

LEGISLATIVE BILL 1

Approved by the Governor November 22, 2002

Introduced by Speaker Bromm, 23; Brashear, 4; at the request of the Governor

AN ACT relating to crimes and offenses; to amend sections 28-303, 29-1602, 29-1603, 29-2027, 29-2519, 29-2520, 29-2521, 29-2522, 29-2524, and 83-1,105.01, Reissue Revised Statutes of Nebraska, and sections 28-105, 28-105.01, 29-2004, 29-2204, 29-2261, and 29-2523, Revised Statutes Supplement, 2002; to change provisions relating to Class I and Class IA felonies; to state intent; to harmonize provisions; to provide severability; to repeal the original sections; and to declare an emergency.

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

Section 1. Section 28-105, Revised Statutes Supplement, 2002, 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
- Class IA felony ..... Life imprisonment without parole
- 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 28-105.01, Revised Statutes Supplement, 2002, is amended to read:

28-105.01. (1) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who was under the age of eighteen years at the time of the commission of the crime.

(2) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person with mental retardation.

(3) As used in subsection (2) of this section, mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy or below on a reliably administered intelligence quotient test shall be presumptive evidence of mental retardation.

(4) ~~Within one hundred twenty days after July 15, 1998, a convicted~~

person sentenced to the penalty of death prior to July 15, 1998, may bring a verified motion in the district court which imposed such sentence requesting a ruling that the penalty of death be precluded under subsection (2) of this section and that the sentence be vacated. The court shall cause notice of each such request to be served on the county attorney, grant a prompt hearing on the request, and determine the issues and make findings of fact with respect to the request. If the court finds by a preponderance of the evidence that the convicted person is a person with mental retardation, the sentence of death shall be vacated and a sentence of life imprisonment imposed.

(5) ~~For any convicted person who may be sentenced to the penalty of death on or after July 15, 1998~~ If (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 defendant waives his or her right to a jury determination of the alleged aggravating circumstances, the court shall hold a hearing prior to any sentencing hearing determination proceeding as provided in section 29-2521 upon a verified motion of the defense requesting a ruling that the penalty of death be precluded under subsection (2) of this section. If the court finds, by a preponderance of the evidence, that the defendant is a person with mental retardation, the death sentence shall not be imposed. A ruling by the court that the evidence of diminished intelligence introduced by the defendant does not preclude the death penalty under subsection (2) of this section shall not restrict the defendant's opportunity to introduce such evidence at the sentencing hearing determination proceeding as provided in section 29-2521 or to argue that such evidence should be given mitigating significance.

Sec. 3. Section 28-303, Reissue Revised Statutes of Nebraska, is amended to read:

28-303. A person commits murder in the first degree if he or she kills another person (1) purposely and with deliberate and premeditated malice, 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 (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 ~~29-2520~~ 29-2519 to 29-2524 and section 13 of this act.

Sec. 4. 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 therein, by the prosecuting attorney of the proper county as informant. ~~He~~ 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 the same, and at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall endorse thereon 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. 5. Section 29-1603, Reissue Revised Statutes of Nebraska, is amended to read:

29-1603. (1) All informations shall be verified by the oath of the county attorney, complainant, or some other person, and the offenses charged 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.

(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.

(3) Different offenses and different degrees of the same offense may be joined in one information, in all cases ~~where~~ 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 ~~he or they~~ the defendant or defendants would have if prosecuted for the same offense upon indictment.

Sec. 6. Section 29-2004, Revised Statutes Supplement, 2002, 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. 7. 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 ~~be~~ is murder in the first or second degree, or manslaughter; and if such person ~~be~~ 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 and section 13 of this act for murder in the first degree.

Sec. 8. Section 29-2204, Revised Statutes Supplement, 2002, 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. 9. Section 29-2261, Revised Statutes Supplement, 2002, 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.

(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 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 provisions of section 71-102, (b) a practicing psychologist licensed to engage in the practice of psychology in this state as provided in section 71-1,206.14, or (c) a practicing mental health professional licensed or certified in this state as provided in section 71-1,333. 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 forthwith to the Department of Correctional Services or, when the defendant is committed to the custody of a specific institution, to such institution.

(8) Notwithstanding subsection (6) of this section, the Nebraska Commission on Law Enforcement and Criminal Justice under the direction and supervision of the Chief Justice of the Supreme Court shall have access to presentence investigations and reports for the sole purpose of carrying out the study required under subdivision (7) of section 81-1425. The commission shall treat such information as confidential, and nothing identifying any individual shall be released by the commission.

