

**DEPARTMENT OF CORRECTIONAL SERVICES  
SPECIAL INVESTIGATIVE COMMITTEE**

**(LR 424 - 2014)**

**REPORT TO THE LEGISLATURE**

**December 15, 2014**

**Committee Members**

Senator Steve Lathrop, District 12, Chair.....	Omaha
Senator Les Seiler, District 33, Vice-Chair.....	Hastings
Senator Ernie Chambers, District 11.....	Omaha
Senator Heath Mello, District 5.....	Omaha
Senator Bob Krist, District 10.....	Omaha
Senator Paul Schumacher, District 22.....	Columbus
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*“Ignorance of the law excuses no man: Not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to refute him.”*

*John Selden*  
*English antiquarian & jurist (1584 - 1654)*

## 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<sup>1</sup> 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..."<sup>2</sup>

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 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.<sup>3</sup>

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<sup>1</sup> For further explanation on segregated housing at NDCS, see page 24

<sup>2</sup> Exhibit D at 14

<sup>3</sup> Exhibit D at 10-12

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 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.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup>

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.

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<sup>4</sup>Exhibit A at 1

<sup>5</sup> 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)

<sup>6</sup>Exhibit P at 30-56

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.<sup>7</sup> 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.

### 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

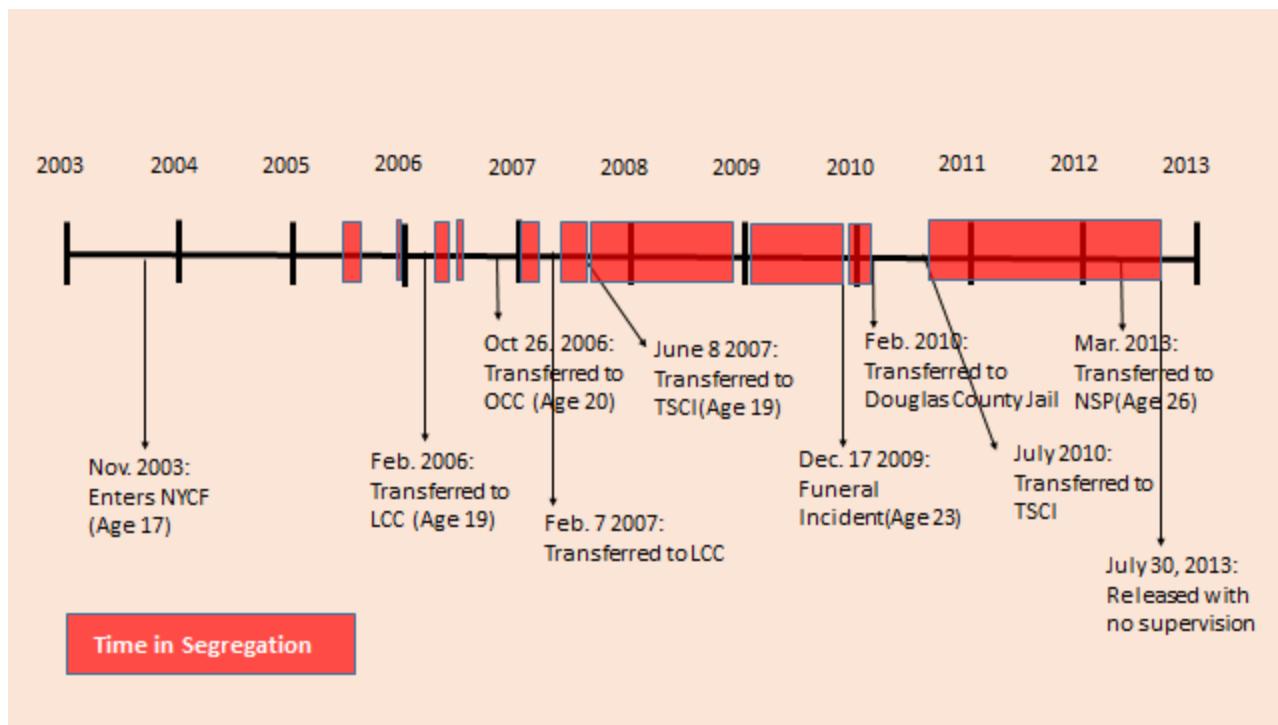
**DCJ:** Douglas County Jail

**OCC:** Omaha Correctional Center

**TSCI:** Tecumseh State Correctional Institute

**NSP:** Nebraska State Penitentiary

<sup>7</sup> Exhibit A at 5



### 3. Good Time Lost

Jenkins' total sentence range was 18 to 21 years. Such a sentence range would have provided Jenkins with  $10\frac{1}{2}$  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  $17\frac{1}{2}$  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  $108\frac{1}{2}$  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.<sup>8</sup> 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.<sup>9</sup> Jenkins complained of auditory hallucinations and expressed a desire for help.<sup>10</sup> Dr. Baker believed Jenkins was paranoid.<sup>11</sup> 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.<sup>12</sup> Dr. Baker also wanted a Mental Illness Review Team (MIRT) evaluation.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> The medication appeared to have a positive effect, which supported Dr. Baker's diagnosis, a diagnosis that Dr. Baker did not change.<sup>16</sup> Dr. Baker increased Jenkins' medication for Risperdal and continued the prescription for Depakote.<sup>17</sup>

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 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.<sup>18</sup>

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.

