APPENDIX

304 Neb. 753
Supreme Court of Nebraska.

STATE of Nebraska, appellee,
v.
Marco E. TORRES, Jr., appellant.

No. S-19-276.
|
Filed January 3, 2020

Synopsis
Background: Defendant, whose convictions for first-degree murder and robbery, and death sentence, were affirmed on appeal, 283 Neb. 142, 812 N.W.2d 213, filed a third motion for postconviction relief. The District Court, Hall County, James D. Livingston, J., denied relief and defendant appealed.

[Holding:] The Supreme Court, Miller-Lerman, J., held that legislature's repeal of death penalty was suspended before repeal took effect by the filing of a referendum petition appearing to have sufficient signatures and thus staying repeal, and thus referendum did not "reimpose" the death penalty upon defendant in violation of due process, did not constitute an unconstitutional bill of attainder, and did not constitute cruel and unusual punishment.

Affirmed.

Procedural Posture(s): Post-Conviction Review.

West Headnotes (3)

[1] **Criminal Law** ⇐ Review De Novo

In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.

[2] **Criminal Law** ⇐ Interlocutory, Collateral, and Supplementary Proceedings and Questions

Appeals of postconviction proceedings will be reviewed independently if they involve a question of law.

[3] **Constitutional Law** ⇐ Sentencing and punishment; imprisonment
Constitutional Law ⇐ Capital Punishment; Death Penalty
Sentencing and Punishment ⇐ Provision authorizing death penalty

Legislature's repeal of death penalty was suspended before repeal took effect by the filing of a referendum petition appearing to have sufficient signatures and thus staying repeal, and therefore referendum did not "reimpose" the death penalty upon defendant in violation of due process, did not constitute an unconstitutional bill of attainder, and did

not constitute cruel and unusual punishment; the repeal was suspended, and thus there was no change in defendant's original death sentence for committing two counts of first-degree murder. U.S. Const. Amends. 8, 14.

Syllabus by the Court

*753 1. **Postconviction: Constitutional Law: Appeal and Error.** In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief.

2. **Postconviction: Appeal and Error.** Appeals of postconviction proceedings will be reviewed independently if they involve a question of law.

Appeal from the District Court for Hall County: JAMES D. LIVINGSTON, Judge, Retired. Affirmed.

Attorneys and Law Firms

Marco E. Torres, Jr., pro se.

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

Heavican, C.J., Miller-Lerman, Cassel, Stacy, Funke, and Papik, JJ.

Miller-Lerman, J.

**731 NATURE OF CASE

Marco E. Torres, Jr., appeals from the order of the district court for Hall County which denied his third motion for postconviction relief without an evidentiary hearing. Torres asserts that the Legislature's statute providing for the repeal of the *754 death penalty, 2015 Neb. Laws, L.B. 268, went into effect, thereby changing his death sentence to life imprisonment. Torres further asserts that the rejection of L.B. 268 by public referendum reimposed a death sentence, that the referendum was constitutionally impermissible in a variety of ways, and that he was harmed thereby. We find no merit to Torres' claims and affirm the order of the district court.

STATEMENT OF FACTS

In 2009, a jury found Torres guilty of two counts of first degree murder and other felony offenses. He was sentenced to death for each of the murders and sentenced to prison terms for the other felonies. We affirmed his convictions and sentences on direct appeal. *State v. Torres*, 283 Neb. 142, 812 N.W.2d 213 (2012).

Torres first moved for postconviction relief in 2013, raising claims of prosecutorial misconduct and ineffective assistance of counsel. The district court denied postconviction relief after conducting an evidentiary hearing. We affirmed in *State v. Torres*, 295 Neb. 830, 894 N.W.2d 191 (2017).

In his second postconviction proceeding, filed on June 14, 2017, Torres claimed that his death sentences were unconstitutional under *Hurst v. Florida*, — U.S. —, 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016), and *Johnson v. U.S.*, — U.S. —, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). The district court found that Torres' motion for postconviction relief was time barred under the 1-year limitations period of Neb. Rev. Stat. § 29-3001(4) (Reissue 2016) and denied relief without conducting an evidentiary hearing. We affirmed in *State v. Torres*, 300 Neb. 694, 915 N.W.2d 596 (2018).

Torres filed a third postconviction proceeding on December 4, 2017. It is the denial of relief from the third postconviction action which gives rise to this appeal. In his third postconviction motion, Torres generally alleged that he was entitled to relief based on the proposition that L.B. 268 changed his sentence from the death penalty to life imprisonment and the 2016 ***755** public referendum which "reject[ed]" L.B. 268 changed it back to a death sentence. Neb. Const. art. III, § 3.

Torres specifically alleged that the referendum reimposed the death penalty on him and that such imposition was cruel and unusual punishment, violated due process, constituted an unconstitutional bill of attainder that targeted the individuals on death row, and violated separation of powers. The district court rejected Torres' claims based on the insufficiency of allegations in the motion and denied the third postconviction motion without an evidentiary hearing. Torres appeals.

ASSIGNMENTS OF ERROR

Torres contends, summarized and restated, that (1) the district court's analysis regarding the powers of the Legislature to enact sentencing laws was flawed and (2) the referendum process and result amounted to imposition of cruel and unusual punishment, violated due process, constituted an impermissible bill of attainder, and violated separation of powers.

Because our analysis differs from that of the district court and eclipses Torres' arguments regarding the powers of the Legislature to enact sentencing statutes, it is not necessary to consider Torres' first assignment of error.

****732** STANDARDS OF REVIEW

[1] [2] In appeals from postconviction proceedings, an appellate court reviews de novo a determination that the defendant failed to allege sufficient facts to demonstrate a violation of his or her constitutional rights or that the record and files affirmatively show that the defendant is entitled to no relief. *State v. Allen*, 301 Neb. 560, 919 N.W.2d 500 (2018). Appeals of postconviction proceedings will be reviewed independently if they involve a question of law. See *State v. Thieszen*, 295 Neb. 293, 887 N.W.2d 871 (2016).

ANALYSIS

As an initial matter, we recognize that the State has suggested that Torres' current postconviction motion is procedurally ***756** barred. Although there may be merit to this argument, as we recognized in *Sandoval v. Ricketts*, 302 Neb. 138, 922 N.W.2d 222 (2019), a postconviction action may be a suitable procedure to examine the claims that are central to this death penalty case, and we therefore proceed to consideration of the merits.

[3] We have reviewed Torres' motion for postconviction relief, and although our reasoning differs from that of the district court, we agree with the determination that Torres has failed to allege sufficient facts to demonstrate a violation of his constitutional rights. See *State v. Allen, supra*. The allegations assert that certain constitutional guarantees were violated; however, we have

recently considered and rejected at length the essential substance of each of Torres' allegations. See, *State v. Mata*, 304 Neb. 326, 934 N.W.2d 475 (2019); *State v. Jenkins*, 303 Neb. 676, 931 N.W.2d 851 (2019).

The principal but flawed premise for Torres' constitutional claims is that L.B. 268 went into effect, thereby changing his death sentence to life imprisonment, and that the successful referendum reimposed the death penalty. In *State v. Jenkins*, we concluded that "the filing of petitions on August 26, 2015—prior to the effective date of L.B. 268—suspended [L.B. 268's] operation until Nebraskans effectively rejected the bill by voting to repeal it.... L.B. 268 never went into effect...." 303 Neb. at 710-11, 931 N.W.2d at 879.

In *State v. Mata*, we described the process as follows:

> In May 2015, the Nebraska Legislature passed 2015 Neb. Laws, L.B. 268, which abolished the death penalty in Nebraska, and then overrode the Governor's veto of the bill. Within L.B. 268, the Legislature provided that "in any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment." The Legislature adjourned sine die on May 29. Because L.B. 268 did not contain an emergency clause, it was to take effect on August 30.
>
> *757 Following the passage of L.B. 268, opponents of the bill sponsored a referendum petition to repeal it. On August 26, 2015, the opponents filed with the Nebraska Secretary of State signatures of approximately 166,000 Nebraskans in support of the referendum. On October 16, the Secretary of State certified the validity of sufficient signatures. Enough signatures were verified to suspend the operation of L.B. 268 until the referendum was approved or rejected by the electors at the upcoming election. During the November 2016 election, the referendum passed and L.B. 268 was repealed, that is, in the language of the Constitution, the act of the Legislature was " 'reject[ed].' "

**733 304 Neb. at 331-32, 934 N.W.2d at 480. See, also, Neb. Const. art. III, § 3; *State v. Jenkins, supra*.

As we addressed in our analysis of comparable claims in *State v. Mata*, the essential substance of claims based on cruel and unusual punishment, due process, and bill of attainder which assert that L.B. 268 changed a death sentence to life imprisonment fails "because L.B. 268 was suspended and no such changes in his sentence occurred." 304 Neb. at 340, 934 N.W.2d at 485.

Torres contends that the anxiety created by the potential modification of a sentence is cruel and unusual punishment. However, we have concluded that such potential does not rise to an Eighth Amendment violation. See *State v. Mata, supra*. Accordingly, we reject this claim.

Torres also contends that his due process rights were violated when the successful referendum "reinstat[ed] the capital sentences *en masse*." Brief for appellant at 26. He claims he was denied the benefits of individualized sentencing. However, as we have explained, no resentencing occurred, and therefore this argument fails.

In a similar manner, Torres' assertion that the rejection of L.B. 268 by referendum was essentially a bill of attainder which was directed at him also fails. Torres specifically *758 claims that the "repeal of L.B. 268 by referendum sentenced ... Torres to death." Brief for appellant at 31. As we have explained, Torres' death sentence was not suspended and the imposition of the death penalty was not a direct consequence of the referendum.

Finally, to the extent that Torres' claim is based on a violation of separation of powers, we addressed and rejected this claim in *State v. Mata*, 304 Neb. 326, 343, 934 N.W.2d 475, 487 (2019), in which we concluded that the claim fails "because the result of the referendum is not invalidated even if such actions [of the Governor and other executive officers in the referendum process] were constitutionally improper." The remedy is not invalidation of the referendum, but instead removal from "the violating position." *Id.* at 344, 934 N.W.2d at 487.

APPENDIX A

CONCLUSION

We have reviewed de novo the district court's determination that Torres failed to allege sufficient facts that demonstrate a violation of his constitutional rights and find no error in this determination. Accordingly, we affirm the district court's order which denied postconviction relief.

AFFIRMED.

Freudenberg, J., not participating.

All Citations

304 Neb. 753, 936 N.W.2d 730

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APPENDIX A

IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA

STATE OF NEBRASKA,

Complainant,

vs.

MARCO ENRIQUE TORRES, JR.,

Defendant.

CASE NO. CR 07-202

JOURNAL ENTRY AND JUDGMENT

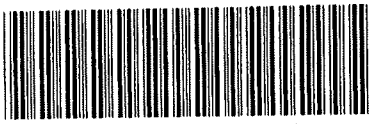
This matter comes on to be heard before the Court on a Postconviction Relief Motion filed December 4, 2017, by Defendant, pro se. The action was reassigned to this Judge in January 2019.

The Court, has the discretion to review the files and records existing before the Postconviction Motion was filed sua sponte to determine whether the Postconviction Action affirmatively shows, either on its face or in combination with files and records before the Court whether any substantial issues are raised before granting the full evidentiary hearing. State v. Dean, 264 Neb. 42. While review by the Court concerning whether an evidentiary hearing is required or not is not mandatory it is within the purview of the postconviction court to make a determination whether to hold an evidentiary hearing or not.

DISCUSSION

The entire Postconviction Action is based upon the Defendant's claim that his sentence of death on some of the charges he was convicted of was void by action of the Nebraska State Legislature in 2015 with the passage of what was referred to as LB 268 which abolished the death penalty and changed or commuted the sentences presently being served for punishment by death to life imprisonment without benefit of parole.

Sandoval, et al. v. Ricketts, et al., 302 Neb. 144, holds that an assertion that a sentence was void may be made pursuant to the Nebraska Postconviction Act §29-3001.



None of the claims in this Postconviction Action collaterally attack the Defendant's conviction and sentence by the trial court and affirmed by the Nebraska Supreme Court in 2012. State v. Torres, 283 Neb. 142. The entire basis of the Postconviction Action is that the death sentences of the Defendant were abolished and commuted by a legal action of the Nebraska Legislature in LB 268 and that the Referendum passed by the voters in 2016 repealing LB 268 was a resentence of the Defendant to death. Defendant argues various claims that his conclusions concerning the action of the Legislature and the Referendum vote violate the 8th and 14th Amendments to the United States Constitution and the Constitution of the State of Nebraska. The entire basis of the action, i.e. that LB 268 abolished the Defendant's death sentences and resentenced the Defendant to life imprisonment without benefit of parole is misplaced as to the legal and factual conclusions of Defendant's claims. The original death sentences handed down by the District Court (trial court) were never vacated. The Nebraska Constitution, Article II, §1separates the power of state government into three distinct departments and states affirmatively that none of the powers belonging to one department shall be subservient to powers belonging to the others. The power to sentence or resentence (commute) is entrusted to the Executive Department, i.e. The Board of Pardons, which consists of the Governor, the Attorney General and the Secretary of State who are granted the sole power to "...grant...commutations in all cases of conviction for offenses against the laws of the state..." Article IV, § 13, State v. Bainbridge, 249 Neb. 260.

