

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 36

Introduced by Flood, 19.

Read first time January 8, 2009

Committee: Judiciary

A BILL

1 FOR AN ACT relating to the death penalty; to amend sections  
2 29-2532, 29-2533, 29-2534, 29-2535, 29-2536, 29-2537,  
3 29-2538, 29-2539, 29-2540, 29-2541, 29-2542, 29-2543, and  
4 29-2546, Reissue Revised Statutes of Nebraska; to change  
5 the method of and procedure for inflicting the death  
6 penalty; to provide powers and duties for the Director of  
7 Correctional Services and the Department of Correctional  
8 Services; to harmonize provisions; to provide a duty  
9 for the Revisor of Statutes; to provide severability;  
10 to repeal the original sections; and to outright repeal  
11 sections 29-2544 and 29-2545, Reissue Revised Statutes of  
12 Nebraska.

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

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

3           29-2537 (1) If any ~~convict~~ convicted person under  
4 sentence of death shall appear to be ~~mentally~~ incompetent, the  
5 ~~warden or sheriff having him or her in custody~~ Director of  
6 Correctional Services shall forthwith give notice thereof to a  
7 judge of the district court of the judicial district in which the  
8 ~~convict~~ convicted person was tried and sentenced and such judge  
9 shall at once make such investigation as shall satisfy him or  
10 her as to whether a commission ought to be named to examine such  
11 ~~convict.~~ convicted person.

12           (2) If he ~~or she~~ shall determine the court determines  
13 that there is not sufficient reason for the appointment of a  
14 commission, he ~~or she~~ the court shall so find and refuse to suspend  
15 the execution of the ~~convict.~~ convicted person. If the judge shall  
16 ~~determine~~ court determines that a commission ought to be appointed  
17 to examine such ~~convict,~~ he ~~or she~~ convicted person, the court  
18 shall make a finding to that effect and cause it to be entered  
19 upon the records of the district court in the county in which  
20 such ~~convict~~ convicted person was sentenced, and, if necessary,  
21 the ~~judge~~ court shall suspend the execution and appoint ~~the three~~  
22 ~~superintendents of the state centers at Lincoln, Hastings, and~~  
23 ~~Norfolk~~ three licensed mental health professionals employed by  
24 the state as a commission to examine such ~~convict.~~ convicted  
25 person. The commission shall examine the ~~convict~~ convicted person

1 to determine whether he or she is ~~mentally~~ competent or ~~mentally~~  
2 incompetent and shall report its findings in writing to such judge  
3 the court within ten days after its appointment. If ~~for any reason~~  
4 ~~any of such superintendents cannot serve in such capacity,~~ the  
5 judge shall appoint in his or her place one of the assistant  
6 ~~superintendents of such center.~~ If two members of the commission  
7 shall find the ~~convict~~ mentally convicted person incompetent,  
8 the judge court shall suspend his or her the convicted person's  
9 execution until further order. Any time thereafter, when it shall  
10 be made to appear to the judge that the convict has become mentally  
11 competent, he or she shall appoint a commission in the manner  
12 provided in this section, who shall make another investigation as  
13 to the mental competency of the convict, and in case such convict  
14 is again declared mentally incompetent his or her execution shall  
15 be suspended by the judge until further order. Such proceedings  
16 may be had at such times as the judge shall order until it  
17 is either determined that the convict is mentally competent or  
18 incurably mentally incompetent. Thereafter, the court shall appoint  
19 a commission annually to review the convicted person's competency.  
20 The results of such review shall be provided to the court. If  
21 the convicted person is subsequently found to be competent by two  
22 members of the commission, the court shall certify that finding  
23 to the Supreme Court which shall then establish a date for the  
24 enforcement of the convicted person's sentence.

25 (3) The standard for the determination of competency

1 under this section shall be the same as the standard for  
2 determining competency to stand trial.