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<sup>8</sup> Exhibit D at 11

<sup>9</sup> Exhibit K at 18-19

<sup>10</sup> Exhibit D at 109-110, 116-117 and Exhibit K at 18-19

<sup>11</sup> Exhibit D at 111

<sup>12</sup> Exhibit D at 299-300 & 410

<sup>13</sup> Exhibit D at 117

<sup>14</sup> Exhibit D at 120

<sup>15</sup> Exhibit D at 120-123

<sup>16</sup> Exhibit D at 120-123

<sup>17</sup> Exhibit D at 122 and Exhibit K at 24-25

<sup>18</sup> Exhibit D at 7-23

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.<sup>19</sup>

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.”<sup>20</sup> 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 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.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup>

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.<sup>24</sup>

Meanwhile, Dr. Baker continued to meet with Jenkins until his transfer to NSP. Dr. Baker’s diagnosis remained unchanged despite MIRT’s findings.<sup>25</sup> 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.

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<sup>19</sup> Exhibit D at 20-27

<sup>20</sup> Exhibit D at 92

<sup>21</sup> Exhibit D at 66-96

<sup>22</sup> Exhibit D at 81-83

<sup>23</sup> Exhibit K at 64

<sup>24</sup> Exhibit L 103-115

<sup>25</sup> Exhibit D at 136

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.<sup>26</sup>

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 staff. Dr. Baker's notes are also remarkable for the fact that she once again makes specific findings necessary to support a civil commitment.<sup>27</sup>

Dr. Baker's notes from the February 4, 2013, evaluation would ultimately be withheld by Dr. Mark Weilage<sup>28</sup> 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."<sup>29</sup> 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."<sup>30</sup> He had reported to medical staff that he intended to "eat the hearts of women, men and children" upon his release.<sup>31</sup> 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."<sup>32</sup> Custody staff were reporting that he was not sleeping. He was also observed to be compulsively exercising while naked. Staff also reported that he was loud and agitated and verbally threatening others.<sup>33</sup>

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."<sup>34</sup> He also described night terrors "where he will sacrifice people and dreams of cannibalism."<sup>35</sup> 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

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<sup>26</sup> Exhibit D at 144-146 and Exhibit L at 174

<sup>27</sup> Exhibit L at 175-177

<sup>28</sup> Dr. Mark Weilage is a psychologist and Assistant Behavioral Health Administrator at NDCS.

<sup>29</sup> Exhibit L at 175

<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Ibid

<sup>33</sup> Exhibit L at 175-177

<sup>34</sup> Ibid

<sup>35</sup> Ibid

Probable PTSD  
Patient with strong anti-social and narcissistic traits  
Relational problems NOS  
Polysubstance dependence (Cannabis; “WET,” alcohol)  
Adjustment Disorder <sup>36</sup>

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.<sup>37</sup>

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.”<sup>38</sup> She also suggested a second opinion evaluation by a psychiatric nurse or psychiatrist.<sup>39</sup> 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.<sup>40</sup>

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

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<sup>36</sup> Exhibit L at 176

<sup>37</sup> Exhibit L at 176-177

<sup>38</sup> Exhibit L at 177

<sup>39</sup> Exhibit L at 175-177

<sup>40</sup> Exhibit L at 221

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.”<sup>41</sup>

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.”<sup>42</sup> 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.<sup>43</sup>

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 clarify diagnostic picture.<sup>44</sup>

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:

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<sup>41</sup> Ibid

<sup>42</sup> Exhibit L at 222

<sup>43</sup> Exhibit L at 223

<sup>44</sup> Exhibit L at 224

Timeline:<sup>45</sup>

- 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.”<sup>46</sup>
- 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.”<sup>47</sup>
- February 9, 2009: Jenkins stated that segregation was making him worse.
- 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

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<sup>45</sup> See Exhibits K and L for documents detailing the timeline events

<sup>46</sup> Exhibit K at 3

<sup>47</sup> Exhibit K at 7

"the public always asks, what could have been done." He requested help for rehabilitation and that the "hole" was not the answer.<sup>48</sup>

- 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.
- 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.

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<sup>48</sup> Exhibit K at 20-21

- 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 ½ 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.”<sup>49</sup> 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.