The resentencing of the Defendant by the Legislature in LB 268 was constitutionally flawed at the time of its passage and in violation of Article II, § 1 and Article IV, § 13 of the Nebraska Constitution and did not, as Defendant concludes set aside the sentences of death by the district court and affirmed by the Nebraska Supreme Court. Torres, supra. The resentence of the Defendant and those in that class as set out in LB 268 by commuting prior valid sentences of death did not retroactively change the imposition of the death sentences of the Defendant. The constitutional power to sentence is not placed in the Legislature Bainbridge, supra, nor in the Nebraska

Supreme Court. State v. Reeves, 258 Neb. 511. Neither the action of the legislative branch of government as set forth in LB 268 nor the Referendum vote of the people of the State of Nebraska were effectual in commuting or resentencing the Defendant. Both of these legal theories upon which the Motion for Postconviction Relief is based are flawed both factually and legally. What Defendant may or may not have presumed that they meant to his individual sentences is mistakenly placed.

CONCLUSION

The Court finds that there are no substantial issues raised before the Court for granting a full evidentiary hearing as the original sentence by the trial court upon which Defendant wishes to challenge has no foundational or legal basis. While the legislative branch of government may classify certain crimes and penalties for violation of certain crimes in general the Legislature has no power and did not commute or resentence the Defendant by the passage of LB 268 nor can the voting citizens of the State of Nebraska by Referendum pronounce a commutation or a resentencing.

The Postconviction Motion filed by the Defendant is denied without evidentiary hearing. The Motion of the Defendant to appoint counsel is denied. Defendant's Motion to Proceed In Forma Pauperis is sustained.

BY THE COURT:

JAMES D. LIVINGSTON
DISTRICT JUDGE, RET.

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on March 4, 2019 , I served a copy of the foregoing document upon the following persons at the addresses given, by mailing by United States Mail, postage prepaid, or via E-mail:

Marco E Torres Jr
Inmate 67300, P.O. Box 900
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Martin R Klein
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DISTRICT COURT OFFICIAL Seal HALL COUNTY, NEBRASKA

Date: March 4, 2019 BY THE COURT: Valorie Bendfeldt
CLERK

IN THE DISTRICT COURT OF HALL COUNTY, NEBRASKA

STATE OF NEBRASKA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. CR 07-202**
	)	
MARCO E. TORRES, JR., *Pro Se*,	)	
	)	
Defendant.	)	

PRO SE MOTION FOR POST-CONVICTION RELIEF

Defendant Marco Torres, *Pro Se,* moves for post-conviction relief from his sentences of death based on constitutional violations related to the vacatur of his death sentence under Legis. B. 268, 140th Leg., 1st Sess. (Neb. 2015), its purported reinstatement through the referendum process, and the specific targeting of Defendant's execution in the reinstatement effort.

PROCEDURAL HISTORY

Mr. Torres was convicted by a death-qualified jury on August 27, 2009, of two counts first degree murder, three counts of the use of a deadly weapon in the commission of a felony, one count of robbery, and one count of unauthorized use of financial transaction device and was sentenced to death on January 29, 2010. Verdict of Jury, Counts I through VII. (Dir. App. Trans., Verdict of Jury Counts I-VII, Aug 27, 2009, pp.376-82); (Dir. App. Trans., Order of Sentence, Jan. 29, 2010, p.428).[1]

[1] Citations to the Transcript filed in the Direct Appeal are to the Certified Supplemental Transcript filed on March 16, 2010, at the Nebraska Supreme Court, *State v. Torres*, Case No. S-10-000111. Citations to the Transcript contain the

Mr. Torres appealed his conviction to the Nebraska Supreme Court, raising numerous grounds. On February 3, 2012, the Nebraska Supreme Court affirmed his convictions and sentences. *State v. Torres*, 812 N.W.2d 213 (Neb. 2012). Mr. Torres' conviction became final on October 1, 2012, when the United States Supreme Court denied his petition for a writ of certiorari. *Torres v. Nebraska*, 568 U.S. 871 (2012) (Mem).

Mr. Torres filed a *pro se* motion for post-conviction relief in the District Court of Hall County, Nebraska, on May 28, 2013. He later filed counseled amended and second amended motions for post-conviction relief. (P.C. Trans., Verified Motion for Post-Conviction Relief, May 28, 2013, pp.4-13; Amended Motion for Post-Conviction Relief, Sept. 16, 2013, pp.40-42; Stipulation Re Amended Pleading and Second Amended Motion for Post-Conviction Relief, Nov. 6, 2014, pp.58-63; Second Amended Motion for Post-Conviction Relief, Nov. 13, 2015, pp.72-78). He raised the following issues: Ineffective assistance of counsel at the guilt phase; ineffective assistance of counsel at the sentencing phase, ineffective assistance of sentencing counsel for failure to obtain the services of a mitigation specialist, prosecutorial

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reference to the proceeding, the title of the document, the date filed, and beginning page number. Abbreviations are as follows: "Dir. App. Trans." is the Direct Appeal Transcript; "P.C. Trans." is the Post-Conviction Transcript filed on March 15, 2016, at the Nebraska Supreme Court, *State v. Torres*, Case No S-16-000269. Citations to the Bill of Exceptions contain the reference to the volume number or Exhibit Folder, and the cited page numbers or applicable exhibit number. Abbreviations are as follows: "BOE" is the Bill of Exceptions; "Vol." is volume. Citations to BOE Exhibit Folders will reference the applicable exhibit number ("Ex.") and any applicable page number.

misconduct, and claims based upon *Brady v. Maryland*, 373 U.S. 83 (1963). (P.C. Trans., Verified Motion for Post-Conviction Relief, May 28, 2013, pp.5-10; Amended Motion for Post-Conviction Relief, Sept. 16, 2013, pp.40-41; Stipulation Re Amended Pleading and Second Amended Motion for Post-Conviction Relief, Nov. 6, 2014, pp.59-61; Second Amended Motion for Post-Conviction Relief, Nov. 13, 2015, pp.72-74). On February 17, 2016, the Hall County District Court entered an order denying Mr. Torres' motion for post-conviction relief. Mr. Torres appealed the court's denial of post-conviction relief and on February 17, 2017, the Nebraska Supreme Court affirmed the denial of relief. *State v. Torres*, 894 N.W.2d 191 (Neb. 2017).

On June 14, 2017, Mr. Torres filed a *pro se* motion for post-conviction relief in Hall County District Court, *Nebraska v. Torres*, Case No. CR 07-202, arguing his death sentences are unconstitutional in light of recently announced Supreme Court precedent. *See Hurst v. Florida*, 136 S. Ct. 616 (2016) (holding the United States Constitution requires the jury to find every fact necessary to impose death beyond a reasonable doubt and also requires a jury to make the ultimate determination to impose death); *See also Johnson v. United States,* 135 S. Ct. 2551 (2015) (holding that enhancing a sentence based upon vaguely defined prior conduct violates the United States Constitution.) The Hall County District Court entered an order on June 28, 2017, denying Mr. Torres' motion for post-conviction relief. (2nd P.C.

Trans[2]., Journal Entry, June 28, 2017, pp. 57-59). Mr. Torres appealed the court's denial of post-conviction relief and his appeal is currently pending before the Nebraska Supreme Court[3]. *See State v. Torres*, Case No. CR 17-740 (Neb., filed July 21, 2017).

REFERENDUM BACKGROUND

On May 20, 2015, the Nebraska legislature passed Legislative Bill 268 that abolished the death penalty in Nebraska and provided that the sentences of those already on death row would be changed to a sentence of life imprisonment. Legis. B. 268, 140th Leg., 1st Sess. (Neb. 2015). On May 26, 2015, the Nebraska Governor vetoed the act. On May 27, 2015, the Nebraska Legislature overrode the Nebraska Governor's veto to enact Neb. Legis. B. 268. The legislation was set to formally go into effect after three months, on August 30, 2015. *See* Neb. Const. art III, §27.

During this same time period, in response to the passage of Neb. Legis. B. 268, death penalty supporters, led by the Nebraska Governor and a campaign named Nebraskans for the Death Penalty, collected signatures for a public referendum, "Referendum 426," that would let voters decide to accept or reject the legislation. On December 7, 2015, the Nebraska Governor announced that the

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[2] The Post-conviction transcript for Nebraska Supreme Court Case No. CR 17-740 was filed on August 7, 2017, and is referred to hereinafter as "2nd P.C. Trans.". The page numbers referenced are the page numbers of the 2nd P.C. Transcript wherein the referenced documents are located.

[3] Attorney Jeffrey A. Pickens of the Commission on Public Advocacy was appointed on August 24, 2017, by the Nebraska Supreme Court to represent Mr. Torres in his appeal of the Hall County District Court's denial of post-conviction relief. *See State v. Torres*, Case No. CR 17-740 (Neb., filed July 21, 2017).

referendum *now* left the fate of the prisoners (whom the Legislature earlier said would be sentenced to life imprisonment) to the voters. He stated:

> In November 2016, Nebraska voters will determine the future of capital punishment in our state at the ballot box. To give deference to the vote of the people, my administration will wait to carry out capital punishment sentences or make additional efforts to acquire drugs until the people of our state decide this issue.

Gov. Ricketts' Statement on Capital Punishment, Dec. 7, 2015, https://governor.nebraska.gov/press/gov-ricketts%E2%80%99-statement-capital-punishment.

On November 8, 2016, voters passed the Referendum to set aside the death penalty repeal. With the Governor's official proclamation of those results on December 5, 2016, capital punishment in this state was effectively reinstated.

The referendum effort focused on the execution of each death row inmate. Much of the advertising, promotion, and publicity in support of the death penalty reinstatement campaign focused on each inmate individually, by name. For example, the website in support of the referendum, run by Nebraskans for the Death Penalty, had an interactive map of the state with the words "Nebraska's Ten Death Row Inmates." *See* http://www.voterepeal.com/. On the web site, which is still active, scrolling over the map brings up the name, prisoner number, the location of the crimes, and date of the death sentence for each prisoner, including Mr. Torres.

Nebraskans for the Death Penalty also produced video advertisements that show pictures of the men and describe their crimes while ominous music plays in the background. The advertisement's voiceover then says:

> These are the men on Nebraska's death row. Their crimes were heinous. They terrified communities, and devastated families: killing innocent wives, husbands, mothers, fathers, and even children as young as three years old. The death penalty protects the public from the most dangerous people in our society.

Nebraskans for the Death Penalty, *"Repeal" (Digital ad)*, https://www.youtube.com/watch?v=uw9xOjjX0u0. Comments by supporters of the campaign also show that they were in support of reinstating the death penalty in order to ensure that these ten men would be executed.

Nebraskans for the Death Penalty's official Facebook page included comments like, "These are the worst of the worst individuals in NE. Google Jeffrey Hessler, he is on death row, because he needs to be. I'm voting to REPEAL, in order to KEEP the death penalty in Nebraska!" and "That's the way I'm voting. We need the death penalty, these are sick people and need to be stopped dead." The group's Facebook page also shared hundreds of posts and articles, some of which profiled the men currently on death row or were pleas from the families of victims asking that these ten men receive the death penalty. Facebook, Nebraskans for the Death Penalty Posts, https://www.facebook.com/Nebraskans-for-the-Death-Penalty-512638988889407/. During a public debate on the referendum in October 2016, state treasurer and chairman of Nebraskans for the Death Penalty, Don Stenberg, explicitly referred to the ten prisoners and called for them to be executed. *See* Andrea Larson, *Advocates for and against death penalty take part in public discussion* (Oct. 13, 2016), http://norfolkdailynews.com/news/advocates-for-and-

against-death-penalty-take-part-in-public/article_245180e8-9152-11e6-aa83-97586eb1abab.html.

CLAIMS

Claim I. Mr. Torres' Execution in These Unprecedented Circumstances Would Violate the United States' and Nebraska's Constitutional Bans Against Cruel and Unusual Punishment.

A. Imposition of the Death Penalty Following the Imposition of a Life Sentence Constitutes Cruel and Unusual Punishment Under the Eighth Amendment to the United States Constitution.

Nebraska's legislative commutation and subsequent re-imposition of death sentences subjects Mr. Torres to extreme psychological and emotional harm in violation of the United States Constitution's prohibition against cruel and unusual punishments. *See* U.S. Const. amends. VIII; XIV. The Constitution does not permit execution of a sentence in a manner creating unnecessary stress or anxiety. Legal, medical, and psychological scholars have noted the tremendous harm caused by variability and uncertainty around death sentences.

