highest court decision.....His lack of understanding and follow-up is partially the blame for the miscalculated sentences."[156]

As to Green's culpability, he admitted that he never read *Castillas* when released in February 2013, even though it related to corrections and was available to the public on the Nebraska Supreme Court's website.[157] He did not read *Castillas* when Douglass attached it to an email on the same day it was released.[158] He did not read *Castillas* after receiving Douglass' email that indicated NDCS would ignore the holding. He did not read *Castillas* after following up with Poppert after Douglass' emails.[159] Green continued his ignorance even after a

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[155] Exhibit S at 4

[156] Exhibit S at 9

[157] Exhibit C at 443

[158] Exhibit C at 443-444

[159] Exhibit C at 457

October 31, 2013, sentencing review committee meeting, where *Castillas* was discussed.[160] Perhaps most troubling, Green admitted that he only decided to take the time to review *Castillas* after the June 2014, Omaha World Herald story.[161] Clearly, Green failed in his duties as NDCS legal counsel.

What is less clear to the Committee but is still troubling is the involvement of Deputy Director Larry Wayne. Poppert testified that he advised his supervisor, Larry Wayne, of the *Castillas* opinion on the day of its release.[162] Larry Wayne, by contrast, testified that Poppert did not inform him of the *Castillas* opinion.[163] Neither circumstance serves Wayne's interest well. If Poppert advised Wayne of the *Castillas* opinion, Wayne's failure to ensure that the *Castillas* holding was incorporated into NDCS' sentencing calculation policy is inexcusable. He was the deputy director in charge of the records administration department.[164] As such, he was Poppert's immediate supervisor and the person ultimately responsible for ensuring that NDCS policy was responsive to case law developed by the Nebraska Supreme Court. On the other hand, if as Wayne suggests, Poppert never advised him of the *Castillas* opinion, Wayne still shares some measure of culpability for a management style that leaves him isolated and ignorant of a supreme court case with such serious consequences for NDCS.

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[160] Exhibit C at 460

[161] Exhibit C at 454-455

[162] Exhibit C at 206

[163] Exhibit E at 84-86

[164] Exhibit E at 84-86

As a result of the failure to timely apply the holding of *Castillas* to the TRD calculation for inmates serving a mandatory minimum sentence, 306 inmates were released early. While the failure to implement the holding in *Castillas* into NDCS policy may not be clearly related to overcrowding, the plan formulated to deal with the 306 mistakenly released inmates is.

After the Omaha World-Herald's story, the Governor, along with members of his administration and the Attorney General's office crafted a plan to address the mistakenly released inmates. The Governor's public comments suggest an appreciation for the fact that any plan to address the mistakenly released inmates will be controlled by the Nebraska Supreme Court holding in *Anderson v. Houston*, 274 Neb. 916 (2008). In fact, the Governor made the following remark which clearly demonstrates a familiarity with the holding in *Anderson* and its application to the circumstances of the 306 inmates mistakenly released: "inmates who would have completed their sentence by late-June "qualified" for sentence credit under the *Anderson* ruling."[165]

The *Anderson* opinion was a Nebraska Supreme Court opinion by Chief Justice Heavican. In the *Anderson* case, the court was faced with the question of whether an inmate was entitled to day for day credit for time spent at liberty following an inmate's mistaken release by the Department of Correctional Services. In the opinion, the Chief Justice recognized jurisdictions across the country have employed any one of three different theories to determine under what circumstances an inmate might receive credit

[165] Exhibit P at 121

for time spent at liberty following their mistaken release. The Court settled on one theory known as "the equitable doctrine." As the Chief Justice explained, under the "equitable doctrine," an inmate who was mistakenly released by the Department of Correctional Services would receive day for day credit provided two criteria were met. First, the inmate must not have been aware of the mistake and second, the inmate must not have broken the law while at liberty. The opinion was straight forward and its application to the 306 mistakenly released inmates should have been a simple process.