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<sup>49</sup> 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.<sup>50</sup>
- May 7, 2013: Jenkins requested mental health treatment. He stated he will bring death and destruction.
- 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.<sup>51</sup> 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.<sup>52</sup>

### 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

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<sup>50</sup> Exhibit L at 230

<sup>51</sup> The Committee expresses concern that inmates seeking mental health treatment are denied assistance for purely technical reasons.

<sup>52</sup> Exhibit D at 218-219

to keep Jenkins in segregation where he was assured of receiving no programming 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.<sup>53</sup> 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.<sup>54</sup> In both instances, management at NDCS tapped Dr. Mark 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.<sup>55</sup>

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.<sup>56</sup> 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.<sup>57</sup>

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<sup>53</sup> The Committee acknowledges the efforts made by Richard Smith, Deputy Johnson County Attorney, to gather the information necessary to file a civil commitment.

<sup>54</sup> Exhibit L at 185-191

<sup>55</sup> Exhibit D at 210 & 216

<sup>56</sup> Exhibit L at 185

<sup>57</sup> 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.<sup>58</sup>

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.<sup>59</sup> This information was not provided to Smith. More importantly, Dr. Weilage was also aware of Dr. Baker's February 4, 2013, report.<sup>60</sup> Dr. Weilage never provided Dr. Baker's reports to Smith.<sup>61</sup> In testimony before the Committee, Dr. Weilage admitted that he withheld Baker's report.<sup>62</sup>

Dr. Cameron White testified that he was troubled that Dr. Weilage did not find a mental illness, especially considering Jenkins' behaviors.<sup>63</sup> 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.<sup>64</sup>

A similarly disturbing sequence of events unfolded in Dr. Weilage's dealings with the Ombudsman's office who requested a meeting for the purpose of discussing a transition plan for Jenkins and Nikko Jenkins' mental health status.<sup>65</sup> 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."<sup>66</sup> 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 why Dr. Weilage did not share the report.<sup>67</sup>

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<sup>58</sup> Exhibit L at 255

<sup>59</sup> Exhibit D at 203 & 212-214

<sup>60</sup> Exhibit D at 212 & 215

<sup>61</sup> Exhibit D at 220

<sup>62</sup> Exhibit D at 312

<sup>63</sup> Exhibit D at 397

<sup>64</sup> Exhibit D at 344-346

<sup>65</sup> Exhibit L at 185-190

<sup>66</sup> Exhibit E at 16

<sup>67</sup> Exhibit D at 240-242, 312, 357 & 367 and Exhibit E at 14, 15-19, 22, 92, 98 & 103

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.<sup>68</sup>

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.<sup>69</sup>

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 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.

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<sup>68</sup> Exhibit E at 23

<sup>69</sup> Exhibit D at 312 & 356-357

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.<sup>70</sup> 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.<sup>71</sup> 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 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<sup>72</sup>. 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."

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<sup>70</sup> Exhibit E at 171

<sup>71</sup> Exhibit A at 15

<sup>72</sup> Exhibit P at 57

It is important to note that although the public and inmates often refer to “solitary confinement,” 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.”<sup>73</sup>

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.<sup>74</sup> 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 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.”<sup>75</sup>

### 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.

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<sup>73</sup> Exhibit R at 11-12

<sup>74</sup> Exhibit P at 62-63

<sup>75</sup> Exhibit P at 77-83

NDCS regulations identify five categories of special management inmates: 1) Disciplinary Segregation; 2) Death Row; 3) Court-Imposed Segregation; 4) Immediate Segregation; and 5) Administrative Segregation, which includes four subgroups (*see table below*).

### Categories of Special Management Inmates

Types of Segregation for Special Management Inmates	
<b>Disciplinary Segregation</b>	Temporary separation from the general population due to violation of institution rules.
<b>Death Row</b>	Separation of inmates from the general population due to a sentence of death.
<b>Court-Imposed Segregation</b>	Temporary separation from the general population as ordered by a court; usually no longer than 48 hours.
<b>Immediate Segregation</b>	Temporary separation from the general population pending another event, e.g., investigation of a conduct violation, misconduct hearing, classification hearing, inmate safety, etc.
<b>Administrative Segregation (AS)</b>	<p>1) <b>Administrative Confinement (AC)</b> Inmates separated from the general population because they are considered a threat to other inmates and/or staff.</p> <p>2) <b>Intensive Management (IM)</b> Most restrictive status, for inmates considered to be an immediate threat to other inmates and staff.</p> <p>3) <b>Protective Custody (PC)</b> Confinement of an inmate for an indefinite period of time to protect the inmate from real or perceived threat of harm by others.</p> <p>4) <b>Transition Confinement</b> Confinement of an inmate in a structured transition program.</p>

Source: AR 201.05, AR 210.01 and DCS staff.<sup>76</sup>

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.<sup>77</sup>

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 least every four months

<sup>76</sup> Exhibit R at 12

<sup>77</sup> Exhibit B at 71-72

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.