Sec. 10. Section 29-2519, Reissue Revised Statutes of Nebraska, is amended to read:

29-2519. (1) The Legislature hereby finds that it is reasonable and necessary to establish mandatory standards for the imposition of the sentence of death; that the imposition of the death penalty in every instance of the commission of the crimes specified in section 28-303 fails to allow for mitigating factors which may dictate against the penalty of death; and that the rational imposition of the death sentence requires the establishment of specific legislative guidelines to be applied in individual cases by the court. The Legislature therefor determines that the death penalty should be imposed only for the crimes set forth in section 28-303 and, in addition, that it shall only be imposed in those instances when the aggravating circumstances existing in connection with the crime outweigh the mitigating circumstances, as set forth in sections 29-2520 to 29-2524 and section 13 of this act.

(2) The Legislature hereby finds and declares that:

(a) The decision of the United States Supreme Court in Ring v. Arizona (2002) requires that Nebraska revise its sentencing process in order

to ensure that rights of persons accused of murder in the first degree, as required under the Sixth and Fourteenth Amendments of the United States Constitution, are protected;

(b) The changes made by this legislative bill are intended to be procedural only in nature and ameliorative of the state's prior procedures for determination of aggravating circumstances in the sentencing process for murder in the first degree;

(c) The changes made by this legislative bill are not intended to alter the substantive provisions of sections 28-303 and 29-2520 to 29-2524;

(d) The aggravating circumstances defined in section 29-2523 have been determined by the United States Supreme Court to be "functional equivalents of elements of a greater offense" for purposes of the defendant's Sixth Amendment right, as applied to the states under the Fourteenth Amendment, to a jury determination of such aggravating circumstances, but the aggravating circumstances are not intended to constitute elements of the crime generally unless subsequently so required by the state or federal constitution; and

(e) To the extent that such can be applied in accordance with state and federal constitutional requirements, it is the intent of the Legislature that the changes to the murder in the first degree sentencing process made by this legislative bill shall apply to any murder in the first degree sentencing proceeding commencing on or after the effective date of this act.

Sec. 11. 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, within seven days fix a date for an aggravation hearing on determination of the sentence to be imposed. Such determination shall be made by: (1) The judge who presided at the trial or who accepted the plea of guilty; (2) a panel of three judges including the judge who presided or accepted the plea, the two additional judges having been designated by the Chief Justice of the Supreme Court after receiving a request therefor from the presiding judge; or (3) a panel of three district judges named by the Chief Justice of the Supreme Court when such Chief Justice has determined that the presiding judge is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered. 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. 12. Section 29-2521, Reissue Revised Statutes of Nebraska, is amended to read:

29-2521. (1) When a person has been found guilty 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) such person waives his or her right to a jury determination of the alleged aggravating circumstances, the sentence of such person shall be determined by:

(a) A panel of three judges, including the judge who presided at the trial of guilt or who accepted the plea and two additional active district court judges named at random by the Chief Justice of the Supreme Court. The judge who presided at the trial of guilt or who accepted the plea shall act as the presiding judge for the sentencing determination proceeding under this section; or

(b) If the Chief Justice of the Supreme Court has determined that the judge who presided at the trial of guilt or who accepted the plea is disabled or disqualified after receiving a suggestion of such disability or disqualification from the clerk of the court in which the finding of guilty was entered, a panel of three active district court judges named at random by the Chief Justice of the Supreme Court. The Chief Justice of the Supreme Court shall name one member of the panel at random to act as the presiding judge for the sentencing determination proceeding under this section.

(2) In the sentencing determination proceeding ~~for determination of sentence~~ before a panel of judges when the right to a jury determination of the alleged aggravating circumstances has been waived, the panel shall, as soon as practicable after receipt of the written report resulting from the presentence investigation ordered as provided in section 29-2261, hold a hearing. At such hearing, evidence may be presented as to any matter that the ~~court~~ presiding judge deems relevant to sentence, and shall include matters relating to ~~any of~~ the aggravating circumstances alleged in the information, to any of the ~~or~~ mitigating circumstances set forth in section 29-2523, and to sentence excessiveness or disproportionality. The Nebraska Evidence Rules shall apply to evidence relating to aggravating circumstances. Each aggravating circumstance shall be proved beyond a reasonable doubt. Any evidence at the sentencing determination proceeding - ~~Any such evidence~~ which the ~~court~~ presiding judge deems to have probative value may be received. The state and the defendant or his or her counsel shall be permitted to present argument for or against sentence of death. The ~~court~~ presiding judge shall set forth the general order of procedure at the outset of the ~~sentence~~ sentencing determination proceeding. The panel shall make written findings of fact based upon the trial of guilt and the sentencing determination proceeding, identifying which, if any, of the alleged aggravating circumstances have been proven to exist beyond a reasonable doubt. Each finding of fact with respect to each alleged aggravating circumstance shall be

