

LEGISLATIVE BILL 36

Approved by the Governor May 28, 2009

Introduced by Flood, 19; Janssen, 15; McCoy, 39; Lautenbaugh, 18.

FOR AN ACT relating to the death penalty; to amend sections 29-2532, 29-2533, 29-2534, 29-2535, 29-2536, 29-2537, 29-2538, 29-2539, 29-2540, 29-2541, 29-2542, 29-2543, and 29-2546, Reissue Revised Statutes of Nebraska; to change the method of and procedure for inflicting the death penalty; to provide, change, and eliminate certain powers and duties for the Director of Correctional Services and the Department of Correctional Services; to change certain duties of the Supreme Court; to harmonize provisions; to provide a duty for the Revisor of Statutes; to provide severability; to repeal the original sections; and to outright repeal sections 29-2544 and 29-2545, Reissue Revised Statutes of Nebraska.

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

Section 1. Section 29-2537, Reissue Revised Statutes of Nebraska, is amended to read:

29-2537 (1) If any convict convicted person under sentence of death shall appear to be mentally incompetent, the warden or sheriff having him or her in custody Director of Correctional Services shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict convicted person was tried and sentenced and such judge shall at once make such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such convict- convicted person.

(2) If he or she shall determine the court determines that there is not sufficient reason for the appointment of a commission, he or she the court shall so find and refuse to suspend the execution of the convict- convicted person. If the judge shall determine court determines that a commission ought to be appointed to examine such convict, he or she convicted person, the court shall make a finding to that effect and cause it to be entered upon the records of the district court in the county in which such convict convicted person was sentenced, and, if necessary, the judge court shall suspend the execution and appoint the three superintendents of the state centers at Lincoln, Hastings, and Norfolk three licensed mental health professionals employed by the state as a commission to examine such convict- convicted person. The commission shall examine the convict convicted person to determine whether he or she is mentally competent or mentally incompetent and shall report its findings in writing to such judge the court within ten days after its appointment. If for any reason any of such superintendents cannot serve in such capacity, the judge shall appoint in his or her place one of the assistant superintendents of such center. If two members of the commission shall find the convict mentally convicted person incompetent, the judge court shall suspend his or her the convicted person's execution until further order. Any time thereafter, when it shall be made to appear to the judge that the convict has become mentally competent, he or she shall appoint a commission in the manner provided in this section, who shall make another investigation as to the mental competency of the convict, and in case such convict is again declared mentally incompetent his or her execution shall be suspended by the judge until further order. Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent. Thereafter, the court shall appoint a commission annually to review the convicted person's competency. The results of such review shall be provided to the court. If the convicted person is subsequently found to be competent by two members of the commission, the court shall certify that finding to the Supreme Court which shall then establish a date for the enforcement of the convicted person's sentence.

(3) The standard for the determination of competency under this section shall be the same as the standard for determining competency to stand trial.

Sec. 2. Section 29-2538, Reissue Revised Statutes of Nebraska, is amended to read:

29-2538 If a court has suspended the execution of the convicted person pending an investigation as to his or her competency, the date for the enforcement of the convicted person's sentence has passed, and the convicted person is found to be competent, the court shall certify that finding to the Supreme Court which shall appoint a day for the enforcement of the convicted person's sentence. In case such judge has suspended the execution of

the convict pending an investigation as to his sanity, and the convict shall be found to be sane, the judge shall appoint a day for his execution, which shall be carried into effect in the same manner as provided in the original sentence, a certified copy of which shall be transmitted by mail to the executioner.

Sec. 3. Section 29-2539, Reissue Revised Statutes of Nebraska, is amended to read:

29-2539 The members of such the commission appointed pursuant to section 29-2537 shall each receive mileage at the rate authorized in section 81-1176 for state employees for each mile actually and necessarily traveled in reaching and returning from the place where the convict convicted person is confined and examined, and it is hereby made the duty of the commission to act in this capacity without compensation other than that already provided for them by law. All of the findings and orders aforesaid shall be entered in the district court records of the county wherein the convict convicted person was originally tried and sentenced, and the costs therefor, including those providing for the mileage of the members of the commission, shall be allowed and paid in the usual manner by the county in which the convict convicted person was tried and sentenced to death.

Sec. 4. Section 29-2540, Reissue Revised Statutes of Nebraska, is amended to read:

29-2540 If a female convict convicted person under sentence of death shall appear to be pregnant, the warden or sheriff Director of Correctional Services shall in like manner notify the judge of the district court of the county in which she was sentenced, who shall in all things proceed as in the case of a mentally an incompetent convict convicted person.