The Eighth and Fourteenth Amendments bar states from using punishments that "involve the unnecessary and wanton infliction of pain." *Gregg v. Georgia,* 428 U.S. 153, 173 (1976). To establish an Eighth Amendment violation, a petitioner need not show the existence of a specific injury, but rather must only demonstrate that the punishment involves "conditions posing a substantial risk of serious harm." *Taylor v. Crawford,* 487 F.3d 1072, 1079-80 (8th Cir. 2007) (holding that petitioner could bring an Eighth Amendment claim for the *risk* of injury caused by lethal

injection protocol, though ultimately finding that the facts of that case did not present a constitutionally significant risk).

The Founders adopted the Eighth Amendment not only to prohibit the government from inflicting physical pain on the people, but also to prevent "exercises of cruelty . . . other than those which inflicted bodily pain or mutilation." *Weems v. United States*, 217 U.S. 349, 372 (1910). The Eighth Amendment forbids laws and punishment subjecting a person to "circumstance[s] of degradation," *id.* at 366, or to "circumstances of *terror*, pain, *or disgrace*" that are "superadded" to a sentence of death. *Id.* at 370 (emphasis added). Furthermore, the Supreme Court has ruled unconstitutional those punishments which do not "accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.'" *Gregg*, 428 U.S. at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

The U.S. Court of the Appeals for the Eighth Circuit and other federal courts have held that Eighth Amendment violations may exist in cases without any physical injuries. *Hobbs v. Lockhart*, 46 F.3d 864, 869 (8th Cir. 1995) ("We cannot conclude that plaintiff's emotional distress was not an injury serious enough to be constitutionally cognizable."); *Obama v. Burl*, 477 Fed. App'x. 409, 411 (8th Cir. 2012) (unpublished) (finding a potential Eighth Amendment violation where constant lighting of prisoner's cell "caused inability to sleep, emotional distress, and constant headaches"); *Beal v. Foster*, 803 F.3d 356, 357–58 (7th Cir. 2015) (quoting *Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir.2012)) ("the alleged pain sufficient to constitute cruel punishment may be physical or psychological.")).

In this case, the State creates a substantial risk of serious emotional and psychological harm to Mr. Torres by re-imposing a death sentence after the Legislature enacted a law reforming his death sentence to life and after the inmates understood their sentences had been reduced to life in prison. Mr. Torres is subject to a uniquely cruel and unprecedented form of psychological suffering through alternating periods of relief and terror as he has been told that his life would be spared, that the voters would decide if he could be executed, and then told again that he would be executed. The inconsistent dictates of the state on which Mr. Torres' life hinges add stress and exacerbate his anxiety to such an extent as to violate his rights to be free from unnecessary suffering and the deprivation of his basic dignity.

Even in the ordinary case, death-row prisoners face emotional challenges. Researchers note that condemned prisoners, like terminally ill patients, may eventually come to terms with impending death. Craig Haney, *Psychological Secrecy and the Death Penalty: Observations on "The Mere Extinguishment of Life,"* 16 Studies in Law, Politics, and Society 3 (1997). During this final stage, prisoners may accept or become resigned to their fate, and mentally prepare themselves for their execution. Robert Johnson, *Under Sentence of Death: The Psychology of Death Row Confinement*, 5 LAW & PSYCHOL. REV. 141, 145-46 (1979); Elisabeth Kubler Ross, ON DEATH AND DYING 112 (1969). This acceptance or resignation, however, is in stark contrast to the shock that prisoners experience when first sentenced to death.

When first arriving on death row, the "prospect of execution ... gives rise to intense preoccupation. The future is necessarily uncertain and men feel vulnerable and afraid." Johnson, *supra*, at 151. As a result of the Nebraska Legislature's reprieve and the subsequent reinstatement of the death penalty, Mr. Torres is made to repeatedly endure one of the most psychologically traumatic aspects of his sentence and incarceration. Furthermore, the uncertainty surrounding his sentence adds a further sense of terror because of the unpredictability of his upcoming death. *See* Joel Lieberman, *Terror Management, Illusory Correlation, and Perceptions of Minority Groups*, 21 Basic and Applied Social Psychology 13 (1999); Victor Florian & Mario Mikulincer, *Fear of Death and the Judgment of Social Transgressions: A Multidimensional Test of Terror Management Theory*, 73 Journal of Personality and Social Psychology 369 (1997). Unlike prisoners who remain on death row and have the opportunity to accept and prepare for their executions, Mr. Torres has been thrown into a state of confusion, chaos, and uncertainty that has added serious psychological harm and emotional pain beyond that anticipated with the ordinary sentence of death.

Even if not the intended result here, it is a known form of torture to keep a prisoner ignorant and guessing as to his future, ricocheted among unpredictable situations. Researchers note that "[s]ubjecting prisoners to unpredictable situations to maximize stress is a practice well known to people working with torture survivors." Metin Basoglu & Susan Mineka, *The Role of Uncontrollable and Unpredictable Stress in Post-Traumatic Stress Responses in Torture Survivors*, in

Torture and Its Consequences: Current Treatment Approaches 201 (1992); *see also* A. Koestler, DARKNESS AT NOON (Macmillan 1941). Specifically, experienced torturers recognize that one way to make the effects of torture more severe is to use "methods which block the [victim]'s coping efforts" in a way that will "remove control from the victim and maximize unpredictability," thereby creating additional and "more extensive psychological suffering." Basgolu & Mineka, *supra.* Subsequently, the trauma inflicted on torture survivors is not only a result of the kind of pain that is inflicted, but also the manner in which it is applied and how the victim is able to process the experience. In this case, the stress and pain already suffered by condemned prisoners is exacerbated by drawing out their mental anguish in a manner mirroring the favorite tool of those seeking to inflict maximal pain.

The possibility that causing such extreme pain and suffering is not the primary goal of those inflicting the punishment is not relevant in this kind of an Eighth Amendment cruel and unusual punishment analysis. The Court of Appeals for the Eighth Circuit has made it clear that the legislature (or in this case the voters) need not have the specific intent to cause pain or suffering to the prisoner by the use of a certain punishment process. *Taylor v. Crawford*, 487 F.3d at 1079-80 (holding that petitioner challenging the State's execution protocol did not have to prove deliberate indifference on the part of prison officials). Therefore, even if the voters did not intend to cause this kind of suffering, the imposition of the death penalty in this case still violates the Eighth Amendment.

To be sure, all death row prisoners suffer to some extent based on the knowledge of and uncertainty surrounding their execution. In declining to hold the death penalty categorically unconstitutional under the Eighth Amendment, the Supreme Court accepts that some degree of emotional or psychological suffering comes with it. *See Baze v. Rees*, 553 U.S. 36, 47 (2008) (lead opinion of Chief Justice Roberts) ("We begin with the principle, settled by *Gregg*, that capital punishment is constitutional . . . It necessarily follows that there must be a means of carrying it out."). In the case of Mr. Torres, however, the State has created conditions that add a level of suffering and cruelty that far exceeds what a typical condemned prisoner faces. Mr. Torres is forced to again endure the most traumatic parts of his sentence and is subjected to psychological conditions that are more analogous to torture than incarceration. It is exactly this kind of "unnecessary and wanton infliction of pain" on top of an existing death sentence that the Eighth Amendment prohibits. *Gregg*, 428 U.S. at 173. In fact, the Supreme Court has previously held punishments to be unconstitutional for very similar reasons. Although decided under the Ex Post Facto Clause rather than the Eighth Amendment, the Court in *In re Medley*, 134 U.S. 160 (1890), found that not telling a prisoner the time and date of his execution was unconstitutional. The Court's reasoning focused on the additional psychological pain and suffering, noting that "secrecy [about the time of execution] must be accompanied by an immense mental anxiety amounting to a great increase in punishment." *Id.* at 172.

The Supreme Court also examined the cruelty of imposing a second death sentence in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947). There, the petitioner had suffered through and survived a botched execution in the electric chair and asked for relief "because he once underwent the psychological strain of preparation for electrocution" and to "require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment." *Id.* at 464. Ultimately, the Court ruled against the prisoner because the original failed execution was accidental, *id.*, and because Justice Frankfurter did not believe that the Eighth Amendment had been incorporated through the Fourteenth Amendment. *Id.* at 471 (Frankfurter, J., concurring) (a decision that has subsequently been reversed by the Court in *Robinson v California*, 370 U.S. 660 (1962)). The torturous execution of Mr. Torres after telling him he will serve a life sentence is not an unfortunate accident but the foreseeable result of the State's decision to place him (and other death-row prisoners) in the middle of its death penalty debate and to target him for execution after he had been told his life would be spared. *See also* Claim III *infra* p.25 (showing Mr. Torres' death sentence is a Bill of Attainder).

The State has ping ponged Mr. Torres from death to life and to death again. His individual fate became hostage to an ongoing political contest between the Legislature, the Governor, and the voters. The inmates learned about each development. In the history of capital punishment in this nation, there is no known parallel to what Mr. Torres has been forced to endure (other than his fellow death-

row prisoners during this time period). Regardless of intent, the trauma that the State has added to Mr. Torres' already painful pending execution adds up to punishment barred as cruel and unusual under the Eighth Amendment.

The punishment is also prohibited under the Eighth Amendment's prohibition against punishments that do not comport with "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. Under that analysis, courts look to "objective indicia of society's standards, as expressed in pertinent legislative enactments and state practice." *Roper v. Simmons*, 543 U.S. 551, 563 (2005). Typically, this means that courts count how many states still permit a particular type of sentencing practice and how many have abolished or never adopted it. *See, e.g., id.* at 564-66; *Atkins v. Virginia*, 536 U.S. 304, 312-17 (2002); *Kennedy v. Louisiana*, 554 U.S. 407, 422-26 (2008).

In this case, the practice in question is so unusual that there is no evidence that any other state has ever imposed a sentence in such a manner. There is no consensus across states that shows that society accepts the practice of legislatively reinstating vacated death sentences. In fact, the evidence shows that in states which have judicially or legislatively abolished the death penalty, no person who was on death row at the time of abolition has ever been executed, even if that state later reinstated capital punishment. *See* Brief of Amici Curiae Legal Historians & Scholars at 6-9, *State v. Santiago*, 122 A.3d 1 (Conn. 2012), 2012 WL 7985132 (demonstrating what occurred after each death-penalty repeal in America). The fact that states have resoundingly rejected the practice of executing prisoners after

states abolish the death penalty, and that no state has ever executed a group of prisoners after informing them that the death penalty has been abolished, shows that the execution of Mr. Torres is unusual and does not comport with our society's evolving standards of decency and is therefore unconstitutional.

B. Imposition of the Death Penalty Following the Imposition of a Life Sentence Constitutes Cruel and Unusual Punishment Under the Nebraska State Constitution.

Mr. Torres is further protected from cruel and unusual punishment by the Nebraska State Constitution. Neb. Const. art I, §9. While much of the analysis of state and federal constitutional questions is similar and therefore reincorporated here by reference instead of repeated, there are some differences bearing emphasis. The Nebraska Supreme Court has found the State Constitution to be more protective against cruel and unusual punishment than the Federal Constitution. In *State v. Mata*, 275 Neb. 1, 745 N.W.2d 229 (Neb. 2008) the court found that Nebraska's use of the electric chair for executions violated Nebraska's prohibition on cruel and unusual punishments, even if it would not violate the Eighth Amendment. In *Mata*, the Nebraska Supreme Court relied on much of the same analysis as used in federal Eighth Amendment claims, including consideration of the "risk that prisoner will suffer unnecessary and wanton pain" and the subjective "evolving standards of decency" of society. *Mata*, 275 Neb at 40-44, 745 N.W.2d 261-64.

The Nebraska court, however, also emphasized that punishments "must accord with 'the dignity of man,' which is the basic concept underlying the

prohibition against cruel and unusual punishment." *Mata*, 275 Neb at 44-45, 745 N.W.2d at 264-65. In applying this "dignity of man standard," *id.* at 275 Neb at 45, 745 N.W.2d at 264, the court noted that a punishment may be undignified "irrespective of the pain that" the punishment may inflict on the prisoner. The court pointed to the physical disfigurement and burns that could result from electrocution as undignified. In the case of Mr. Torres, he is subjected not only to the substantial risk of serious harm but to the degrading and undignified treatment of being told his sentence has been commuted by the Legislature's duly-enacted statute and then told that the voters would decide his fate in a referendum, and finally that it has been determined that he will again face execution. To spare a prisoner's life only to take it away again is beneath the dignity of man protected by the Nebraska Constitution.

The Nebraska Supreme Court has also been more explicit than the Eighth Circuit with regard to the fact that legislators' intent is not relevant in analyzing whether a sentence is imposed in a cruel and unusual manner. The court said that "[a]lthough the state and federal Constitutions prohibit the 'unnecessary and wanton' infliction of pain, we do not believe 'wanton' in the context of state sanctioned punishment implies a mental state. In a method of execution challenge, 'wanton' means that the method itself is inherently cruel." *Id.*, 275 Neb. at 46, 745 N.W.2d at 265. Therefore, the additional suffering that prisoners are subjected to because of the death penalty repeal and reinstatement violates the Nebraska Constitution because the psychological impact is exceptionally traumatic (cruel and

wanton) and there is no penal necessity to inflict that additional level of pain and suffering.