In fact, the comments of the Governor and the Attorney General suggest that both recognize that, at a very minimum, *Anderson* required that before an inmate would receive day for day credit for time spent at liberty, the inmate must not have broken any laws. In a June 26, 2014, press conference, the Attorney General and the Governor stated:

Governor: "According to *Anderson v. Houston* any individual who was released early and who has not committed a crime since their release is entitled to be credited with time served in the community towards their release date..."[166]

Attorney General: "Remember there were 257 inmates who because of the *Anderson* court case they were released early but they have been on the outside and not committed additional crimes, they get credit for being on the outside.....We're going to give them credit for it, by the *Anderson v. Houston* case. They're going to get credit for that even though they weren't on the inside....The case law is clear,

[166] Ibid

they owe us time. The case law is clear that they get credit for the time that they were on the outside, if they didn't screw up."[167]

While the statements of both the Governor and the Attorney General suggest an appreciation for the fact that inmates that break the law should not receive day for day credit, the pair seemed determined to use the *Anderson* opinion as a means to provide day for day credit for all 306 inmates released including those who had broken the law. This is best described in a September 29, 2014, article in the Omaha World Herald:

> As Heineman, Bruning and Kenney, the Corrections director, determined whom to round up, they had a pivotal Nebraska Supreme Court ruling as their guide. In a no-nonsense decision, the high court ruled in 2008 that an Omaha man, David *Anderson*, could receive credit for the time spent out of prison after officials mistakenly released him. But the high court made one condition abundantly and redundantly clear. Five times, Chief Justice Mike Heavican, who wrote the court's unanimous opinion, railed against the notion that a prisoner should get credit if he "misbehaves while at liberty." The Supreme Court's words: "Like a majority of courts, we agree that no equitable relief is required where a prisoner misbehaves while at liberty. Prisoners who commit crimes

[167] Exhibit P at 16-17

while at liberty do not deserve sentence credit. Sentence credit should not apply in cases where the prisoner.... committed crimes while at liberty." The Governor himself cited the *Anderson* ruling several times. On July 2 and again on Aug. 15, Heineman said inmates who would have completed their sentence by late-June "qualified" for sentence credit under the *Anderson* ruling. Heineman even quoted the ruling in a press release. "According to *Anderson*....any individual who was released early and who has not committed a crime since their release is entitled to be credited with the time served in the community toward their release date," the Governor's statement began. But he skipped over the good-behavior requirement as he continued: "Therefore, any inmate who has been back in his community longer than his recalculated release date will have completed his sentence requirement and will not be returned to incarceration....Heineman and Bruning declined requests for interviews to explain the state's strategy for the roundup. Instead, the Governor and attorney general - whose terms expire at the end of the year – issued a joint statement: "Regarding the sentence calculation errors made by the Department of Correctional Services, the State of Nebraska continues to pursue a balanced and common sense

> legal strategy. For any criminal who was released early and then re-arrested, those convicted felons appeared in court, a judge conducted a pre-sentence investigation and then those individuals were sentenced for their additional crimes." What about the time the prisoners owed on the original sentence? The Governor and attorney general declined comment, citing "matters currently in litigation." In reality, none of those inmates has sued.[168]

The plan ultimately developed by the Governor and the Attorney General was to require the return of 40 prisoners who owed time and not require the return of 257 inmates who had been mistakenly released into the community longer than their recalculated sentence date.[169] Of the 40 inmates, 20 were brought back on warrants. The remaining 20 inmates had less than six months to serve on their sentence and placed on parole, the RFP program and five were placed on the Temporary Alternative Placement Program (TAPP explained below).[170] How the administration and the Attorney General followed through with these inmates reflects, once again, the second principle to control NDCS: "keep those prisoners released from returning to the Department of Correctional Services."

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[168] Exhibit P at 114-123

[169] Exhibit P at 28-29

[170] Exhibit E at 236 and Exhibit P at 28-29

The Omaha World-Herald article on September 29, 2014, disclosed that a number of the prisoners who had been mistakenly released had, in fact, committed felonies while at mistaken liberty.[171] The *Anderson* holding would require that these inmates be returned to the Department of Correctional Services to resume their sentence where they left off on the date they were mistakenly released. These individuals were never required to return to the Department of Correctional Services to complete their sentences, at least not before the Omaha World-Herald did a story on the subject and the LR424 Committee questioned both Director Kenney and Governor Heineman as to why those inmates that have broken the law have not been required to return to the Department of Correctional Services to resume their sentence.

Once the Omaha World-Herald published their September 29, 2014, story and the Committee questioned both Director Kenney and Governor Heineman, the Attorney General announced that it had filed "a test case." It is the considered opinion of the Committee that even if a test case was necessary, a delay of five months is suspicious at best and is more likely a reflection of the fact that the administration and the Attorney General had no intention of requiring those inmates who broke the law after they were mistakenly released to return to Corrections to serve out the balance of their sentences. The holding in *Anderson* is not as complex as the remarks from the Attorney General would have us believe. *Anderson* provided a process as well as the criteria for evaluating which inmates were not

[171] Exhibit P at 114-123

entitled to day for day credit and, therefore, needed to be returned to the Department of Correctional Services. To suggest that a test case was necessary was, in the Committee's opinion, the "spin" that followed the embarrassing revelation that both the administration and the Attorney General were not compelling those who committed serious criminal offenses to return to the Department of Correctional Services to resume their sentences.