<b>Total number of inmates in Restrictive housing on November 17, 2014</b>	<b>629</b>
<b>Administrative Confinement (AC)</b>	<b>153</b>
<b>Immediate Segregation (IS)</b>	<b>118</b>
<b>Disciplinary Segregation (DS)</b>	<b>91</b>
<b>Protective Custody (PC)</b>	<b>310</b>
<b>Death Row (DR)</b>	<b>11</b>
<b>Intensive Management (IM)</b>	<b>4</b>

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 ½ 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.”<sup>78</sup>

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 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.”<sup>79</sup> 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

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<sup>78</sup> Exhibit B at 77

<sup>79</sup> Exhibit G at 86

isolated long term from all other prisoners.

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."<sup>80</sup>

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 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.<sup>81</sup> 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.<sup>82</sup>

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 of the Department of Correctional Services, Tom Clement, in Colorado who was murdered on his own front porch by an inmate

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<sup>80</sup> Exhibit G at 92-93 and 83-113 for Ms. Wallace's entire testimony

<sup>81</sup> Exhibit P at 142 & 152

<sup>82</sup> Exhibit G at 57, 59-61 & 69-71

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.<sup>83</sup> 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 chance to return to the general population.<sup>84</sup>

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<sup>83</sup> See Exhibit R

<sup>84</sup> Exhibit G at 83-113 for Rebecca Wallace's testimony

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 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..."<sup>85</sup> 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.

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

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<sup>85</sup> Exhibit G at 5

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.<sup>86</sup> 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."<sup>87</sup> The state now finds itself without the promised 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.<sup>88</sup>

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.<sup>89</sup> Mentally ill inmates account for 10 to 15% of TCSI's segregation population, yet no meaningful mental health treatment is provided.<sup>90</sup> The segregation environment itself can cause a mentally ill inmate to decompensate and a psychotic illness to emerge in a healthy inmate.<sup>91</sup> Mentally ill inmates may lose touch with reality, engage in self-injury, eat their own flesh and attempt to commit suicide.<sup>92</sup> Healthy inmates can experience a hypersensitivity to stimuli, hallucinations, revenge fantasies, rage, anger, depression, apathy, suicide and/or suicide attempts, and self-mutilation.<sup>93</sup>

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.<sup>94</sup> The result is predictable. 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.

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<sup>86</sup> Exhibit G at 9

<sup>87</sup> Exhibit G at 20

<sup>88</sup> Exhibit G at 2-53 for William Spaulding's testimony

<sup>89</sup> Exhibit G at 86-89

<sup>90</sup> Exhibit G at 58-59

<sup>91</sup> Exhibit G at 67 & 71

<sup>92</sup> Exhibit G at 91

<sup>93</sup> Exhibit G at 90

<sup>94</sup> Exhibit G at 64

Dr. Miller suggested that a lack of programming played a role in the inadequacy of mental health care.<sup>95</sup> 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 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.

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<sup>95</sup> Exhibit G at 54-82 for Dr. Stacey Miller's testimony

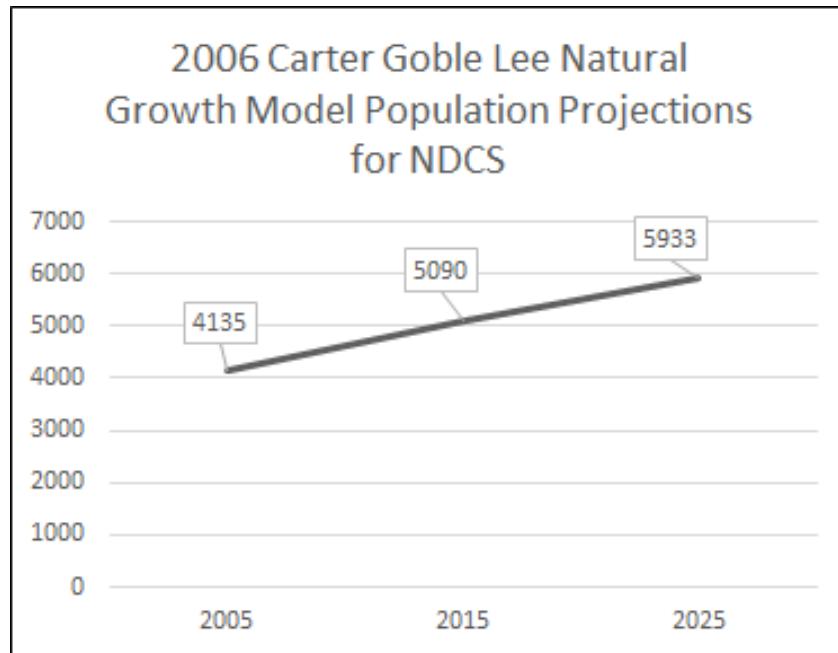
## OVERCROWDING

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:



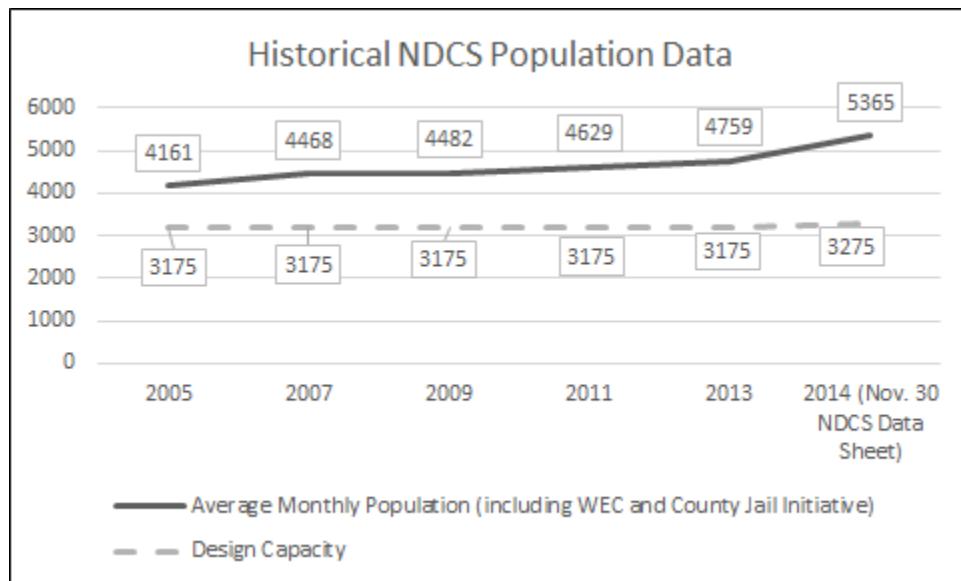
The projections and the recommendations of the Carter Goble Lee report included the following observation in the July 2006 draft regarding the importance of developing additional capacity:

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.<sup>96</sup>

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.

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<sup>96</sup> Exhibit N at 20



The recommendations of the Carter Goble Lee report were presented to the Governor's office in 2006.<sup>97</sup> The Governor elected to not follow the 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.<sup>98</sup>

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.<sup>99</sup> 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

<sup>97</sup> 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 Lee report. (Exhibit F at 20-21)

<sup>98</sup> Exhibit P at 6-7

<sup>99</sup> Exhibit P at 1

housing unit at the Community Corrections Center-Lincoln (CCC-Lincoln), and a new 900 bed multiple custody facility. The total costs were approximately \$150 million.<sup>100</sup>

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 Services institutions in a shorter time span. The "Low Cost Options" involved minimal expenditures and band-aid approaches to deal with overcrowding.<sup>101</sup>

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."<sup>102</sup> 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 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.

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<sup>100</sup> Exhibit P at 2-5

<sup>101</sup> Exhibit N at 41-42

<sup>102</sup> Exhibit F at 43

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.<sup>103</sup>

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.<sup>104</sup>

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 compliance with their post-release treatment plan.<sup>105</sup>

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<sup>103</sup> Exhibit G at 120-124

<sup>104</sup> Exhibit G at 122

<sup>105</sup> Exhibit G at 146-147

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 assured the District Court Judges that the program would be available to “non-violent offenders” only.<sup>106</sup> In fact, the initial administrative regulations reflected this criteria.<sup>107</sup>

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.”<sup>108</sup> 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.<sup>109</sup>

During the period of time that violent offenders were excluded from the RFP program, no less than 162 inmates convicted of violent offenses that included murder, first degree assault, terroristic threats and the like were placed on the Reentry Furlough Program.<sup>110</sup>

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<sup>106</sup> Exhibit G at 150-153