Claim II. Mr. Torres' Execution in These Unprecedented Circumstances Violates the Due Process Clause of the Nebraska and United States Constitutions.

The Government shall not "deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Nebraska Constitution echoes this sentiment, promising, "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the laws." Neb. Const. art. 1 § 3.

The Nebraska Legislature provided a mass commutation for capital prisoners over the governor's veto that prison officials and prisoners alike acted upon.[4]

Due process forbade the State from reinstating the capital sentences *en masse*. *See Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (finding state mandatory sentence violated the prisoner's right to liberty and due process of law). Rather, both state and federal law guaranteed each individual to a new sentencing procedure. *Id.*; *see also Gardner v. Florida*, 430 U.S. 349, 357-58 (1977) (discussing importance of individualized sentencing procedures in capital trials to both the specific prisoner and society as a whole); *State v. Reeves*, 258 Neb. 511, 523-35, 604

[4] This paragraph refers specifically to Neb. Legis. B. 268. In January of 2017, the Nebraska Legislature again considered repealing the state's capital punishment regime. Legis. B. 446, 205th Leg., 1st Reg. Sess. (Neb. 2017). The 2017 proposed legislation was pending as of the filing of this Petition. *See* http://www.nebraskalegislature.gov/bills/view_bill.php?DocumentID=31497.

N.W.2d 151, 161-68 (Neb. 2000) (holding that state resentencing process requires an individualized hearing to take place in the original district court in compliance with state statutes). Rather than being afforded a sentencing hearing, the Nebraska Governor and the mass media sentenced Mr. Torres to death.

A. Resentencing Must Take Place in the District Court Where the Original Trial was Held.

In 2000, the Nebraska Supreme Court considered a case very similar to this case in *State v. Reeves*, 258 Neb. 511, 604 N.W.2d 151 (Neb. 2000). The *Reeves* court held "the Nebraska Constitution places original sentencing authority in the district courts and does not provide sentencing as one of [the Nebraska Supreme Court's] powers." *Id.* at 529,165. "[T]he Nebraska Legislature did not authorize [the Nebraska Supreme Court] to perform the same function as the sentencing judge or sentencing panel." *Id.* 258 Neb.at 531, 604 N.W.2d at 166.

The *Reeves* Court considered the language of Neb. Rev. Stat. § 29-2520, which provides the procedures for the penalty phase of a capital trial. Section 29-2520 states in relevant part:

> Whenever any person is found guilty of a violation of section 28-303 and the information contains a notice of aggravation as provided in section 29-1603, the district court shall, as soon as practicable, fix a date for an aggravation hearing to determine the alleged aggravating circumstances. If no notice of aggravation has been filed, the district court shall enter a sentence of life imprisonment.

Neb. Rev. Stat. § 29-2520 (1) (2017). Nowhere does the statute grant the Nebraska Supreme Court the power to resentence capital defendants, even when the court identifies a constitutional error. *Reeves*, 258 Neb. at 531, 604 N.W.2d at 165-66. Nor

does § 29-2520 contain any language granting power to the Nebraska Legislature to impose death sentences. Neb. Rev. Stat. § 29-2520. As a result, a ballot referendum, which functions as a legislative matter,[5] does not have the power to reinstate a death sentence. *Id.*; *see Reeves*, 258 Neb. at 531, 604 N.W.2d at 165-66. "[T]he statutory sections regarding the weighing of aggravating and mitigating circumstances and the determination of the sentence specifically place that role in the district court, with the judge who presided at trial." *Id* at 258 Neb. at 531, 604 N.W.2d at 165.

No resentencing hearing took place in the district court in this case. Instead, the Legislature through appropriate legislative action removed capital punishment as an option, commuting Mr. Torres' sentence to a sentence of life without the possibility of parole. Legis. B. 268, §21, 140th Leg., 1st Sess. (Neb. 2015). In reaction, a ballot referendum sought to reinstate the death sentences for all of those prisoners whose sentences had been commuted *en masse*. The ballot referendum, however, failed to consider the law under the existing statute, which mandates that only the district court where the original trial was held holds the power to conduct a penalty phase proceeding, including a resentencing hearing. Neb. Rev. Stat. § 29-2520; *see also Reeves*, 258 Neb. at 531, 604 N.W.2d at 165-66. As a result, the ballot referendum failed to provide the individual prisoners affected by Referendum 426

[5] *State ex rel. Lemon v. Gale*, 272 Neb. 295, 304, 721 N.W.2d 347, 356 (2006) ("The Legislature and the electorate are concurrently in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved the people is effectual.")

with sufficient due process in violation of the Fourteenth Amendment of the United States Constitution and Article I § 3 of the Nebraska Constitution.

B. A Capital Resentencing Hearing is a "Critical Stage" of Trial.

Due process (along with its sister, Equal Protection) emphasizes "the central aim of our entire judicial system–all people charged with a crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" *Griffin v. Illinois*, 351 U.S. 12, 17 (1956).

The goal of equality for all applies no less during sentencing proceedings as during the initial guilt determination. *See Gardner*, 430 U.S. at 358. "[T]he sentencing is a critical stage of the criminal proceeding . . . The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* The American belief that "debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases." *Gardner*, 430 U.S. at 360.

Because sentencing hearings are a critical stage of trial, sentencing is among the type of proceedings that have been accorded greater protection under substantive due process. *See Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 278 (1998) (noting that the amount of process due to an individual is proportional to the degree to which the particular stage in question was "integral" to the trial process).

The right to life and substantive due process protections are especially critical in capital cases because "death is a different kind of punishment from any other which may be imposed in this country . . . in both its severity and its finality." *Gardner*, 430 U.S. at 357. Thus, if the State seeks to impose a death sentence, every stage of the trial–*especially the penalty phase as a "critical stage"*–must be given all of the substantive due process that the courts can afford. *Id.* at 358. The protection of due process cannot waiver. "The defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process." *Id.* (citing *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968)).

Here, Mr. Torres seeks to protect his right to life regarding Nebraska's sentencing procedure. Because this involves a "critical stage" of trial, his right to due process must be protected with the full force of the law. *See Woodard*, 523 U.S. at 278 (finding process due dependent on the proceeding); *Gardner*, 430 U.S. at 358 (noting the importance of process in capital cases); *Reeves*, 258 Neb. at 531, 604 N.W.2d 165-66 (finding sentencing hearings in capital cases a critical stage that requires the attention of the original trial judge). In this instance, due process requires that the Government provide Mr. Torres with adequate notice and a right to be heard before depriving him of his right to life, liberty, or property. U.S. Const. amend. XIV, § 1; Neb. Const. art. I, § 3.

Further, because (1) sentencing is a critical stage of trial and (2) the right to life is a particularly protected fundamental right, Mr. Torres could not be

resentenced without first going through the proper sentencing channels. *See Gardner*, 430 U.S. at 357-58; *Reeves*, 258 Neb. at 531, 604 N.W.2d at 165-66. Referendum 426 did not go through the proper channels; the referendum failed to provide a resentencing hearing for the men whose sentences were commuted under Neb. Legis. B. 268 and instead reinstated death sentences *en masse*. The failure to resentence Mr. Torres under the statutory procedures, which require a sentencing hearing, was analogous to a court's sentencing Mr. Torres to death *ex parte*–an unfathomable idea. *See Gardner*, 430 U.S. at 357-58.

C. Failure to Provide an Individualized Resentencing Hearing Deprived Mr. Torres of His Protected Right to Life Under the Fourteenth Amendment of the United States Constitution.

"Due Process emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985). While each prisoner is entitled to individualized consideration of his or her case, a capital prisoner's case requires particular attention:

> In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability. This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.
>
> Although the condemned prisoner does not enjoy the same presumptions accorded a defendant who has yet to be convicted or sentenced, he has not lost the protection of the Constitution altogether[.]

Ford v. Wainwright, 477 U.S. 399, 411 (1986) (internal citations omitted).

Death is different "in both its severity and finality." *Gardner*, 430 U.S. at 357. A death sentence affects both society in general as well as the individual being sentenced. Society is considering taking the life of one of its individuals, which "differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Id.* at 358. "There is [ ] no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does." *Woodard*, 523 U.S. at 291 (Stevens, J., concurring in part and dissenting in part).

"It is axiomatic that due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979) (internal citations omitted). Legal process exists to minimize the risk of error, especially erroneous judicial decisions. *Id.* at 13. As a result, "the quantum and quality of the process due in a particular situation depend upon the need to serve the purpose of minimizing the risk of error." *Id.* In this case, the greatest risk of error is an erroneous sentence of death.

Even though Referendum 426 reinstated capital punishment as an option, there is no guarantee that a jury would have chosen to reinstate the death penalty in Mr. Torres' case. A prisoner who received a valid sentence under a statute that is later voided cannot receive his original punishment without affirmation of the new sentence by a jury. *Hicks*, 447 U.S. at 346.

> The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent

> determined by the jury in the exercise of its statutory discretion . . . [and denying] the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision . . . [disregards] the petitioner's right to liberty [and] is a denial of due process of law.

Hicks, 447 U.S. at 346 (emphasis in original) (internal citations omitted).

In this case, a jury *might* have sought to reinstate the death penalty, but a jury was never given that opportunity. Instead, the State reinstated Mr. Torres' sentence *en masse* without providing Mr. Torres an opportunity to deny or explain the particularities of his own circumstances. *See Gardner*, 430 U.S. at 362 (finding due process violation where a death sentence was imposed based on information that the defendant was provided no opportunity to deny nor explain).

Nebraska's failure to provide Mr. Torres with an individualized resentencing hearing exposed him and all of Nebraska's death row population to the same defects that caused the U.S. Supreme Court to find capital punishment unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972). Every capital case must disclose the rationale for imposing the death sentence, no matter how many times the death sentence is imposed on an individual; if the death sentence is vacated, the district court must articulate the rationale for reinstating a sentence of death. *Gardener*, 430 U.S. at 361; *Reeves*, 258 Neb. at 530-31, 604 N.W.2d at 165. Anything less violates Due Process. *Id.*

Claim III. The Repeal of Neb. Legis. B. 268 was an Unconstitutional Bill of Attainder Because It Imposes a New Death Sentence on Individuals Without Additional Judicial Process.

The repeal by referendum of Neb. Legis. B. 268 is an unconstitutional bill of attainder, targeting Mr. Torres, among others, for execution. Neb. Legis. B. 268 had overturned the death penalty in Nebraska and resentenced the ten men on death row to life without parole. Its repeal by referendum targeted those ten men and sentenced them anew to death through a legislative act rather than through judicial process.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri,* 71 U.S. 277, 323 (1866). The United States and Nebraska Constitutions forbid the passage of such laws. Const. art. 1 § 9; Neb. Rev. St. Const. art. I § 16. Although there is question regarding the comparative broadness of the national and Nebraska prohibitions, the Supreme Court of Nebraska has previously held that certain protections in the Nebraska Constitution are more expansive than those in the U.S. Constitution. *Mata,* 275 Neb. at 39-40, 745 N.W.2d 260-61(holding that the Nebraska Constitution can be more protective than the Eighth Amendment).

The constitutional protections against bills of attainder were "intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." *United States v. Brown,* 381 U.S. 437, 442 (1965). They reflect "the Framers' belief

that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons." *Brown,* 381 U.S. at 445.

Legislative Act by Referenda: In Nebraska, the legislative branch includes the people of the State when they speak through voter initiatives and referenda. The legislative authority of the State is thus constitutionally bifurcated–one half belonging to the legislature, the other to the people, who have reserved the right of initiative and referendum. Neb. Rev. St. Const. Art III § 1.

> "The legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves the power to propose laws and amendments to the Constitution and to enact or reject the same at the polls, independent of the Legislature, which power shall be called the power of initiative. The people also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature, which power shall be called the power of referendum."

Id. The "[l]egislature and the electorate are concurrently equal in rank as sources of legislation, and provisions authorizing the initiative should be construed in such a manner that the legislative power reserved in the people is effectual." *State ex rel. Stenberg v. Moore,* 258 Neb. 199, 210-11, 602 N.W.2d 465, 474 (Neb. 1999).

As a result, courts have treated Nebraskan referenda passed by the people as legislative acts. In 2006, the Eighth Circuit ruled that an amendment to the Nebraska Constitution passed by referendum was not a bill of attainder because it did not inflict punishment. *Citizens for Equal Protection v. Bruning,* 455 F.3d 859 (8th Cir. 2006). If laws passed by referendum could not be bills of attainder this would have been dispositive, and the court would not have engaged in the more

detailed analysis under the three pronged test. *See also, State v. Thorne,* 129 Wash. 2d 736, 921 P.2d 514 (Wash. 1996) (the Supreme Court of Washington treated a referendum passed by voters as a legislative act and ruled it was not a bill of attainder on separate grounds).

