

## LEGISLATIVE BILL 12

Approved by the Governor March 10, 2011

Introduced by Wightman, 36.

FOR AN ACT relating to criminal law; to amend sections 28-105, 29-2204, 29-2520, 29-2522, 29-2524, and 83-1,105.01, Reissue Revised Statutes of Nebraska; to change the statutes to reflect the Nebraska Supreme Court opinion State v. Conover, 270 Neb. 446, 703 N.W.2d 898 (2005); to harmonize provisions; and to repeal the original sections.

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

Section 1. Section 28-105, Reissue Revised Statutes of Nebraska, 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 nine classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class I felony	Death
Class IA felony	Life imprisonment <del>without parole</del>
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) 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. 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. 2. Section 29-2204, Reissue Revised Statutes of Nebraska, is amended to read:

29-2204 (1) Except when a term of life imprisonment ~~without parole~~ 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) 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

(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 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 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. 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. 3. Section 29-2520, Reissue Revised Statutes of Nebraska, is amended to read:

29-2520 (1) 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, ~~without parole.~~

(2) Unless the defendant waives his or her right to a jury determination of the alleged aggravating circumstances, such determination shall be made by:

(a) The jury which determined the defendant's guilt; or

(b) A jury impaneled for purposes of the determination of the alleged aggravating circumstances if:

(i) The defendant waived his or her right to a jury at the trial of guilt and either was convicted before a judge or was convicted on a plea of guilty or nolo contendere; or

(ii) The jury which determined the defendant's guilt has been discharged.

A jury required by subdivision (2)(b) of this section shall be impaneled in the manner provided in sections 29-2004 to 29-2010.

(3) The defendant may waive his or her right to a jury determination of the alleged aggravating circumstances. The court shall accept the waiver after determining that it is made freely, voluntarily, and knowingly. If the defendant waives his or her right to a jury determination of the alleged aggravating circumstances, such determination shall be made by a panel of judges as a part of the sentencing determination proceeding as provided in section 29-2521.

(4)(a) At an aggravation hearing before a jury for the determination of the alleged aggravating circumstances, the state may present evidence as to the existence of the aggravating circumstances alleged in the information. The Nebraska Evidence Rules shall apply at the aggravation hearing.

(b) Alternate jurors who would otherwise be discharged upon final submission of the cause to the jury shall be retained during the deliberation of the defendant's guilt but shall not participate in such deliberations. Such alternate jurors shall serve during the aggravation hearing as provided in section 29-2004 but shall not participate in the jury's deliberations under this subsection.

(c) If the jury serving at the aggravation hearing is the jury which determined the defendant's guilt, the jury may consider evidence received at the trial of guilt for purposes of reaching its verdict as to the existence or nonexistence of aggravating circumstances in addition to the evidence received at the aggravation hearing.

(d) After the presentation and receipt of evidence at the aggravation hearing, the state and the defendant or his or her counsel may present arguments before the jury as to the existence or nonexistence of the alleged aggravating circumstances.

(e) The court shall instruct the members of the jury as to their duty as jurors, the definitions of the aggravating circumstances alleged in the information, and the state's burden to prove the existence of each aggravating circumstance alleged in the information beyond a reasonable doubt.

(f) The jury at the aggravation hearing shall deliberate and return a verdict as to the existence or nonexistence of each alleged aggravating circumstance. Each aggravating circumstance shall be proved beyond a reasonable doubt. Each verdict with respect to each alleged aggravating circumstance shall be unanimous. If the jury is unable to reach a unanimous verdict with respect to an aggravating circumstance, such aggravating circumstance shall not be weighed in the sentencing determination proceeding as provided in section 29-2521.

(g) Upon rendering its verdict as to the determination of the aggravating circumstances, the jury shall be discharged.

(h) If no aggravating circumstance is found to exist, the court shall enter a sentence of life imprisonment, ~~without parole.~~ If one or more aggravating circumstances are found to exist, the court shall convene a panel of three judges to hold a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality as provided in subsection (3) of section 29-2521.

Sec. 4. Section 29-2522, Reissue Revised Statutes of Nebraska, is amended to read:

29-2522 The panel of judges for the sentencing determination proceeding shall either unanimously fix the sentence at death or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment, ~~without parole.~~ Such sentence determination shall be based upon the following considerations:

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

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

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

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

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

Sec. 5. Section 29-2524, Reissue Revised Statutes of Nebraska, is amended to read:

29-2524 Nothing in sections 25-1140.09, 28-303, 28-313, and 29-2519 to 29-2546 shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall they in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment ~~without parole~~ in accordance with the provisions of section 29-2308, nor shall they limit the right of the Board of Pardons to commute any sentence of death to a sentence of life imprisonment, ~~without parole.~~

Sec. 6. Section 83-1,105.01, Reissue Revised Statutes of Nebraska, is amended to read:

83-1,105.01 Except when a term of life imprisonment ~~without parole~~ is required by law, in imposing an indeterminate sentence upon an offender the court shall:

(1) 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;

(2) 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; or

(3)(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 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 any applicable provision of law. The term of the sentence shall run from the date of original commitment under this subdivision.

(b) In order to encourage the use of this procedure in appropriate cases, all costs incurred during the period the offender is held in a state institution under this subdivision shall be the responsibility of the state and the county shall be liable only for the cost of delivering the offender 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.

Sec. 7. Original sections 28-105, 29-2204, 29-2520, 29-2522, 29-2524, and 83-1,105.01, Reissue Revised Statutes of Nebraska, are repealed.