<sup>107</sup> Exhibit N at 56A and 56B

<sup>108</sup> Exhibit N at 56A and 56B

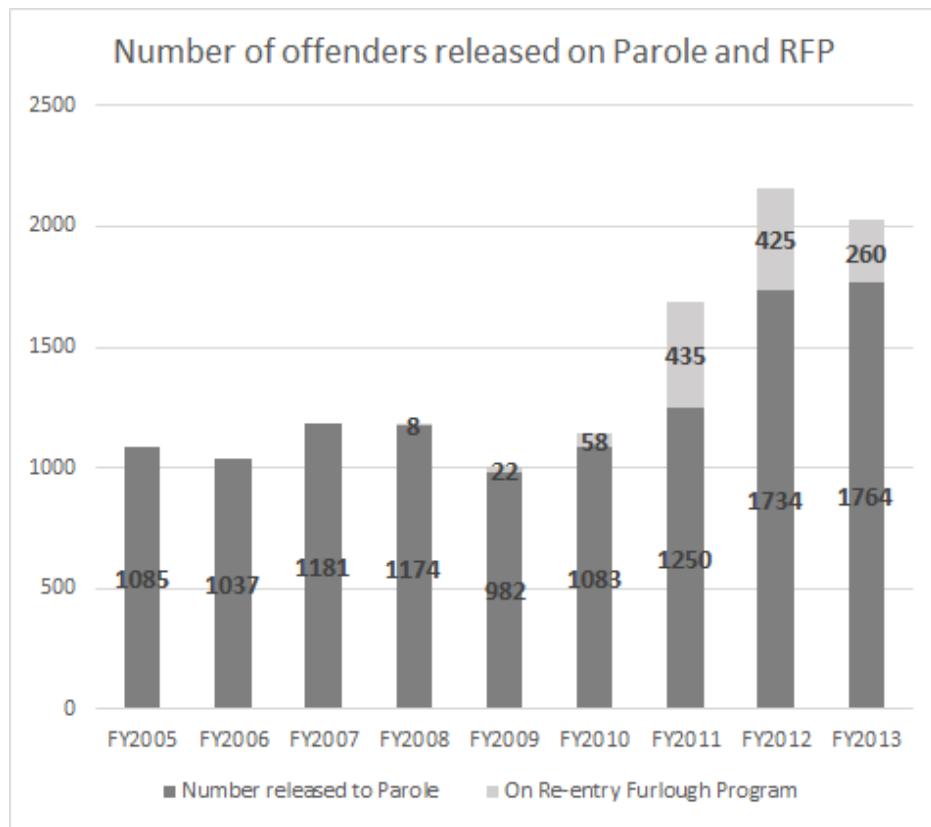
<sup>109</sup> Exhibit T at 30-31. After the Governor’s appearance before the Committee, an employee of the Department of Correctional Services presented to the Committee Chair a Director’s “Policy Directive” purportedly issued in 2010 which removed the exclusion of violent offenders from the RFP regulations. 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)

<sup>110</sup> Exhibit O at 56K-56N

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.



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.<sup>111</sup> She testified that this was done in an effort to alleviate overcrowding. Casmer testified that historically they

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<sup>111</sup> 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.”

had moved approximately 100 people per month through parole, and this quota would have significantly increased the number of people discharged to the community.<sup>112</sup>

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.”<sup>113</sup>

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 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.<sup>114</sup>

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.<sup>115</sup>

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.<sup>116</sup>

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 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.<sup>117</sup> The

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<sup>112</sup> Exhibit G at 132-135

<sup>113</sup> Exhibit G at 142

<sup>114</sup> Exhibit G at 132, 139-140

<sup>115</sup> Exhibit G at 148

<sup>116</sup> Exhibit G at 140

<sup>117</sup> 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

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.

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.<sup>118</sup>

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

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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)

<sup>118</sup> Exhibit F at 209

by society, to say you're going to start here with something of value and you determine whether you keep it or not.<sup>119</sup>

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 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.<sup>120</sup>

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.<sup>121</sup> 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."<sup>122</sup>

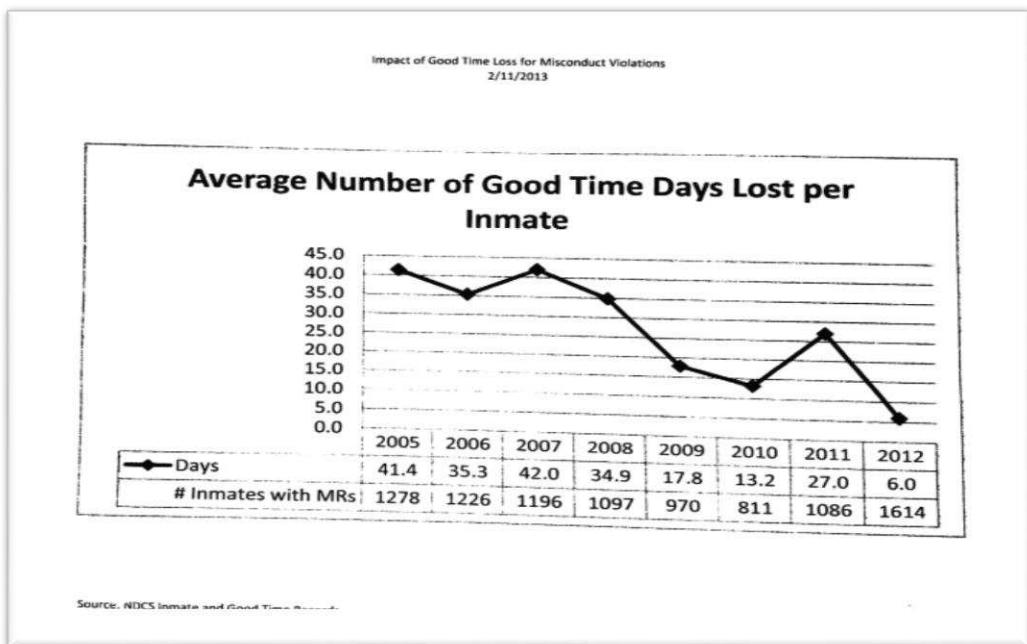
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<sup>119</sup> Ibid