Federal courts and Nebraska state courts use essentially the same test to determine whether or not a law is a bill of attainder. To establish a bill of attainder under the Nebraska constitution, a petitioner must show by the "clearest proof" that a particular legislative act would "(1) specify the affected persons, (2) inflict punishment, and (3) lack a judicial trial." *State v. Palmer*, 257 Neb. 702, 717-18, 600 N.W.2d 756, 769-70 (Neb. 1999). Mr. Torres' death sentence, handed down by the referendum-repeal of Neb. Legis. B. 268, satisfies all three of these requirements.

(1) Specifies Affected Persons:

Here, the *de facto* question on the Nebraska ballot was not just whether the death penalty repeal should be allowed in the future but whether Mr. Torres should be sentenced to death once more and executed. The original legislative bill specifically addressed the fate of the men already on death row, stating: "In any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment without possibility of parole." Neb. Legis. B. 268 § 21. The public campaign in support of the referendum, led by Nebraskan's for the Death Penalty, left no question that the purpose of the referendum was to ensure that Mr. Torres and the other death-row prisoners would be executed. He was mentioned by name

on television ads, websites, and in public debates. The campaign's focus on the individuals on death row—and the public's reaction to this campaign—made it clear that a vote for the referendum would impose a death sentence on Mr. Torres.

In repealing Neb. Legis. B. 268, the voters sought to resentence Mr. Torres and the other nine men to death. Although not mentioned in the ballot title for the referendum, Mr. Torres' life was put to a popular vote: would it be life without parole or execution?

Of course, bills of attainders are not required to name the specific people they target and may affect a larger group than just a single person. *Cummings,* 71 U.S. 277. Courts have repeatedly held that even laws implicating *prospective* groups still target specific individuals when the bill levies a unique punishment to them. *Brown,* 381 U.S. at 462; *Crain v. City of Mountain Home, Arkansas,* 611 F.2d 726 (8th Cir. 1979). In *Crain* and *Brown*, the courts struck as bills of attainder law that significantly lowered the salary of the city attorney and banned members of the Communist party from holding labor union positions, respectively. Even though the law at issue in *Brown* "inflict[ed] its deprivation upon more than three people," the Court still held it to be a bill of attainder because it specified (without naming) "the people upon whom the sanction it prescribes is to be levied." *Brown*, 381 U.S. at 461. And even though in *Crain* one of the laws at issue was "facially constitutional" and would have affected all future city attorneys—a potentially infinite class—the court still held it to be a bill of attainder because its target and impetus was to punish one particular city attorney. *Brown*, 381 U.S. at 461.

Similarly, while this referendum affects all future capitally charged defendants, it specifically targets Mr. Torres and nine other men. For future defendants, death is only a *possibility*: the choice between life without parole or execution left to a jury. Neb. Legis. B. 268 had changed Mr. Torres' sentence of death to life. Its repeal by referendum then imposed death–leaving him in a state of tortured uncertainty. *See also*, Claim I *supra* pp. 7-17.

The decision *Neelley v. Walker*, 67 F. Supp. 3d 1319 (M.D. Ala. 2014), presents an analogous situation. In *Neelley*, the court found that a prisoner had stated a colorable bill of attainder claim where the Alabama Legislature had retroactively rescinded the right to parole review for former death row prisoners serving life imprisonment. The plaintiff was the *only* prisoner in fifty years who had ever won a rare commutation of her death sentence to life imprisonment, making her parole eligible. The court based its decision on language in floor debates expressing the intent of the Legislature to deny her the opportunity of parole and a suspicious provision making the new law retroactive to four months prior to her commutation. *Id.* at 1329-30. *See also Woldt v. People*, 64 P.3d 256, 271 (Colo. 2003) (in context of Ex Post Facto Clause, three capital defendants were "identifiable targets of the legislation" where the section applied only to three persons who had received the death penalty from a three-judge panel).

If the Legislature had passed a bill naming ten men serving life without parole and resentenced them to death, it would be a paradigmatic unconstitutional

bill of attainder. The effects of the referendum are identical to this theoretical bill of attainder.

(2) *Inflicts Punishment:*

"The classic example [of attainder] is death." *ACORN* v. *United States,* 662 F. Supp. 2d 285, 291 (E.D.N.Y. 2009). The repeal of Neb. Legis. B. 268 by referendum sentenced Mr. Torres to death. He could not be executed without its passing.

The classic sources for considering whether there was a legislative intent to punish include "legislative history, the context or timing of the legislation, or specific aspects of the text or structure of the disputed legislation." *Eagleman v. Diocese of Rapid City*, 2015 S.D. 22, ¶11, 862 N.W.2d 839, 845 (S.D. 2015) (quoting *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 478 (1977)). The legislative history of and discussion surrounding the referendum reveals that resentencing the ten men to death was not a mere side effect of the legislation but its intent and the source of much of its support. But for the passing of the referendum Mr. Torres would not face the ultimate punishment the State can inflict.

(3) Lacks a Judicial Trial:

In the referendum, Mr. Torres and the men on Nebraska's death row faced a *de facto* sentencing trial by the public. Although he had once received a jury trial, the passage of Neb. Legis. B. 268 changed his death sentence to one of life imprisonment. The referendum effectively re-litigated the question of whether Mr. Torres should receive the death penalty or life in prison. If the referendum had been rejected, his sentence of life without parole would have been confirmed. If it passed,

as it did, he would again be sentenced to death. Whether Mr. Torres could be executed thus hinged on the results of the referendum vote, not on the verdict of a jury.

The Nebraska Supreme Court has consistently rejected claims of bills of attainder when "the Legislature has not determined guilt, it has merely imposed burdens on those whom the judicial branch has already found guilty." *In re Interest of A.M., Jr.*, 281 Neb. 482, 797 N.W.2d 233 (Neb. 2011) (declining to hold that statutes requiring convicted sex offenders to register and receive treatment were impermissible bills of attainder). Death, however, is not a slightly harsher degree of punishment placed on one already convicted, but a different punishment in kind. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Imposing a death sentence requires a jury trial to "allow [for] the particularized consideration of relevant aspects of the character and record of each convicted defendant." *Id.* at 309. In *Brown*, the Supreme Court described the dangers of allowing the legislature to replace juries:

> Everyone must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited—the very class of cases most likely to be prosecuted by this mode.

Brown, 381 U.S. at 445.

The referendum placed into the hands of the electorate that which is reserved specifically to juries, lacking the constitutional safeguards and "particularized

consideration" that accompany the penalty phase of a trial. This is exactly the kind of legislation the framers were protecting against when they instituted bans on bills of attainder, and it cannot stand.

Claim IV: The Referendum Process Denied Mr. Torres Due Process and Equal Protection of the Laws.

The Nebraska Governor exceeded his granted powers in spear-heading the referendum. The State of Nebraska's failure to honor its own separation of powers doctrine denies Mr. Torres due process and equal protection of the law in a manner that is arbitrary and capricious. The Governor's use of his office to exercise powers not granted to him is an arbitrary and capricious denial of Mr. Torres' due process and equal protection rights. *Hicks*, 447 U.S. at 346.

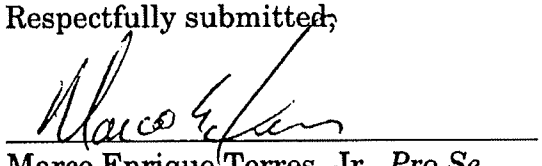
STATUTE OF LIMITATIONS

This post-conviction motion is timely filed. Nebraska law requires post-conviction petitioners to file motions within one year of the time their claim could have been discovered. Neb. Rev. Stat. Ann. § 29-3001(4). In this case Mr. Torres would not have been able to file such a claim until the new referendum went into effect and reinstated the death penalty. Pursuant to Nebraska election laws, the referendum went into effect on December 5, 2016, following the state canvassing board's certification and Governor's proclamation of the election results. Neb. Rev. Stat. Ann. § 32-1414. This petition is filed within one year of the Governor's proclamation of the election results on December 5, 2016, which purported to reinstate Mr. Torres 'death sentence, and therefore is timely.

CONCLUSION

For the reasons stated herein, Mr. Torres prays this Court will grant his *Pro Se* Motion for Post-Conviction Relief, vacate his death sentence, and remand his case for a new, individualized resentencing hearing.

Respectfully submitted,



Marco Enrique Torres, Jr., *Pro Se*
DCS ID# 67300
Tecumseh State Correctional Institution
2725 North Highway 50
P.O. Box 900
Tecumseh, NE 68450-0900

CERTIFICATE OF SERVICE

I hereby certify that on 29th, of November, 2017, I provided a true and correct copy of the *Pro Se* Motion for Post-Conviction Relief to the following:

State of Nebraska, represented by James D. Smith, Assistant Attorney General, (Bar Number: #15476), by postage prepaid United States mail to 2115 State Capitol, P.O. Box 98920, Lincoln, NE 68509-8920.

State of Nebraska, represented by Jack Zitterkopf, Hall County Attorney General, (Bar Number # 15588), by postage prepaid United States mail to P.O. Box 267, Grand Island, NE 68802.

FILED
DEC 0 4 2017
VALORIE BENDIXEN
CLERK OF DISTRICT COURT

Marco Enrique Torres, Jr., *Pro Se*
DCS ID# 67300

DE 4 19

NOTICE PURSUANT NEBRASKA SUPREME COURT RULE § 3-501.2(c)

This pleading was prepared by Susanne Bales, Tennessee Bar 017868, and Stephen Ferrell, Ohio Bar No. 0061707, Assistant Federal Community Defenders, Federal Defender Services of Eastern Tennessee, Inc., 800 South Gay Street, Suite 2400, Knoxville, Tennessee 37929-9714, both of whom are admitted to the practice of law in the federal courts in the State of Nebraska and are appointed to represent Mr. Torres in a related federal habeas proceeding.

VERIFICATION

Marco E. Torres, Jr., *Pro Se*, being first duly sworn upon oath, deposes and states that he is the Petitioner in the above-entitled motion for post-conviction relief, he has read the motion, knows the contents thereof, and that the allegations contained therein are true as he verily believe.

Marco E Torres 67300
Marco Enrique Torres, Jr., *Pro Se*
DCS ID# 67300

STATE OF NEBRASKA)
) SS:
COUNTY OF JOHNSON)

SUBSCRIBED AND SWORN to before me this 29 day of Nov., 2017.

Christina Horne
Signature of Notary Public

Christina Horne
Printed Name of Notary Public

CERTIFICATE OF SERVICE

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FILED
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CLERK OF DISTRICT COURT

Marco E. Torres 67300

Marco Enrique Torres, Jr., *Pro Se*
DCS ID# 67300

DEC 4 10

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United States Constitution, Article I, Section 9

The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

No bill of attainder or ex post facto Law shall be passed.

No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.

No tax or duty shall be laid on articles exported from any state.

No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another: nor shall vessels bound to, or from, one state, be obliged to enter, clear or pay duties in another.

No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

LEGISLATIVE BILL 268

Passed over the Governor's veto May 27, 2015.

Introduced by Chambers, 11; Coash, 27; Garrett, 3; Ebke, 32; Davis, 43; Kolterman, 24; Krist, 10; McCollister, 20; Williams, 36; Campbell, 25; Pansing Brooks, 28; Crawford, 45; Hansen, 26; Cook, 13; Mello, 5; Nordquist, 7; Bolz, 29.

A BILL FOR AN ACT relating to crimes and offenses; to amend sections 23-3406, 23-3408, 24-1106, 25-1140.09, 28-104, 28-202, 28-303, 29-1602, 29-1822, 29-2004, 29-2005, 29-2006, 29-2020, 29-2027, 29-2407, 29-2801, 29-3205, 29-3920, 29-3928, 29-3929, 29-3930, 55-480, 83-1,110.02, and 83-4,143, Reissue Revised Statutes of Nebraska, and sections 28-105, 28-201, 28-1356, 29-1603, 29-2204, 29-2261, and 29-3922, Revised Statutes Cumulative Supplement, 2014; to eliminate the death penalty; to change and eliminate provisions relating to murder in the first degree, presentence reports, indeterminate sentences, the Commission on Public Advocacy, and the authority of courts and the Department of Correctional Services; to state intent; to eliminate a homicide-case report, provisions on capital punishment, proportionality review provisions, and obsolete provisions; to harmonize provisions; to repeal the original sections; and to outright repeal sections 24-1105, 29-2519, 29-2521, 29-2521.01, 29-2521.03, 29-2521.04, 29-2521.05, 29-2523, 29-2524.01, 29-2524.02, 29-2525, 29-2527, 29-2528, 29-2811, 83-1,105.01, 83-1,132, 83-964, 83-965, 83-966, 83-967, 83-968, 83-969, 83-970, 83-971, and 83-972, Reissue Revised Statutes of Nebraska, and sections 28-105.01, 29-2520, 29-2521.02, 29-2522, 29-2524, 29-2537, 29-2538, 29-2539, 29-2540, 29-2541, 29-2542, 29-2543, and 29-2546, Revised Statutes Cumulative Supplement, 2014.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 23-3406, Reissue Revised Statutes of Nebraska, is amended to read:

23-3406 (1) The contract negotiated between the county board and the contracting attorney shall specify the categories of cases in which the contracting attorney is to provide services.