The Committee cannot help but observe the irony involved in the administration's failure to follow the *Anderson* opinion as it developed a plan for dealing with the 306 mistakenly released inmates. In the first instance, the inmates were released as a result of the Department of Correctional Services failure to implement and follow the Nebraska Supreme Court opinion in *Castillas*. This failure was the subject of harsh criticism and press conferences by both the Governor and the Attorney General who then developed a strategy for dealing with the debacle that involved ignoring another Nebraska Supreme Court opinion, *Anderson v. Houston*.

The plan to deal with the 306 mistakenly released inmates involved not only a willingness to ignore the *Anderson* opinion from the Nebraska Supreme Court, it also involved the creation of a program Director Kenney titled the Temporary Alternative Placement Program. This program, Kenney stated, was a creature of his own imagination.[172] Under the TAPP program, Kenney selected five inmates to simply remain in the community where the clock would run out on the balance of the sentence they owed the sentencing

[172] Exhibit P at 28-29

judges and their victims. Kenney testified that he created the TAPP program by taking a "lenient" view of his statutory authority to place inmates in "suitable residential facilities."[173] This "lenient interpretation" did not square with the law.

For all of the criticism rightfully heaped upon George Green, he did provide Director Kenney with a legal opinion that the TAPP program was not supported by the law.[174] Green provided Kenney with the legal authority for his opinion which included an Attorney General opinion authored in 1991 which opinion clearly stated that any individuals placed on furlough require Parole Board approval.[175] The TAPP program had no such requirement.

The Committee concludes that the TAPP program was developed, once again, in response to the second principle driving NDCS policy in the wake of the overcrowding crisis: "keep those prisoners released from returning to the Department of Correctional Services."

What's more remarkable, Director Kenney would be advised by his legal counsel that his "lenient view" of the statute was outside of the law and that he would not, thereafter, secure an opinion from the Attorney General's office. Instead, Kenney's response to his legal counsel was "I don't have the luxury of statutory compliance."[176]

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[173] Exhibit E at 246

[174] Exhibit E at 240

[175] Exhibit O at 110-112

[176] Exhibit E at 249

In the Committee's judgment, Kenney's statement to his legal counsel is both a troubling admission that he was creating a "program" outside of the law and the clearest example of the decision making process at NDCS once the consequences of the overcrowding crisis settled upon NDCS. Judges alone decide an appropriate sentence an offender owes his or her victim. NDCS is not authorized by law to unilaterally credit offenders with time not lawfully spent in custody. Kenney's decision to do so was directly related to overcrowding and was, in the Committee's judgment, not supported by legal authority.

The failure of NDCS to timely apply the *Castillas* opinion to sentence calculation policy may very well have been the result of little more than standard bureaucratic incompetence. The same cannot be said for the manner in which the administration dealt with the 306 mistakenly released inmates. Rather than conform the solution to the law, a familiar course was followed in which the law was set aside to accommodate the second principle controlling NDCS in the midst of the overcrowding crisis: "keep those prisoners released from returning to the Department of Corrections."

Not only did the plan developed to address the 306 mistakenly released inmates involve solutions outside of the law, but the decision to do so was deliberate as evidenced by Director Kenney's observation: "I don't have the luxury of statutory compliance."

That comment, in the Committee's judgment, pretty much summed up the sentiment at NDCS and in the administration when it came to the

implementation of "no cost options" as a strategy for addressing the overcrowding crisis.

The pressure to alleviate overcrowding through "no cost options" began in the governor's office and was felt throughout the administration down to the level of a records manager. As Jeannene Douglass commented:

> Jeannene Douglass: I know. I'm trying to tell you. I think it was the overall atmosphere of the whole division.
>
> Senator Lathrop: Was the ....
>
> Jeannene Douglass: Everybody was getting pressure. And it just comes on down. It's kind of like when you're showing your dog in a dog show. How you feel travels right down that leash to that dog. The same thing is happening here.
>
> Senator Lathrop: I think that's a perfect analogy. Tell us about the atmosphere.
>
> Jeannene Douglass: There was...it was quite well known that we had to reduce the population and that there was a lot of pressure to find ways to do it. And I think it was coming from the Governor on down. That's just an opinion.[177]

In many ways, the decision to employ "no cost options" was a failure of leadership. Section 83- 962 of the Nebraska statutes provides a process for addressing an overcrowding emergency. Under the Correctional System Overcrowding Emergency Act,

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[177] Exhibit C at 165

the governor may declare an emergency when the "population is over 140% of design capacity."[178] Once an emergency is declared the Parole Board must then parole all suitable candidates until the "population is at operational capacity."[179] This process, of course, is transparent and the Governor's involvement quite obvious.