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

5           29-2538 If a court has suspended the execution of  
6 the convicted person pending an investigation as to his or her  
7 competency, the date for the enforcement of the convicted person's  
8 sentence has passed, and the convicted person is found to be  
9 competent, the court shall certify that finding to the Supreme  
10 Court which shall appoint a day for the enforcement of the  
11 convicted person's sentence. In case such judge has suspended the  
12 execution of the convict pending an investigation as to his sanity,  
13 and the convict shall be found to be sane, the judge shall appoint  
14 a day for his execution, which shall be carried into effect in the  
15 same manner as provided in the original sentence, a certified copy  
16 of which shall be transmitted by mail to the executioner.

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

19           29-2539 The members of ~~such~~ the commission appointed  
20 pursuant to section 29-2537 shall each receive mileage at the  
21 rate authorized in section 81-1176 for state employees for each  
22 mile actually and necessarily traveled in reaching and returning  
23 from the place where the ~~convict~~ convicted person is confined  
24 and examined, and it is hereby made the duty of the commission  
25 to act in this capacity without compensation other than that

1 already provided for them by law. All of the findings and orders  
 2 aforesaid shall be entered in the district court records of the  
 3 county wherein the ~~convict~~ convicted person was originally tried  
 4 and sentenced, and the costs therefor, including those providing  
 5 for the mileage of the members of the commission, shall be allowed  
 6 and paid in the usual manner by the county in which the ~~convict~~  
 7 convicted person was tried and sentenced to death.

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

10           29-2540 If a female ~~convict~~ convicted person under  
 11 sentence of death shall appear to be pregnant, the ~~warden or~~  
 12 ~~sheriff~~ Director of Correctional Services shall in like manner  
 13 notify the judge of the district court of the county in which she  
 14 was sentenced, who shall in all things proceed as in the case of a  
 15 ~~mentally an incompetent convict.~~ convicted person.

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

18           29-2541 If the commission shall ~~find~~ appointed pursuant  
 19 to section 29-2537 finds that the female ~~convict~~ convicted person  
 20 is pregnant, the ~~judge~~ court shall suspend the execution of her  
 21 sentence. At such time as it shall be determined that such woman  
 22 is no longer pregnant, the judge shall appoint a ~~time~~ date for her  
 23 execution, ~~which shall be carried into effect in the same manner~~  
 24 ~~as provided in the original sentence.~~ and issue a warrant directing  
 25 the enforcement of the sentence of death which shall be delivered

1 to the Director of Correctional Services. The costs and expenses  
2 thereof shall be the same as those provided for in the case of a  
3 ~~mentally an incompetent convict~~ convicted person and shall be paid  
4 in the same manner.

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

7           29-2542 If any person who has been convicted of a crime  
8 punishable by death, and sentenced to be electrocuted, death, shall  
9 escape, and shall not be retaken before the time fixed for his  
10 or her execution, it shall be lawful for the ~~warden,~~ Director of  
11 Correctional Services, or any sheriff or other officer or person,  
12 to rearrest such person and return him or her to the custody of the  
13 ~~warden of the Nebraska Penal and Correctional Complex,~~ director,  
14 who shall thereupon make return thereof to the Governor of the  
15 state, and the Governor shall thereupon notify the Supreme Court  
16 that such person has been returned to custody. Upon receipt of that  
17 notice, the Supreme Court shall then issue a warrant, fixing and  
18 appointing a day for the execution, a date for the enforcement of  
19 the sentence which shall be delivered to the director. The date  
20 of execution shall be set no later than sixty days following the  
21 issuance of the warrant. carried into effect by the warden in the  
22 same manner as herein provided for the execution of an original  
23 sentence of death.