(2) The contract negotiated between the county board and the contracting attorney shall be awarded for at least a two-year term. Removal of the contracting attorney short of the agreed term may be for good cause only.

(3) The contract between the county board and the contracting attorney may specify a maximum allowable caseload for each full-time or part-time attorney who handles cases under the contract. Caseloads shall allow each lawyer to give every client the time and effort necessary to provide effective representation.

(4) The contract between the county board and the contracting attorney shall provide that the contracting attorney be compensated at a minimum rate which reflects the following factors:

(a) The customary compensation in the community for similar services rendered by a privately retained counsel to a paying client or by government or other publicly paid attorneys to a public client;

(b) The time and labor required to be spent by the attorney; and

(c) The degree of professional ability, skill, and experience called for and exercised in the performance of the services.

(5) The contract between the county board and the contracting attorney shall provide that the contracting attorney may decline to represent clients with no reduction in compensation if the contracting attorney is assigned more cases which require an extraordinary amount of time and preparation than the contracting attorney can competently handle.

(6) The contract between the contracting attorney and the county board shall provide that the contracting attorney shall receive at least ten hours of continuing legal education annually in the area of criminal law. The contract between the county board and the contracting attorney shall provide funds for the continuing legal education of the contracting attorney in the area of criminal law.

(7) The contract between the county board and the contracting attorney shall require that the contracting attorney provide legal counsel to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association and the Canons of Ethics for Attorneys in the State of Nebraska. The contract between the county board and the contracting attorney shall provide that the contracting attorney shall be available to eligible defendants upon their request, or the request of someone acting on their behalf, at any time the Constitution of the United States or the Constitution of Nebraska requires the appointment of counsel.

(8) The contract between the county board and the contracting attorney shall provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation~~, including capital cases~~.

Sec. 2. Section 23-3408, Reissue Revised Statutes of Nebraska, is amended to read:

23-3408 In the event that the contracting attorney is appointed to

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represent an individual charged with a ~~Class I or~~ Class IA felony, the contracting attorney shall immediately apply to the district court for appointment of a second attorney to assist in the case. Upon application from the contracting attorney, the district court shall appoint another attorney with substantial felony trial experience to assist the contracting attorney in the case. Application for fees for the attorney appointed by the district court shall be made to the district court judge who shall allow reasonable fees. Once approved by the court, such fees shall be paid by the county board.

Sec. 3. Section 24-1106, Reissue Revised Statutes of Nebraska, is amended to read:

24-1106 (1) In cases which were appealable to the Supreme Court before September 6, 1991, the appeal, if taken, shall be to the Court of Appeals except in ~~capital cases,~~ cases in which life imprisonment has been imposed~~,~~ and cases involving the constitutionality of a statute.

(2) Any party to a case appealed to the Court of Appeals may file a petition in the Supreme Court to bypass the review by the Court of Appeals and for direct review by the Supreme Court. The procedure and time for filing the petition shall be as provided by rules of the Supreme Court. In deciding whether to grant the petition, the Supreme Court may consider one or more of the following factors:

(a) Whether the case involves a question of first impression or presents a novel legal question;

(b) Whether the case involves a question of state or federal constitutional interpretation;

(c) Whether the case raises a question of law regarding the validity of a statute;

(d) Whether the case involves issues upon which there is an inconsistency in the decisions of the Court of Appeals or of the Supreme Court; and

(e) Whether the case is one of significant public interest.

When a petition for direct review is granted, the case shall be docketed for hearing before the Supreme Court.

(3) The Supreme Court shall by rule provide for the removal of a case from the Court of Appeals to the Supreme Court for decision by the Supreme Court at any time before a final decision has been made on the case by the Court of Appeals. The removal may be on the recommendation of the Court of Appeals or on motion of the Supreme Court. Cases may be removed from the Court of Appeals for decision by the Supreme Court for any one or more of the reasons set forth in subsection (2) of this section or in order to regulate the caseload existing in either the Court of Appeals or the Supreme Court. The Chief Judge of the Court of Appeals and the Chief Justice of the Supreme Court shall regularly inform each other of the number and nature of cases docketed in the respective court.

Sec. 4. Section 25-1140.09, Reissue Revised Statutes of Nebraska, is amended to read:

25-1140.09 On the application of the county attorney or any party to a suit in which a record of the proceedings has been made~~, upon receipt of the notice provided in section 29-2525,~~ or upon the filing of a praecipe for a bill of exceptions by an appealing party in the office of the clerk of the district court as provided in section 25-1140, the court reporter shall prepare a transcribed copy of the proceedings so recorded or any part thereof. The reporter shall be entitled to receive, in addition to his or her salary, a per-page fee as prescribed by the Supreme Court for the original copy and each additional copy, to be paid by the party requesting the same except as otherwise provided in this section.

When the transcribed copy of the proceedings is required by the county attorney, the fee therefor shall be paid by the county in the same manner as other claims are paid. When the defendant in a criminal case, after conviction, makes an affidavit that he or she is unable by reason of his or her poverty to pay for such copy, the court or judge thereof may, by order endorsed on such affidavit, direct delivery of such transcribed copy to such defendant, and the fee shall be paid by the county in the same manner as other claims are allowed and paid. ~~When such copy is prepared in any criminal case in which the sentence adjudged is capital, the fees therefor shall be paid by the county in the same manner as other claims are allowed or paid.~~

The fee for preparation of a bill of exceptions and the procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of a bill of exceptions shall be regulated and governed by rules of practice prescribed by the Supreme Court. The fee paid shall be taxed, by the clerk of the district court, to the party against whom the judgment or decree is rendered except as otherwise ordered by the presiding district judge.

Sec. 5. Section 28-104, Reissue Revised Statutes of Nebraska, is amended to read:

28-104 The terms offense and crime are synonymous as used in this code and mean a violation of, or conduct defined by, any statute for which a fine~~,~~ or imprisonment~~, or death~~ may be imposed.

Sec. 6. Section 28-105, Revised Statutes Cumulative Supplement, 2014, is amended to read:

28-105 (1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into eight ~~nine~~ classes which are distinguished from one another by the following penalties which are authorized upon conviction:

~~Class I felony~~ ~~Death~~

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Class IA felony	Life imprisonment
Class IB felony	Maximum — life imprisonment
	Minimum — twenty years imprisonment
Class IC felony	Maximum — fifty years imprisonment
	Mandatory minimum — five years imprisonment
Class ID felony	Maximum — fifty years imprisonment
	Mandatory minimum — three years imprisonment
Class II felony	Maximum — fifty years imprisonment
	Minimum — one year imprisonment
Class III felony	Maximum — twenty years imprisonment, or
	twenty-five thousand dollars fine, or both
	Minimum — one year imprisonment
Class IIIA felony	Maximum — five years imprisonment, or
	ten thousand dollars fine, or both
	Minimum — none
Class IV felony	Maximum — five years imprisonment, or
	ten thousand dollars fine, or both
	Minimum — none

(2)(a) All sentences of imprisonment for Class IA, IB, IC, ID, II, and III felonies and sentences of one year or more for Class IIIA and IV felonies shall be served in institutions under the jurisdiction of the Department of Correctional Services.

(b) Sentences of less than one year shall be served in the county jail except as provided in this subsection. If the department certifies that it has programs and facilities available for persons sentenced to terms of less than one year, the court may order that any sentence of six months or more be served in any institution under the jurisdiction of the department. Any such certification shall be given by the department to the State Court Administrator, who shall forward copies thereof to each judge having jurisdiction to sentence in felony cases.

(3) Nothing in this section shall limit the authority granted in sections 29-2221 and 29-2222 to increase sentences for habitual criminals.

(4) A person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation.

Sec. 7. Section 28-201, Revised Statutes Cumulative Supplement, 2014, is amended to read:

28-201 (1) A person shall be guilty of an attempt to commit a crime if he or she:

(a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or

(b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

(2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he or she intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.

(4) Criminal attempt is:

(a) A Class II felony when the crime attempted is a Class ~~I~~ IA, IB, IC, or ID felony;

(b) A Class III felony when the crime attempted is a Class II felony;

(c) A Class IIIA felony when the crime attempted is sexual assault in the second degree under section 28-320, a violation of subdivision (2)(b) of section 28-416, incest under section 28-703, or assault by a confined person with a deadly or dangerous weapon under section 28-932;

(d) A Class IV felony when the crime attempted is a Class III felony not listed in subdivision (4)(c) of this section;

(e) A Class I misdemeanor when the crime attempted is a Class IIIA or Class IV felony;

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(f) A Class II misdemeanor when the crime attempted is a Class I misdemeanor; and

(g) A Class III misdemeanor when the crime attempted is a Class II misdemeanor.

Sec. 8. Section 28-202, Reissue Revised Statutes of Nebraska, is amended to read:

28-202 (1) A person shall be guilty of criminal conspiracy if, with intent to promote or facilitate the commission of a felony:

(a) He or she agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and

(b) He or she or another person with whom he or she conspired commits an overt act in pursuance of the conspiracy.

(2) If a person knows that one with whom he or she conspires to commit a crime has conspired with another person or persons to commit the same crime, he or she is guilty of conspiring to commit such crime with such other person or persons whether or not he or she knows their identity.

(3) If a person conspires to commit a number of crimes, he or she is guilty of only one conspiracy so long as such multiple crimes are the object of the same agreement or continuous conspiratorial relationship.

(4) Conspiracy is a crime of the same class as the most serious offense which is an object of the conspiracy~~, except that conspiracy to commit a Class I felony is a Class II felony~~.

A person prosecuted for a criminal conspiracy shall be acquitted if such person proves by a preponderance of the evidence that his or her conduct occurred in response to an entrapment.

Sec. 9. Section 28-303, Reissue Revised Statutes of Nebraska, is amended to read:

28-303 (1) A person commits murder in the first degree if he or she kills another person (a ~~1~~) purposely and with deliberate and premeditated malice, (b) ~~or (2)~~ in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or (c ~~3~~) by administering poison or causing the same to be done~~; or if by willful and corrupt perjury or subornation of the same he or she purposely procures the conviction and execution of any innocent person. The determination of whether murder in the first degree shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2519 to 29-2524~~.

(2) Murder in the first degree is a Class IA felony.

Sec. 10. Section 28-1356, Revised Statutes Cumulative Supplement, 2014, is amended to read:

28-1356 (1) A person who violates section 28-1355 shall be guilty of a Class III felony; however, such person shall be guilty of a Class IB felony if the violation is based upon racketeering activity which is punishable as a Class ~~I, IA,~~ IA or IB felony.

(2) In lieu of the fine authorized by section 28-105, any person convicted of engaging in conduct in violation of section 28-1355, through which pecuniary value was derived, or by which personal injury or property damage or other loss was caused, may be sentenced to pay a fine that does not exceed three times the gross value gained or three times the gross loss caused, whichever is greater, plus court costs and the costs of investigation and prosecution reasonably incurred. Any fine collected under this subsection shall be remitted to the State Treasurer for distribution in accordance with Article VII, section 5, of the Constitution of Nebraska.

Sec. 11. Section 29-1602, Reissue Revised Statutes of Nebraska, is amended to read:

29-1602 All informations shall be filed in the court having jurisdiction of the offense specified in the informations ~~therein~~, by the prosecuting attorney of the proper county as informant. The prosecuting attorney shall subscribe his or her name thereto and endorse thereon the names of the witnesses known to him or her at the time of filing. After the information has been filed, the prosecuting attorney shall endorse on the information the names of such other witnesses as shall then be known to him or her as the court in its discretion may prescribe~~, except that if a notice of aggravation is contained in the information as provided in section 29-1603, the prosecuting attorney may endorse additional witnesses at any time up to and including the thirtieth day prior to the trial of guilt~~.

Sec. 12. Section 29-1603, Revised Statutes Cumulative Supplement, 2014, is amended to read:

29-1603 (1) All informations shall be in writing and signed by the county attorney, complainant, or some other person, and the offenses charged in the informations ~~therein~~ shall be stated with the same fullness and precision in matters of substance as is required in indictments in like cases.

~~(2)(a) Any information charging a violation of section 28-303 and in which the death penalty is sought shall contain a notice of aggravation which alleges one or more aggravating circumstances, as such aggravating circumstances are provided in section 29-2523. The notice of aggravation shall be filed as provided in section 29-1602. It shall constitute sufficient notice to describe the alleged aggravating circumstances in the language provided in section 29-2523.~~

~~(b) The state shall be permitted to add to or amend a notice of aggravation at any time up to and including the thirtieth day prior to the trial of guilt.~~

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~~(c) The existence or contents of a notice of aggravation shall not be disclosed to the jury until after the verdict is rendered in the trial of guilt.~~

(2 ~~3~~) Different offenses and different degrees of the same offense may be joined in one information, in all cases in which the same might by different counts be joined in one indictment; and in all cases a defendant or defendants shall have the same right, as to proceedings therein, as the defendant or defendants would have if prosecuted for the same offense upon indictment.