In contrast to the statutory process available to the Governor in the Correctional System Overcrowding Emergency Act, the administration chose a course that involved working in the shadows where pressure on NDCS and the Parole Board was applied to move inmates to the community with plausible deniability. All while maintaining that overcrowding was not influencing decisions at NDCS. The findings of this Committee suggest otherwise.

I. COMMITTEE RECOMMENDATIONS

The Committee makes the following recommendations:

1. The Committee recommends that the Department of Correctional Services Special Investigative Committee should be reconstituted by the next Legislature. The Committee should provide oversight in the implementation of the recommendations made in this report, as well as the recommendations provided in the report from the Performance Audit Committee which report is found in the Appendix and is incorporated in this report by this reference as though set forth herein in its entirety. Finally, the Committee should also be

[178] Neb. Rev. Stat. §83-962 (Reissue 2014)

[179] Ibid

involved in the oversight process of the Council of State Government's recommendations.

2. The Committee recommends that the Reentry Furlough Program should be abolished. The Committee acknowledges that there may be some merit in programs that facilitate supervised release. For that reason, the Committee offers no recommendation as to whether the Reentry Furlough Program or some other form of supervised release should be available to the Department of Correctional Services as a tool for reducing recidivism. In the event there is to be a furlough program or a supervised release program established for the use of the Department of Correctional Services, it should be created legislatively.

3. The Committee recommends that the Legislative Research Office and/or the Legislative Performance Audit Committee conduct an assessment/audit to determine which Administrative Regulations were promulgated in violation of the Administrative Procedures Act. The results of the audit/assessment should be provided to each member of the Legislature. If such an audit or assessment discloses the need for clarification of the Administrative Procedures Act, the Legislature should act.

4. The Committee recommends that the Legislature establish the "Office of Inspector General of the Nebraska Correctional System." The Office should conduct audits, inspections, reviews and other activities as necessary to aid the Legislature in its oversight of the Nebraska correctional system.

5. The Committee recommends that Director Kenney not be retained by the next

administration. Likewise, the Committee believes the actions or inaction of Kyle Poppert, Dr. Mark Weilage and Larry Wayne warrant termination.

6. The Committee recommends that Section 83-962 be amended to mandate that the Governor declare a correctional system overcrowding emergency whenever the Director certifies the population is over 140% of design capacity. The Committee believes the procedure found in Section 83-962 is a far more transparent process and provides for greater accountability when the Administration undertakes to resolve overcrowding by means other than developing additional capacity.

7. The Committee adopts the opinion and conclusions of the Ombudsman, Marshall Lux, in his Memorandum to Senator Steve Lathrop dated December 5, 2014. This Memorandum is found in the Appendix. The insights of the Ombudsman concerning the Department of Correctional Services are particularly well thought out through and, in the judgment of the Committee, provide particularly good insight into the culture problems that exist at NDCS. The Committee would also adopt the recommendations of the Ombudsman in his Memorandum specifically related to the following:

- The LR 424 Committee mandate be renewed in the next Legislative session.
- Take steps necessary to ensure the Parole Board is independent of the Department of Correctional Services to include physically removing them from the same office space as the Department of Correctional Services and providing them with their own attorney.

- Allowing the Parole Board the role of developing standards for all reentry programming going forward.
- That all regulations from NDCS be examined and all regulations not promulgated in compliance with the Administrative Procedures Act be abandoned. Furthermore, a clarification of the APA to ensure that any regulations of the rights and interests of inmates are regarded as "private rights" and "private interests" under the Administrative Procedures Act".
- That the Reentry Furlough Program be abandoned and if it is to be established, that it be established through the legislative process.
- That the State should move forward a proposal to establish a free standing mental health facility for mentally ill NDCS inmates at the Hastings Regional Center.
- The State of Nebraska should consider the privatization of mental health care inside NDCS.
- This Committee share what it has learned regarding mental health treatment with the Health and Human Services Committee.
- The State should consider developing a computer program to calculate inmate sentences, their parole-eligibility date, and their tentative release date.