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

1           29-2543 (1) Whenever any person has been tried and  
2 convicted before any district court in this state, ~~of a crime~~  
3 ~~punishable by death and under the conviction~~ has been sentenced  
4 ~~by the court to suffer death,~~ and has had his or her sentence of  
5 death affirmed by the Supreme Court on mandatory direct review,  
6 it shall be the duty of the clerk of the court before which the  
7 ~~conviction was had~~ Supreme Court to issue a warrant, under the  
8 seal of the court, reciting therein the conviction and sentence and  
9 establishing a date for the enforcement of the sentence directed to  
10 the warden of the Nebraska Penal and Correctional Complex, Director  
11 of Correctional Services, commanding him or her to proceed at the  
12 time named in the sentence to carry the same into execution by  
13 causing the person so convicted and sentenced to be electrocuted  
14 by the passage of an electric current through the body until dead.  
15 The clerk shall deliver the warrant to the sheriff of the county in  
16 which conviction was had and such sheriff shall thereupon forthwith  
17 remove such convicted person to a Department of Correctional  
18 Services adult correctional facility of the state and there deliver  
19 him or her, together with the warrant, into the custody of the  
20 warden who shall receive and safely keep such convict within a  
21 Department of Correctional Services adult correctional facility  
22 until the time of execution or until otherwise ordered by competent  
23 authority. warrant. The date of execution shall be set no later  
24 than sixty days following the issuance of the warrant.

25           (2) Thereafter, if the initial execution date has been

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

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

9           29-2546 Whenever the Supreme Court reverses the judgment  
10 of conviction in accordance with which any ~~convict~~ convicted person  
11 has been sentenced to death and is confined in a Department  
12 of Correctional Services adult correctional facility as herein  
13 provided, it shall be the duty of the ~~warden,~~ Director of  
14 Correctional Services, upon receipt of a copy of such judgment  
15 of reversal, duly certified by the clerk of the court and under  
16 the seal thereof, to forthwith deliver such ~~convict~~ convicted  
17 person into the custody of the sheriff of the county in which the  
18 conviction was had to be held in the jail of the county awaiting  
19 the further judgment and order of the court in the case.

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

22           ~~29-2532~~ A sentence of death shall be enforced by the  
23 intravenous injection of a substance or substances in a quantity  
24 sufficient to cause death. The lethal substance or substances shall  
25 be administered in compliance with an execution protocol created



1 and maintained by the Department of Correctional Services. The  
2 mode of inflicting the punishment of death, in all cases, shall  
3 be by causing to pass through the body of the convicted person  
4 a current of electricity of sufficient intensity to cause death,  
5 and the application of such current shall be continued until  
6 such convicted person is dead. The warden of the Nebraska Penal  
7 and Correctional Complex, and in case of his death, sickness,  
8 absence or inability to act, then the deputy warden, shall be  
9 the executioner; PROVIDED, the warden may in writing specially  
10 designate and appoint a suitable and competent person to act for  
11 him, and under his direction, as executioner in any particular  
12 case. A crime punishable by death must be punished according to the  
13 provisions herein made and not otherwise.

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

21           (2) The director shall create, modify, and maintain a  
22 written execution protocol describing the process and procedures  
23 by which an execution will be carried out consistent with  
24 this section. The director shall (a) select the substance or  
25 substances to be employed in an execution by lethal injection,

1 (b) create a documented process for obtaining the necessary  
2 substances, (c) designate an execution team composed of one or  
3 more executioners and any other personnel deemed necessary to  
4 effectively and securely conduct an execution, (d) describe the  
5 respective responsibilities of each member of the execution team,  
6 (e) describe the training required of each member of the execution  
7 team, and (f) perform or authorize any other details deemed  
8 necessary and appropriate by the director.

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

14 (4) The execution protocol created, modified, and  
15 maintained by the director for the execution of a convicted person  
16 sentenced to death shall be exempt from the requirements of the  
17 Administrative Procedure Act.

18 (5) The execution protocol or any portion thereof  
19 shall not be made available to any person without the express  
20 authorization of the director or an order of the district court  
21 of Lancaster County, issued for good cause shown, limiting those  
22 portions of the execution protocol to be produced and subject to  
23 a protective order limiting those allowed to be privy to those  
24 portions of the protocol ordered produced.