Sec. 13. Section 29-1822, Reissue Revised Statutes of Nebraska, is amended to read:

29-1822 A person who becomes mentally incompetent after the commission of a crime or misdemeanor shall not be tried for the offense during the continuance of the incompetency. If, after the verdict of guilty and before judgment is pronounced, such person becomes mentally incompetent, then no judgment shall be given while such incompetency continues ~~shall continue; and if, after judgment and before execution of the sentence, such person shall become mentally incompetent, then in case the punishment be capital, the execution thereof shall be stayed until the recovery of such person from the incompetency~~.

Sec. 14. Section 29-2004, Reissue Revised Statutes of Nebraska, is amended to read:

29-2004 (1) All parties may stipulate that the jury may be selected up to thirty-one days prior to the date of trial. The stipulation must be unanimous among all parties and evidenced by a joint stipulation to the county court.

(2) In all cases, except as may be otherwise expressly provided, the accused shall be tried by a jury drawn, summoned, and impaneled according to provisions of the code of civil procedure, except that whenever in the opinion of the court the trial is likely to be a protracted one, the court may, immediately after the jury is impaneled and sworn, direct the calling of one or two additional jurors, to be known as alternate jurors. Such jurors shall be drawn from the same source and in the same manner, and have the same qualifications as regular jurors, and be subject to examination and challenge as such jurors, except that each party shall be allowed one peremptory challenge to each alternate juror. The alternate jurors shall take the proper oath or affirmation, ~~and~~ shall be seated near the regular jurors with equal facilities for seeing and hearing the proceedings in the cause, and shall attend at all times upon the trial of the cause in company with the regular jurors. They shall obey all orders and admonitions of the court, and if the regular jurors are ordered to be kept in the custody of an officer during the trial of the cause, the alternate jurors shall also be kept with the other jurors and~~, except as hereinafter provided,~~ shall be discharged upon the final submission of the cause to the jury. ~~If an information charging a violation of section 28-303 and in which the death penalty is sought contains a notice of aggravation, the alternate jurors shall be retained as provided in section 29-2520.~~ If, before the final submission of the cause a regular juror dies or is discharged, the court shall order the alternate juror, if there is but one, to take his or her place in the jury box. If there are two alternate jurors the court shall select one by lot, who shall then take his or her place in the jury box. After an alternate juror is in the jury box he or she shall be subject to the same rules as a regular juror.

Sec. 15. Section 29-2005, Reissue Revised Statutes of Nebraska, is amended to read:

29-2005 Every person arraigned for any crime punishable by ~~with death, or~~ imprisonment for life~~,~~ shall be admitted on his or her trial to a peremptory challenge of twelve jurors. Every ~~, and no more; every~~ person arraigned for any offense that may be punishable by imprisonment for a term exceeding eighteen months and less than life~~,~~ shall be admitted to a peremptory challenge of six jurors. In ~~; and in~~ all other criminal trials, the defendant shall be allowed a peremptory challenge of three jurors. The attorney prosecuting on behalf of the state shall be admitted to a peremptory challenge of twelve jurors in all cases when the offense is punishable by ~~with death or~~ imprisonment for life, six jurors when the offense is punishable by imprisonment for a term exceeding eighteen months and less than life, and three jurors in all other cases. In each case for which ~~; Provided, that in all cases where~~ alternate jurors are called, as provided in section 29-2004, ~~then in that case~~ both the defendant and the attorney prosecuting for the state shall each be allowed one added peremptory challenge to each alternate juror.

Sec. 16. Section 29-2006, Reissue Revised Statutes of Nebraska, is amended to read:

29-2006 (1) The following shall be good causes for challenge to any person called as a juror or alternate juror, on the trial of any indictment:

(a ~~1~~) That he or she was a member of the grand jury which found the indictment;

(b) That he or she ~~(2) that he~~ has formed or expressed an opinion as to the guilt or innocence of the accused. However ~~; Provided,~~ if a juror or alternate juror states ~~shall state~~ that he or she has formed or expressed an opinion as to the guilt or innocence of the accused, the court shall thereupon proceed to examine, on oath, such juror or alternate juror as to the ground of such opinion; and if it appears ~~shall appear~~ to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumor or hearsay, and not upon conversations with witnesses of the transactions or reading reports of their testimony or hearing them testify, and the juror or alternate juror says ~~shall say~~ on oath that he or she feels able,

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notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that such juror or alternate juror is impartial and will render such verdict, may, in its discretion, admit such juror or alternate juror as competent to serve in such case;

~~(3) in indictments for an offense the punishment whereof is capital, that his opinions are such as to preclude him from finding the accused guilty of an offense punishable with death; (4) that he~~

(c) That he or she is a relation within the fifth degree to the person alleged to be injured or attempted to be injured, or to the person on whose complaint the prosecution was instituted, or to the defendant;

(d) That he or she ~~(5) that he~~ has served on the petit jury which was sworn in the same cause against the same defendant and which jury either rendered a verdict which was set aside or was discharged, after hearing the evidence;

(e) That he or she ~~(6) that he~~ has served as a juror in a civil case brought against the defendant for the same act;

(f) That he or she ~~(7) that he~~ has been in good faith subpoenaed as a witness in the case; or

(g) That he or she ~~(8) that he~~ is a habitual drunkard. ~~; (9)~~

(2) In addition, the same challenges as are ~~shall be~~ allowed in ~~criminal prosecutions that are allowed to parties in~~ civil cases shall be allowed in criminal prosecutions.

Sec. 17. Section 29-2020, Reissue Revised Statutes of Nebraska, is amended to read:

29-2020 In ~~Except as provided in section 29-2525 for cases when the punishment is capital, in~~ all criminal cases when a defendant feels aggrieved by any opinion or decision of the court, he or she may order a bill of exceptions. The ordering, preparing, signing, filing, correcting, and amending of the bill of exceptions shall be governed by the rules established in such matters in civil cases.

Sec. 18. Section 29-2027, Reissue Revised Statutes of Nebraska, is amended to read:

29-2027 In all trials for murder the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it is murder in the first or second degree or manslaughter. If ~~; and if~~ such person is convicted by confession in open court, the court shall proceed by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly ~~or as provided in sections 29-2519 to 29-2524 for murder in the first degree~~.

Sec. 19. Section 29-2204, Revised Statutes Cumulative Supplement, 2014, is amended to read:

29-2204 (1) Except when the defendant is found guilty of a Class IA felony ~~a term of life imprisonment is required by law~~, in imposing an indeterminate sentence upon an offender the court shall:

~~(a)(i) Until July 1, 1998, fix the minimum and maximum limits of the sentence to be served within the limits provided by law, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum; and~~

~~(ii) Beginning July 1, 1998:~~

(a)(i) ~~(A)~~ Fix the minimum and maximum limits of the sentence to be served within the limits provided by law for any class of felony other than a Class IV felony, except that when a maximum limit of life is imposed by the court for a Class IB felony, the minimum limit may be any term of years not less than the statutory mandatory minimum. If the criminal offense is a Class IV felony, the court shall fix the minimum and maximum limits of the sentence, but the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term and the maximum limit shall not be greater than the maximum provided by law; or

(ii ~~B~~) Impose a definite term of years, in which event the maximum term of the sentence shall be the term imposed by the court and the minimum term shall be the minimum sentence provided by law;

(b) Advise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost; and

(c) Advise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost.

If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility or between the statement of the maximum limit of the sentence and the statement of mandatory release, the statements of the minimum limit and the maximum limit shall control the calculation of the offender's term. If the court imposes more than one sentence upon an offender or imposes a sentence upon an offender who is at that time serving another sentence, the court shall state whether the sentences are to be concurrent or consecutive.

(2)(a) When the court is of the opinion that imprisonment may be appropriate but desires more detailed information as a basis for determining the sentence to be imposed than has been provided by the presentence report required by section 29-2261, the court shall commit an offender to the Department of Correctional Services for a period not exceeding ninety days. The department shall conduct a complete study of the offender during that time, inquiring into such matters as his or her previous delinquency or criminal

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experience, social background, capabilities, and mental, emotional, and physical health and the rehabilitative resources or programs which may be available to suit his or her needs. By the expiration of the period of commitment or by the expiration of such additional time as the court shall grant, not exceeding a further period of ninety days, the offender shall be returned to the court for sentencing and the court shall be provided with a written report of the results of the study, including whatever recommendations the department believes will be helpful to a proper resolution of the case. After receiving the report and the recommendations, the court shall proceed to sentence the offender in accordance with subsection (1) of this section. The term of the sentence shall run from the date of original commitment under this subsection.

(b) In order to encourage the use of this procedure in appropriate cases, all costs incurred during the period the defendant is held in a state institution under this subsection shall be a responsibility of the state and the county shall be liable only for the cost of delivering the defendant to the institution and the cost of returning him or her to the appropriate court for sentencing or such other disposition as the court may then deem appropriate.

(3) Except when the defendant is found guilty of a Class IA felony ~~a term of life is required by law~~, whenever the defendant was under eighteen years of age at the time he or she committed the crime for which he or she was convicted, the court may, in its discretion, instead of imposing the penalty provided for the crime, make such disposition of the defendant as the court deems proper under the Nebraska Juvenile Code. Until October 1, 2013, prior to making a disposition which commits the juvenile to the Office of Juvenile Services, the court shall order the juvenile to be evaluated by the office if the juvenile has not had an evaluation within the past twelve months.

Sec. 20. Section 29-2261, Revised Statutes Cumulative Supplement, 2014, is amended to read:

29-2261 (1) Unless it is impractical to do so, when an offender has been convicted of a felony ~~other than murder in the first degree~~, the court shall not impose sentence without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation. ~~When an offender has been convicted of murder in the first degree and (a) a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520 or (b)(i) the information contains a notice of aggravation as provided in section 29-1603 and (ii) the offender waives his or her right to a jury determination of the alleged aggravating circumstances, the court shall not commence the sentencing determination proceeding as provided in section 29-2521 without first ordering a presentence investigation of the offender and according due consideration to a written report of such investigation.~~

(2) A court may order a presentence investigation in any case, except in cases in which an offender has been convicted of a Class IIIA misdemeanor, a Class IV misdemeanor, a Class V misdemeanor, a traffic infraction, or any corresponding city or village ordinance.

(3) The presentence investigation and report shall include, when available, an analysis of the circumstances attending the commission of the crime, the offender's history of delinquency or criminality, physical and mental condition, family situation and background, economic status, education, occupation, and personal habits, and any other matters that the probation officer deems relevant or the court directs to be included. All local and state police agencies and Department of Correctional Services adult correctional facilities shall furnish to the probation officer copies of such criminal records, in any such case referred to the probation officer by the court of proper jurisdiction, as the probation officer shall require without cost to the court or the probation officer.

Such investigation shall also include:

(a) Any written statements submitted to the county attorney by a victim; and

(b) Any written statements submitted to the probation officer by a victim.

(4) If there are no written statements submitted to the probation officer, he or she shall certify to the court that:

(a) He or she has attempted to contact the victim; and

(b) If he or she has contacted the victim, such officer offered to accept the written statements of the victim or to reduce such victim's oral statements to writing.

For purposes of subsections (3) and (4) of this section, the term victim shall be as defined in section 29-119.

(5) Before imposing sentence, the court may order the offender to submit to psychiatric observation and examination for a period of not exceeding sixty days or such longer period as the court determines to be necessary for that purpose. The offender may be remanded for this purpose to any available clinic or mental hospital, or the court may appoint a qualified psychiatrist to make the examination. The report of the examination shall be submitted to the court.

(6) Any presentence report or psychiatric examination shall be privileged and shall not be disclosed directly or indirectly to anyone other than a judge, probation officers to whom an offender's file is duly transferred, the probation administrator or his or her designee, or others entitled by law to receive such information, including personnel and mental health professionals for the Nebraska State Patrol specifically assigned to sex offender registration and community notification for the sole purpose of using such report or examination for assessing risk and for community notification of

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registered sex offenders. For purposes of this subsection, mental health professional means (a) a practicing physician licensed to practice medicine in this state under the Medicine and Surgery Practice Act, (b) a practicing psychologist licensed to engage in the practice of psychology in this state as provided in section 38-3111, or (c) a practicing mental health professional licensed or certified in this state as provided in the Mental Health Practice Act. The court may permit inspection of the report or examination of parts thereof by the offender or his or her attorney, or other person having a proper interest therein, whenever the court finds it is in the best interest of a particular offender. The court may allow fair opportunity for an offender to provide additional information for the court's consideration.

(7) If an offender is sentenced to imprisonment, a copy of the report of any presentence investigation or psychiatric examination shall be transmitted immediately to the Department of Correctional Services. Upon request, the Board of Parole or the Office of Parole Administration may receive a copy of the report from the department.

(8) Notwithstanding subsection (6) of this section, the Supreme Court or an agent of the Supreme Court acting under the direction and supervision of the Chief Justice shall have access to psychiatric examinations and presentence investigations and reports for research purposes. The Supreme Court and its agent shall treat such information as confidential, and nothing identifying any individual shall be released.