- The Legislature should set standards for which inmates can be placed in Administrative Segregation and, perhaps, the length of time they can remain in Administrative Segregation.
- The Legislature should also require that NDCS provide meaningful mental health services to inmates in Administrative Segregation as well as adequate programming resources.
- The NDCS should be provided more in the way of programming resources so that all programming is offered in all institutions.
- The Legislature should pass legislation permitting the Ombudsman's office direct access to NI-CAM system (the NDCS computerized record system).
- Establish a permanent committee to serve as an oversight body for the Department of Correctional Services and for correctional issues.

8. The Committee endorses the remarks of Governor-elect Ricketts regarding the need to conduct a nationwide search for the next Director of Correctional Services. The Committee believes that the next Director of Corrections should be a "reform minded" individual committed to carrying out not only the recommendations of this Committee, but the recommendations of the CSG working group and such reforms as may be necessary to overhaul the state's use of segregated confinement. The Committee believes the Governor-elect should scrutinize each individual who works in the central office at the Department of Correctional Services,

those who work in the area of behavioral health and each warden at a correctional facility, to determine his/her qualifications to continue in that capacity.

9. The Committee recommends that the political branches of government undertake a reform of the State's use of segregation. Such reform should begin by with an evaluation of the mentally ill and cognitively impaired individuals confined to segregation. The State should commit to a significant reduction in the use of segregated confinement, beginning with removing the mentally ill and the cognitively impaired. While the Committee heard testimony about the Colorado experience with reform of segregated confinement, it is difficult to lay out a step by step process. That said, the Committee strongly urges that reforms be undertaken to significantly reduce the State's reliance on segregated confinement and to provide, for those who must be in segregated confinement, mental health care as their circumstances may require. Such mental health care should include allowing inmates to have private conversations with mental health professionals on a regular basis, aligning inmate to licensed mental health staff member ratios with an appropriate standard of care and requiring that all mental health professionals utilize evidenced based therapy models that include an evaluation component to track the effectiveness of interventions.

10. The Committee also recommends that additional resources be devoted to mental health care and adequate programming. Mental health services and programming should be made appropriately available across facilities and to individuals in protective custody. Mental health care and programming should be evidence based. Specifically,

the availability of violence reduction programming should be expanded. Clearly, these are two areas that have been sacrificed to cost-saving measures. It is the Committee's opinion that providing rehabilitation for inmates through programming and mental health treatment is critical to public safety inasmuch as 97% of the inmates will be returned to the community upon completion of their sentence. Additional resources should be invested in community based mental health both in terms of access to mental health treatment that can prevent entry into the correctional system and in terms of the availability of community based mental health for inmates upon re-entry.

11. The Committee recommends that the NDCS issue a quarterly report to the Judiciary Committee of the Nebraska Legislature that reports how many inmates are in each type of confinement, including enumerating the number of inmates with any type of mental illness and their diagnosis who are housed in segregation and the number of inmates released directly to parole or the general public directly from segregation, not including protective custody.

12. The Committee recommends that the NDCS present to the Governor and the Nebraska Legislature, a long-term plan for the usage of segregation. The plan should include better oversight from outside of NDCS, and explicit plans for reduced usage.

13. The Committee recommends that a separate facility or portion of a facility be established for those inmates in long-term protective custody who are not being separated from others in

protective custody. This facility should operate as closely to a general population facility as is practical, and all major programing, especially for sex offenders, be available in this facility.

14. The Committee recommends that inmates not be released directly from segregation (not including protective custody) to the general public under nearly any circumstance, with the possible exception of an inmate that has been exonerated and released. The Committee recommends that transition plans be established for inmates who are housed in any type of segregation (other than protective custody), and are nearing their mandatory release date. Such transition planning must be meaningful and re-establish socialization for those inmates.

15. The Committee recommends that the discharge review team at NDCS should develop a clear and transparent process to review inmates who are mentally ill, sex offenders, violent offenders, and other inmates who pose significant risk to the public safety to ensure adequate programming has been provided, that the opinions of multiple mental health practitioners have been considered, and to assess for possible referral to the Mental Health Board for commitment if appropriate.

16. The Committee recommends that the Legislature examine whether the definition of "mentally ill" as used in the Nebraska Mental Health Commitment Act warrants an amendment to comport with current diagnostic practices.

[END OF SELECTION]