<sup>120</sup> Exhibit B at 162

<sup>121</sup> 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)

<sup>122</sup> Exhibit P at 124- 128



### Good Time Chart<sup>123</sup>

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.<sup>124</sup>

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 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.

<sup>123</sup> Exhibit Q at 172

<sup>124</sup> Exhibit O at 66

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.<sup>125</sup>

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.<sup>126</sup>

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."<sup>127</sup>

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 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."<sup>128</sup>

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

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<sup>125</sup> Exhibit P at 8

<sup>126</sup> Exhibit P at 9-12

<sup>127</sup> Exhibit P at 26

<sup>128</sup> Exhibit P at 21-22

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.”<sup>129</sup>

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 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.”<sup>130</sup>

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.<sup>131</sup>

### [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 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.

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<sup>129</sup> Exhibit C at 155-157

<sup>130</sup> Exhibit P at 23

<sup>131</sup> Exhibit P at 24-25

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.<sup>132</sup>

The opinion from the Attorney General's office was followed by a memorandum authored by Ron Riethmuller, former NDCS Records Administrator. 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.<sup>133</sup>

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 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.<sup>134</sup>

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<sup>132</sup> Exhibit I at 1-3

<sup>133</sup> Exhibit I at 4

<sup>134</sup> Exhibit C at 16

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 method was in accordance with the opinion.<sup>135</sup> 11:48 AM, Douglass responded that the Court was correct regarding PED calculation, but incorrect regarding TRD.<sup>136</sup> 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?"<sup>137</sup> 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?"<sup>138</sup> 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.<sup>139</sup> 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 we must."<sup>140</sup>

Willard testified that she did not agree with Douglass to continue NDCS' practice.<sup>141</sup> 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*.<sup>142</sup> 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."<sup>143</sup>

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."<sup>144</sup> On February 19, 2013, Douglass forwarded

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<sup>135</sup> Exhibit J at 142

<sup>136</sup> Exhibit J at 141

<sup>137</sup> Ibid

<sup>138</sup> Ibid

<sup>139</sup> Exhibit J at 160

<sup>140</sup> Exhibit J at 140-162

<sup>141</sup> Exhibit C at 31

<sup>142</sup> Exhibit C at 31-32, 48, 379 & 381

<sup>143</sup> Exhibit C at 33-36

<sup>144</sup> Exhibit J at 164

Poppert's email to Mickie Baum, Records Manager, with the comment "thought you might get a kick out of this email from KP. Specially the last sentence!!!"<sup>145</sup>

February 19, 2013, John Freudenberg with the Attorney General's office, emailed the *Castillas* case to Kathy Blum, NDCS legal counsel.<sup>146</sup>

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.<sup>147</sup>

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."<sup>148</sup>

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 responded that the calculation was correct.<sup>149</sup> 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."<sup>150</sup>

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.<sup>151</sup> This is what started the paper's investigation.

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<sup>145</sup> Ibid

<sup>146</sup> Exhibit J at 165

<sup>147</sup> Exhibit J at 167-169

<sup>148</sup> Exhibit J at 170-171

<sup>149</sup> Exhibit J at 173-174

<sup>150</sup> Exhibit J at 175-178

<sup>151</sup> Exhibit J at 179-181

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.<sup>152</sup>

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.<sup>153</sup> "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."<sup>154</sup> 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*. 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."<sup>155</sup> 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."<sup>156</sup>

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.<sup>157</sup> He did not read *Castillas* when Douglass attached it to an email on the same day it was released.<sup>158</sup> 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.<sup>159</sup> Green continued his ignorance even after a October 31, 2013, sentencing review committee meeting, where *Castillas* was discussed.<sup>160</sup> Perhaps most troubling, Green admitted that he only decided to take the time to review *Castillas* after the June 2014, Omaha World Herald story.<sup>161</sup> Clearly, Green failed in his duties as NDCS legal counsel.

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<sup>152</sup> Exhibit P at 109-113

<sup>153</sup> Exhibit S at 4, 5 & 8

<sup>154</sup> Exhibit S at 8

<sup>155</sup> Exhibit S at 4

<sup>156</sup> Exhibit S at 9

<sup>157</sup> Exhibit C at 443

<sup>158</sup> Exhibit C at 443-444

<sup>159</sup> Exhibit C at 457

<sup>160</sup> Exhibit C at 460

<sup>161</sup> Exhibit C at 454-455

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.<sup>162</sup> Larry Wayne, by contrast, testified that Poppert did not inform him of the *Castillas* opinion.<sup>163</sup> 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.<sup>164</sup> 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.