unanimous. If the panel is unable to reach a unanimous finding of fact with respect to an aggravating circumstance, such aggravating circumstance shall not be weighed in the sentencing determination proceeding. After the presentation and receipt of evidence and argument, the panel shall determine an appropriate sentence as provided in section 29-2522.

(3) When a jury renders a verdict finding the existence of one or more aggravating circumstances as provided in section 29-2520, the panel of judges shall, as soon as practicable after receipt of the written report resulting from the presentence investigation ordered as provided in section 29-2261, hold a hearing to receive evidence of mitigation and sentence excessiveness or disproportionality. Evidence may be presented as to any matter that the presiding judge deems relevant to (a) mitigation, including, but not limited to, the mitigating circumstances set forth in section 29-2523, and (b) sentence excessiveness or disproportionality as provided in subdivision (3) of section 29-2522. Any such evidence which the presiding judge deems to have probative value may be received. The state and the defendant and his or her counsel shall be permitted to present argument for or against sentence of death. The presiding judge shall set forth the general order of procedure at the outset of the sentencing determination proceeding. After the presentation and receipt of evidence and argument, the panel shall determine an appropriate sentence as provided in section 29-2522.

Sec. 13. The verdict of a jury as to the existence or nonexistence of the alleged aggravating circumstances or, when the right to a jury determination of the alleged aggravating circumstances has been waived, the determination of a panel of judges with respect thereto, shall not be an appealable order or judgment of the district court, and no appeal may be taken directly from such verdict or determination.

Sec. 14. Section 29-2522, Reissue Revised Statutes of Nebraska, is amended to read:

29-2522. The panel of judges for the sentencing determination proceeding ~~After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges~~ shall either unanimously fix the sentence at either death or, if the sentence of death was not unanimously agreed upon by the panel, fix the sentence at life imprisonment, ~~but such~~ without parole. Such sentence determination shall be based upon the following considerations:

- (1) Whether ~~sufficient~~ the aggravating circumstances ~~exist to~~ 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, in which the court imposes the death sentence, the determination of the ~~court~~ panel of judges shall be in writing and ~~shall be supported by written findings of fact based upon the records of the trial and the sentencing proceeding, and referring~~ refer to the aggravating and mitigating circumstances ~~involved~~ weighed in ~~its~~ 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. 15. Section 29-2523, Revised Statutes Supplement, 2002, is amended to read:

29-2523. The aggravating and mitigating circumstances referred to in sections ~~29-2521 and 29-2522~~ 29-2519 to 29-2524 and section 13 of this act shall be as follows:

- (1) Aggravating Circumstances:
  - (a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial prior history of serious assaultive or terrorizing criminal activity;
  - (b) The murder was committed in an effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of such crime;
  - (c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;
  - (d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;
  - (e) At the time the murder was committed, the offender also committed another murder;
  - (f) The offender knowingly created a great risk of death to at least several persons;

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

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

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

~~The facts upon which the applicability of an aggravating circumstance depends must be proved beyond a reasonable doubt.~~

(2) Mitigating Circumstances:

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

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

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

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

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

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

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

Sec. 16. 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 and section 13 of this act 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. 17. 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. 18. If any section in this act or any part of any section is declared invalid or unconstitutional, the declaration shall not affect the validity or constitutionality of the remaining portions.

Sec. 19. Original sections 28-303, 29-1602, 29-1603, 29-2027, 29-2519, 29-2520, 29-2521, 29-2522, 29-2524, and 83-1,105.01, Reissue Revised Statutes of Nebraska, and sections 28-105, 28-105.01, 29-2004, 29-2204, 29-2261, and 29-2523, Revised Statutes Supplement, 2002, are repealed.

Sec. 20. Since an emergency exists, this act takes effect when passed and approved according to law.