Sec. 21. Section 29-2407, Reissue Revised Statutes of Nebraska, is amended to read:

29-2407 Judgments for fines and costs in criminal cases shall be a lien upon all the property of the defendant within the county from the time of docketing the case by the clerk of the proper court, and judgments upon forfeited recognizance shall be a like lien from the time of forfeiture. No property of any convict shall be exempt from execution issued upon any such judgment as set out in this section against such convict except in cases when the convict is sentenced to a Department of Correctional Services adult correctional facility for a period of more than two years ~~or to suffer death~~, in which cases there shall be the same exemptions as at the time may be provided by law for civil cases. The lien on real estate of any such judgment for costs shall terminate as provided in section 25-1716.

Sec. 22. The changes made by this legislative bill shall not (1) limit the discretionary authority of the sentencing court to order restitution as part of any sentence or (2) alter the discretion and authority of the Department of Correctional Services to determine the appropriate security measures and conditions during the confinement of any committed offender.

Sec. 23. It is the intent of the Legislature that in any criminal proceeding in which the death penalty has been imposed but not carried out prior to the effective date of this act, such penalty shall be changed to life imprisonment.

Sec. 24. Section 29-2801, Reissue Revised Statutes of Nebraska, is amended to read:

29-2801 If any person, except persons convicted of some crime or offense for which they stand committed, ~~or persons committed for treason or felony, the punishment whereof is capital, plainly and specially expressed in the warrant of commitment,~~ now or in the future, is ~~or shall be~~ confined in any jail of this state, or is ~~shall be~~ unlawfully deprived of his or her liberty, and makes ~~shall make~~ application, either by himself ~~him~~ or herself or by any person on his or her behalf, to any one of the judges of the district court, or to any county judge, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it is the duty of the judge ~~shall be his duty~~ forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, or by the county judge, as the case may require, under the seal of the court whereof the person allowing such writ is a judge, directed to the proper officer, person, or persons who detain ~~detains~~ such prisoner.

Sec. 25. Section 29-3205, Reissue Revised Statutes of Nebraska, is amended to read:

29-3205 The Uniform Rendition of Prisoners as Witnesses in Criminal Proceedings Act shall ~~Sections 29-3201 to 29-3210 do~~ not apply to any person in this state confined as mentally ill ~~or under sentence of death~~.

Sec. 26. Section 29-3920, Reissue Revised Statutes of Nebraska, is amended to read:

29-3920 The Legislature finds that:

(1) County property owners should be given some relief from the obligation of providing mandated indigent defense services which in most instances are required because of state laws establishing crimes and penalties;

(2) Property tax relief can be accomplished if the state begins to assist the counties with the obligation of providing indigent defense services required by state laws establishing crimes and penalties;

(3) Property tax relief in the form of state assistance to the counties of Nebraska in providing for indigent defense services will also increase accountability because the state, which is the governmental entity responsible for passing criminal statutes, will likewise be responsible for paying some of the costs;

(4) Property tax relief in the form of state assistance to the counties of Nebraska in providing for indigent defense services will also improve

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inconsistent and inadequate funding of indigent defense services by the counties;

(5) Property tax relief in the form of state assistance to the counties of Nebraska in providing for indigent defense services will also lessen the impact on county property taxpayers of the cost of a high profile first-degree murder ~~death penalty~~ case which can significantly affect the finances of the counties; and

(6) To accomplish property tax relief in the form of the state assisting the counties of Nebraska in providing for indigent defense services, the Commission on Public Advocacy Operations Cash Fund should be established to fund the operation of the Commission on Public Advocacy and to fund reimbursement requests as determined by section 29-3933.

Sec. 27. Section 29-3922, Revised Statutes Cumulative Supplement, 2014, is amended to read:

29-3922 For purposes of the County Revenue Assistance Act:

(1) Chief counsel means an attorney appointed to be the primary administrative officer of the commission pursuant to section 29-3928;

(2) Commission means the Commission on Public Advocacy;

(3) Commission staff means attorneys, investigators, and support staff who are performing work for the first-degree murder ~~capital~~ litigation division, appellate division, DNA testing division, and major case resource center;

(4) Contracting attorney means an attorney contracting to act as a public defender pursuant to sections 23-3404 to 23-3408;

(5) Court-appointed attorney means an attorney other than a contracting attorney or a public defender appointed by the court to represent an indigent person;

(6) Indigent defense services means legal services provided to indigent persons by an indigent defense system in first-degree murder ~~capital~~ cases, felony cases, misdemeanor cases, juvenile cases, mental health commitment cases, child support enforcement cases, and paternity establishment cases;

(7) Indigent defense system means a system of providing services, including any services necessary for litigating a case, by a contracting attorney, court-appointed attorney, or public defender;

(8) Indigent person means a person who is indigent and unable to obtain legal counsel as determined pursuant to subdivision (3) of section 29-3901; and

(9) Public defender means an attorney appointed or elected pursuant to sections 23-3401 to 23-3403.

Sec. 28. Section 29-3928, Reissue Revised Statutes of Nebraska, is amended to read:

29-3928 The commission shall appoint a chief counsel. The responsibilities and duties of the chief counsel shall be defined by the commission and shall include the overall supervision of the workings of the various divisions of the commission. The chief counsel shall be qualified for his or her position, shall have been licensed to practice law in the State of Nebraska for at least five years prior to the effective date of the appointment, and shall be experienced in the practice of criminal defense, including the defense of first-degree murder ~~capital~~ cases. The chief counsel shall serve at the pleasure of the commission. The salary of the chief counsel shall be set by the commission.

Sec. 29. Section 29-3929, Reissue Revised Statutes of Nebraska, is amended to read:

29-3929 The primary duties of the chief counsel shall be to provide direct legal services to indigent defendants, and the chief counsel shall:

(1) Supervise the operations of the appellate division, the first-degree murder ~~capital~~ litigation division, the DNA testing division, and the major case resource center;

(2) Prepare a budget and disburse funds for the operations of the commission;

(3) Present to the commission an annual report on the operations of the commission, including an accounting of all funds received and disbursed, an evaluation of the cost-effectiveness of the commission, and recommendations for improvement;

(4) Convene or contract for conferences and training seminars related to criminal defense;

(5) Perform other duties as directed by the commission;

(6) Establish and administer projects and programs for the operation of the commission;

(7) Appoint and remove employees of the commission and delegate appropriate powers and duties to them;

(8) Adopt and promulgate rules and regulations for the management and administration of policies of the commission and the conduct of employees of the commission;

(9) Transmit monthly to the commission a report of the operations of the commission for the preceding calendar month;

(10) Execute and carry out all contracts, leases, and agreements authorized by the commission with agencies of federal, state, or local government, corporations, or persons; and

(11) Exercise all powers and perform all duties necessary and proper in carrying out his or her responsibilities.

Sec. 30. Section 29-3930, Reissue Revised Statutes of Nebraska, is amended to read:

29-3930 The following divisions are established within the commission:

(1) The first-degree murder ~~capital~~ litigation division shall be available to assist in the defense of first-degree murder ~~capital~~ cases in Nebraska,

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subject to caseload standards of the commission;

(2) The appellate division shall be available to prosecute appeals to the Court of Appeals and the Supreme Court, subject to caseload standards of the commission;

(3) The violent crime and drug defense division shall be available to assist in the defense of certain violent and drug crimes as defined by the commission, subject to the caseload standards of the commission;

(4) The DNA testing division shall be available to assist in representing persons who are indigent who have filed a motion pursuant to the DNA Testing Act, subject to caseload standards; and

(5) The major case resource center shall be available to assist public defenders, contracting attorneys, or court-appointed attorneys with the defense of a felony offense, subject to caseload standards of the commission.

Sec. 31. Section 55-480, Reissue Revised Statutes of Nebraska, is amended to read:

55-480 Though not specifically mentioned in the Nebraska Code of Military Justice ~~this code~~, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and all crimes and offenses ~~not capital,~~ of which persons subject to the ~~this~~ code may be guilty, shall be taken cognizance of by a court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Sec. 32. Section 83-1,110.02, Reissue Revised Statutes of Nebraska, is amended to read:

83-1,110.02 (1) A committed offender who is otherwise eligible for parole, who is not under sentence of ~~death or of~~ life imprisonment, and who because of an existing medical or physical condition is determined by the department to be terminally ill or permanently incapacitated may be considered for medical parole by the board. A committed offender may be eligible for medical parole in addition to any other parole. The department shall identify committed offenders who may be eligible for medical parole based upon their medical records.

(2) The board shall decide to grant medical parole only after a review of the medical, institutional, and criminal records of the committed offender and such additional medical evidence from board-ordered examinations or investigations as the board in its discretion determines to be necessary. The decision to grant medical parole and to establish conditions of release on medical parole in addition to the conditions stated in subsection (3) of this section is within the sole discretion of the board.

(3) As conditions of release on medical parole, the board shall require that the committed offender agree to placement for medical treatment and that he or she be placed for a definite or indefinite period of time in a hospital, a hospice, or another housing accommodation suitable to his or her medical condition, including, but not limited to, his or her family's home, as specified by the board.

(4) The parole term of a medical parolee shall be for the remainder of his or her sentence as reduced by any adjustment for good conduct pursuant to the Nebraska Treatment and Corrections Act.

Sec. 33. Section 83-4,143, Reissue Revised Statutes of Nebraska, is amended to read:

83-4,143 (1) It is the intent of the Legislature that the court target the felony offender (a) who is eligible and by virtue of his or her criminogenic needs is suitable to be sentenced to intensive supervision probation with placement at the incarceration work camp, (b) for whom the court finds that other conditions of a sentence of intensive supervision probation, in and of themselves, are not suitable, and (c) who, without the existence of an incarceration work camp, would, in all likelihood, be sentenced to prison.

(2) When the court is of the opinion that imprisonment is appropriate, but that a brief and intensive period of regimented, structured, and disciplined programming within a secure facility may better serve the interests of society, the court may place an offender in an incarceration work camp for a period not to exceed one hundred eighty days as a condition of a sentence of intensive supervision probation. The court may consider such placement if the offender (a) is a male or female offender convicted of a felony offense in a district court, (b) is medically and mentally fit to participate, with allowances given for reasonable accommodation as determined by medical and mental health professionals, and (c) has not previously been incarcerated for a violent felony crime. Offenders convicted of a crime under section 28-303 or sections 28-319 to 28-322.04 ~~or of any capital crime~~ are not eligible to be placed in an incarceration work camp.

(3) It is also the intent of the Legislature that the Board of Parole may recommend placement of felony offenders at the incarceration work camp. The offenders recommended by the board shall be offenders currently housed at other Department of Correctional Services adult correctional facilities and shall complete the incarceration work camp programming prior to release on parole.

(4) When the Board of Parole is of the opinion that a felony offender currently incarcerated in a Department of Correctional Services adult correctional facility may benefit from a brief and intensive period of regimented, structured, and disciplined programming immediately prior to release on parole, the board may direct placement of such an offender in an incarceration work camp for a period not to exceed one hundred eighty days as a condition of release on parole. The board may consider such placement if the felony offender (a) is medically and mentally fit to participate, with allowances given for reasonable accommodation as determined by medical and

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mental health professionals, and (b) has not previously been incarcerated for a violent felony crime. Offenders convicted of a crime under section 28-303 or sections 28-319 to 28-322.04 ~~or of any capital crime~~ are not eligible to be placed in an incarceration work camp.

(5) The Director of Correctional Services may assign a felony offender to an incarceration work camp if he or she believes it is in the best interests of the felony offender and of society, except that offenders convicted of a crime under section 28-303 or sections 28-319 to 28-322.04 ~~28-321 or of any capital crime~~ are not eligible to be assigned to an incarceration work camp pursuant to this subsection.

Sec. 34. Original sections 23-3406, 23-3408, 24-1106, 25-1140.09, 28-104, 28-202, 28-303, 29-1602, 29-1822, 29-2004, 29-2005, 29-2006, 29-2020, 29-2027, 29-2407, 29-2801, 29-3205, 29-3920, 29-3928, 29-3929, 29-3930, 55-480, 83-1,110.02, and 83-4,143, Reissue Revised Statutes of Nebraska, and sections 28-105, 28-201, 28-1356, 29-1603, 29-2204, 29-2261, and 29-3922, Revised Statutes Cumulative Supplement, 2014, are repealed.

Sec. 35. The following sections are outright repealed: Sections 24-1105, 29-2519, 29-2521, 29-2521.01, 29-2521.03, 29-2521.04, 29-2521.05, 29-2523, 29-2524.01, 29-2524.02, 29-2525, 29-2527, 29-2528, 29-2811, 83-1,105.01, 83-1,132, 83-964, 83-965, 83-966, 83-967, 83-968, 83-969, 83-970, 83-971, and 83-972, Reissue Revised Statutes of Nebraska, and sections 28-105.01, 29-2520, 29-2521.02, 29-2522, 29-2524, 29-2537, 29-2538, 29-2539, 29-2540, 29-2541, 29-2542, 29-2543, and 29-2546, Revised Statutes Cumulative Supplement, 2014.