25 Sec. 11. Notwithstanding any other provision of law:

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

7           (2) A pharmacist or pharmaceutical supplier may dispense  
8 the designated substances, without a prescription, to the Director  
9 of Correctional Services or the director's designee upon production  
10 of a written request from the director for the designated  
11 substances necessary to conduct an execution;

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

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

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

25           (2) The identity of all members of the execution team,

1 and any information reasonably calculated to lead to the identities  
2 of such members, including, but not limited to, their names,  
3 residential or office addresses, residential or office telephone  
4 numbers, or social security numbers, shall be confidential, shall  
5 be exempt from the federal Freedom of Information Act, 5 U.S.C.  
6 552, as the act existed on January 1, 2009, shall not be a  
7 public record subject to disclosure pursuant to sections 84-712 to  
8 84-712.09, and shall not be subject to discovery or introduction as  
9 evidence in any civil proceeding unless extraordinary good cause is  
10 shown and a protective order is issued by a district court limiting  
11 dissemination of such information.

12 (3) Without a court order directing the release of such  
13 information, the disclosure of the identity of any member of the  
14 execution team or any information reasonably calculated to lead to  
15 the identities of such persons shall be a Class I misdemeanor. Any  
16 member whose identity is disclosed in violation of this section  
17 shall have a civil cause of action against the person who violated  
18 this section and shall be entitled to recover from such person  
19 actual damages on a showing of a willful violation of this section.

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

1 by any valid method of execution.

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

4           ~~29-2533~~ When any convicted person shall be is sentenced  
5 to be ~~electrocuted,~~ death such punishment shall be inflicted  
6 within the walls of the Department of Correctional Services adult  
7 correctional facility, ~~or within the yard or enclosure adjacent~~  
8 ~~thereto,~~ at a Department of Correctional Services facility under  
9 the supervision of the ~~warden~~ Director of Correctional Services and  
10 in such a manner as to exclude the view of all persons ~~save~~ except  
11 those permitted to be present as provided in sections ~~29-2534 and~~  
12 ~~29-2535,~~ 15 and 16 of this act.

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

15           ~~29-2534~~ Besides the ~~warden,~~ the ~~deputy warden,~~ the  
16 ~~executioner,~~ in case one shall have been appointed by the ~~warden,~~  
17 ~~and his assistants,~~ Director of Correctional Services and those  
18 persons required to be present under the execution protocol, the  
19 following persons, and no others, except as provided in section  
20 ~~29-2535,~~ 16 of this act, may be present at the execution: (1) The  
21 ~~elergyman~~ member of the clergy in attendance upon the ~~prisoner,~~  
22 ~~such other persons,~~ not exceeding three in number as the prisoner  
23 may designate, convicted person; (2) no more than three persons  
24 selected by the convicted person; (3) no more than three persons  
25 representing the victim or victims of the crime; and (4) such other

1 persons, not exceeding six in number, as the ~~warden~~ director may  
2 designate.

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

5           ~~29-2535~~ Whenever the ~~warden~~ Director of Correctional  
6 Services shall deem the presence of a military force necessary to  
7 carry into effect the provisions of sections ~~29-2532 and 29-2533,~~  
8 9 and 14 of this act, he or she shall make the fact known to the  
9 Governor of the state, who is hereby authorized to call out so much  
10 of the military force of the state as in his or her judgment may  
11 be necessary for the purpose.

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

14           ~~29-2536~~ Whenever the ~~warden~~ Director of Correctional  
15 Services shall inflict the punishment of death upon a ~~convict,~~  
16 convicted person, in obedience to the command of the court, he or  
17 she shall make return of his or her proceedings as soon as may  
18 be to the clerk of the court where the conviction was had, and  
19 the clerk shall subjoin the return to the record of conviction and  
20 sentence.

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

23           Sec. 19. If any section in this act or any part of any  
24 section is declared invalid or unconstitutional, the declaration  
25 shall not affect the validity or constitutionality of the remaining

1 portions.

2           Sec. 20. Original sections 29-2532, 29-2533, 29-2534,  
3 29-2535, 29-2536, 29-2537, 29-2538, 29-2539, 29-2540, 29-2541,  
4 29-2542, 29-2543, and 29-2546, Reissue Revised Statutes of  
5 Nebraska, are repealed.

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