Sec. 5. Section 29-2541, Reissue Revised Statutes of Nebraska, is amended to read:

29-2541 If the commission shall find appointed pursuant to section 29-2537 finds that the female convict convicted person is pregnant, the judge court shall suspend the execution of her sentence. At such time as it shall be determined that such woman is no longer pregnant, the judge shall appoint a time date for her execution, which shall be carried into effect in the same manner as provided in the original sentence, and issue a warrant directing the enforcement of the sentence of death which shall be delivered to the Director of Correctional Services. The costs and expenses thereof shall be the same as those provided for in the case of a mentally an incompetent convict convicted person and shall be paid in the same manner.

Sec. 6. Section 29-2542, Reissue Revised Statutes of Nebraska, is amended to read:

29-2542 If any person who has been convicted of a crime punishable by death, and sentenced to be electrocuted, death, shall escape, and shall not be retaken before the time fixed for his or her execution, it shall be lawful for the warden, Director of Correctional Services, or any sheriff or other officer or person, to rearrest such person and return him or her to the custody of the warden of the Nebraska Penal and Correctional Complex, director, who shall thereupon make return thereof to the Governor of the state, and the Governor shall thereupon notify the Supreme Court that such person has been returned to custody. Upon receipt of that notice, the Supreme Court shall then issue a warrant, fixing and appointing a day for the execution, a date for the enforcement of the sentence which shall be delivered to the director. The date of execution shall be set no later than sixty days following the issuance of the warrant, carried into effect by the warden in the same manner as herein provided for the execution of an original sentence of death.

Sec. 7. Section 29-2543, Reissue Revised Statutes of Nebraska, is amended to read:

29-2543 (1) Whenever any person has been tried and convicted before any district court in this state, of a crime punishable by death and under the conviction has been sentenced by the court to suffer death, and has had his or her sentence of death affirmed by the Supreme Court on mandatory direct review, it shall be the duty of the clerk of the court before which the conviction was had Supreme Court to issue a warrant, under the seal of the court, reciting therein the conviction and sentence and establishing a date for the enforcement of the sentence directed to the warden of the Nebraska Penal and Correctional Complex, Director of Correctional Services, commanding him or her to proceed at the time named in the sentence to carry the same into execution by causing the person so convicted and sentenced to be electrocuted by the passage of an electric current through the body until dead. The clerk shall deliver the warrant to the sheriff of the county in which conviction was had and such sheriff shall thereupon forthwith remove such convicted person to a Department of Correctional Services adult correctional facility of the

state and there deliver him or her, together with the warrant, into the custody of the warden who shall receive and safely keep such convict within a Department of Correctional Services adult correctional facility until the time of execution or until otherwise ordered by competent authority. warrant. The date of execution shall be set no later than sixty days following the issuance of the warrant.

(2) Thereafter, if the initial execution date has been stayed and the original execution date has expired, the Supreme Court shall establish a new date for enforcement of the sentence upon receipt of notice from the Attorney General that the stay of execution is no longer in effect and issue its warrant to the director. The date of execution shall be set no later than sixty days following the issuance of the warrant.

Sec. 8. Section 29-2546, Reissue Revised Statutes of Nebraska, is amended to read:

29-2546 Whenever the Supreme Court reverses the judgment of conviction in accordance with which any ~~convict~~ convicted person has been sentenced to death and is confined in a Department of Correctional Services adult correctional facility as herein provided, it shall be the duty of the ~~warden,~~ Director of Correctional Services, upon receipt of a copy of such judgment of reversal, duly certified by the clerk of the court and under the seal thereof, to forthwith deliver such ~~convict~~ convicted person into the custody of the sheriff of the county in which the conviction was had to be held in the jail of the county awaiting the further judgment and order of the court in the case.

Sec. 9. Section 29-2532, Reissue Revised Statutes of Nebraska, is amended to read:

29-2532 A sentence of death shall be enforced by the intravenous injection of a substance or substances in a quantity sufficient to cause death. The lethal substance or substances shall be administered in compliance with an execution protocol created and maintained by the Department of Correctional Services. The mode of inflicting the punishment of death, in all cases, shall be by causing to pass through the body of the convicted person a current of electricity of sufficient intensity to cause death, and the application of such current shall be continued until such convicted person is dead. The warden of the Nebraska Penal and Correctional Complex, and in case of his death, sickness, absence or inability to act, then the deputy warden, shall be the executioner; PROVIDED, the warden may in writing specially designate and appoint a suitable and competent person to act for him, and under his direction, as executioner in any particular case. A crime punishable by death must be punished according to the provisions herein made and not otherwise.

Sec. 10. (1) A sentence of death shall be enforced by the Director of Correctional Services. Upon receipt of an execution warrant, the director shall proceed at the time named in the warrant to enforce the sentence, unless the director is informed that enforcement of the sentence has been stayed by competent judicial authority, the sentence has been commuted, or the conviction has been pardoned.