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."<sup>165</sup>

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 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

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<sup>162</sup> Exhibit C at 206

<sup>163</sup> Exhibit E at 84-86

<sup>164</sup> Exhibit E at 84-86

<sup>165</sup> Exhibit P at 121

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..."<sup>166</sup>

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, 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."<sup>167</sup>

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 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

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<sup>166</sup> Ibid

<sup>167</sup> Exhibit P at 16-17

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.<sup>168</sup>

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.<sup>169</sup> 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).<sup>170</sup> 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.”

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.<sup>171</sup> 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 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.

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<sup>168</sup> Exhibit P at 114-123

<sup>169</sup> Exhibit P at 28-29

<sup>170</sup> Exhibit E at 236 and Exhibit P at 28-29

<sup>171</sup> Exhibit P at 114-123

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.<sup>172</sup> 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 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.”<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup> 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.”<sup>176</sup>

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.

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<sup>172</sup> Exhibit P at 28-29

<sup>173</sup> Exhibit E at 246

<sup>174</sup> Exhibit E at 240

<sup>175</sup> Exhibit O at 110-112

<sup>176</sup> Exhibit E at 249

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.<sup>177</sup>

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, the governor may declare an emergency when the “population is over 140% of design capacity.”<sup>178</sup> Once an emergency is declared the Parole Board must then parole all suitable candidates until the “population is at operational capacity.”<sup>179</sup> This process, of course, is transparent and the Governor’s involvement quite obvious.

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<sup>177</sup> Exhibit C at 165

<sup>178</sup> *Neb. Rev. Stat.* §83-962 (Reissue 2014)

<sup>179</sup> *Ibid*

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.

## 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 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 programming, 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.

## **ACKNOWLEDGMENT**

The Committee wishes to thank all of those who testified and otherwise offered their expertise and shared their experiences. The Committee recognizes that many of these witnesses were compelled to testify through the subpoena process. Nevertheless, the contribution of each witness to the process has been critical to the Committee's understanding of the issues addressed during the course of the investigation as well as the development of recommendations.

The Committee also wishes to acknowledge and express its appreciation to Molly Burton, Doug Koebernick and Dan Jenkins who spent countless hours reviewing tens of thousands of pages of documents and preparing the Committee for each hearing. Their work in writing this report has been invaluable as well.

At times throughout the investigation, legislative staff from other Senator's office helped when the lifting got particularly heavy. The Committee is grateful for their willingness to go above and beyond.

Finally, the Committee is indebted to its thoughtful legal counsel, Sean Brennan. Mr. Brennan has provided solid advice to the Committee and represented the Committee well in proceedings before the Lancaster County District Court.

## **APPENDICES**

### **APPENDIX ONE**

- Legislative Resolution 424

### **APPENDIX TWO**

- Exhibit A: Ombudsman's Nikko Jenkins Report
- Exhibit B: Documents Presented to Testifiers at August 8, 2014, Hearing
- Exhibit C: August 8, 2014, Hearing Transcript
- Exhibit D: Documents Presented to Testifiers at September 4, 2014, Hearing
- Exhibit E: September 4, 2014, Hearing Transcript
- Exhibit F: Documents Presented to Testifiers at September 18, 2014, Hearing
- Exhibit G: September 18, 2014, Hearing Transcript
- Exhibit H: Documents Presented to Testifiers at October 10, 2014, Hearing
- Exhibit I: October 10, 2014, Hearing Transcript
- Exhibit J: Documents Presented to Testifiers at October 29, 2014, Hearing
- Exhibit K: October 29, 2014, Hearing Transcript
- Exhibit L: Documents Presented to Testifiers at November 25, 2014, Hearing
- Exhibit M: November 25, 2014, Hearing Transcript
- Exhibit N: Other Related Documents
- Exhibit O: Legislative Performance Audit Committee Report
- Exhibit P: Other Related Documents, Part I
- Exhibit Q: Other Related Documents, Part II
- Exhibit R: Legislative Performance Audit Committee Report
- Exhibit S: Department of Justice (NIC) Records Report
- Exhibit T: Reentry Furlough Program Administrative Regulations

### **APPENDIX THREE**

- Ombudsman's December 5, 2014, Memorandum
- Inmate Surveys, Attachment One
- Inmate Surveys, Attachment Two
- Inmate Surveys, Attachment Three
- Inmate Surveys, Attachment Four
- Inmate Surveys, Attachment Five
- Inmate Surveys, Attachment Six
- State of Colorado Segregation Report
- NDCS Commonly Used Acronym Table