(2) The director shall create, modify, and maintain a written execution protocol describing the process and procedures by which an execution will be carried out consistent with this section. The director shall (a) select the substance or substances to be employed in an execution by lethal injection, (b) create a documented process for obtaining the necessary substances, (c) designate an execution team composed of one or more executioners and any other personnel deemed necessary to effectively and securely conduct an execution, (d) describe the respective responsibilities of each member of the execution team, (e) describe the training required of each member of the execution team, and (f) perform or authorize any other details deemed necessary and appropriate by the director.

(3) The execution protocol shall require that the first or only substance injected be capable of rendering the convicted person unconscious and that a determination sufficient to reasonably verify that the convicted person is unconscious be made before the administration of any additional substances, if any.

Sec. 11. Notwithstanding any other provision of law:

(1) Any prescription, preparation, compounding, dispensing, obtaining, or administration of the substances deemed necessary to perform a lethal injection shall not constitute the practice of medicine or any other profession relating to health care which is subject by law to regulation, licensure, or certification;

(2) A pharmacist or pharmaceutical supplier may dispense the designated substances, without a prescription, to the Director of Correctional Services or the director's designee upon production of a written request from

the director for the designated substances necessary to conduct an execution;

(3) Obtaining, preparing, compounding, dispensing, and administering the substance or substances designated by the execution protocol does not violate the Uniform Controlled Substances Act or sections 71-2501 to 71-2512; and

(4) If a person who is a member of the execution team is licensed by a board or department, the licensing board or department shall not censure, reprimand, suspend, revoke, or take any other disciplinary action against that person's license as a result of that person's participation in a court-ordered execution.

Sec. 12. (1) The Director of Correctional Services may designate any person qualified under the terms of the execution protocol to administer to the convicted person the substances necessary to comply with the execution protocol.

(2) The identity of all members of the execution team, and any information reasonably calculated to lead to the identity of such members, shall be confidential and exempt from disclosure pursuant to sections 84-712 to 84-712.09 and shall not be subject to discovery or introduction as evidence in any civil proceeding unless extraordinary good cause is shown and a protective order is issued by a district court limiting dissemination of such information.

Sec. 13. No death sentence shall be voided or reduced as a result of a determination that a method of execution was declared unconstitutional under the Constitution of Nebraska or the Constitution of the United States. In any case in which an execution method is declared unconstitutional, the death sentence shall remain in force until the sentence can be lawfully executed by any valid method of execution.

Sec. 14. Section 29-2533, Reissue Revised Statutes of Nebraska, is amended to read:

29-2533 When any convicted person shall be is sentenced to be electrocuted, death, such punishment shall be inflicted within the walls of the Department of Correctional Services adult correctional facility, or within the yard or enclosure adjacent thereto, at a Department of Correctional Services facility under the supervision of the warden Director of Correctional Services and in such a manner as to exclude the view of all persons save except those permitted to be present as provided in sections 29-2534 and 29-2535, 15 and 16 of this act.

Sec. 15. Section 29-2534, Reissue Revised Statutes of Nebraska, is amended to read:

29-2534 Besides the warden, the deputy warden, the executioner, in case one shall have been appointed by the warden, and his assistants, Director of Correctional Services and those persons required to be present under the execution protocol, the following persons, and no others, except as provided in section 29-2535, 16 of this act, may be present at the execution: (1) The clergyman member of the clergy in attendance upon the prisoner, such other persons, not exceeding three in number as the prisoner may designate, convicted person; (2) no more than three persons selected by the convicted person; (3) no more than three persons representing the victim or victims of the crime; and (4) such other persons, not exceeding six in number, as the warden director may designate. At least two persons designated by the director shall be professional members of the Nebraska news media.

Sec. 16. Section 29-2535, Reissue Revised Statutes of Nebraska, is amended to read:

29-2535 Whenever the warden Director of Correctional Services shall deem the presence of a military force necessary to carry into effect the provisions of sections 29-2532 and 29-2533, 9 and 14 of this act, he or she shall make the fact known to the Governor of the state, who is hereby authorized to call out so much of the military force of the state as in his or her judgment may be necessary for the purpose.

Sec. 17. Section 29-2536, Reissue Revised Statutes of Nebraska, is amended to read:

29-2536 Whenever the warden Director of Correctional Services shall inflict the punishment of death upon a convict, convicted person, in obedience to the command of the court, he or she shall make return of his or her proceedings as soon as may be to the clerk of the court where the conviction was had, and the clerk shall subjoin the return to the record of conviction and sentence.

Sec. 18. The Revisor of Statutes shall assign sections 9 and 14 to 17 of this act to Chapter 83, article 9.

Sec. 19. 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. 20. Original sections 29-2532, 29-2533, 29-2534, 29-2535, 29-2536, 29-2537, 29-2538, 29-2539, 29-2540, 29-2541, 29-2542, 29-2543, and 29-2546, Reissue Revised Statutes of Nebraska, are repealed.

Sec. 21. The following sections are outright repealed: Sections 29-2544 and 29-2545, Reissue Revised Statutes of Nebraska.