

LEGISLATURE OF NEBRASKA  
ONE HUNDRED SECOND LEGISLATURE  
FIRST SESSION  
**LEGISLATIVE BILL 12**

Introduced by Wightman, 36.

Read first time January 06, 2011

Committee: Judiciary

A BILL

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

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

1                   Section 1. Section 28-105, Reissue Revised Statutes of  
2 Nebraska, is amended to read:

3                   28-105 (1) For purposes of the Nebraska Criminal Code and  
4 any statute passed by the Legislature after the date of passage of  
5 the code, felonies are divided into nine classes which are  
6 distinguished from one another by the following penalties which are  
7 authorized upon conviction:

8	Class I felony	Death
9	Class IA felony	Life imprisonment <del>without parole</del>
10	Class IB felony	Maximum - life imprisonment
11		Minimum - twenty years imprisonment
12	Class IC felony	Maximum - fifty years imprisonment
13		Mandatory minimum - five years imprisonment
14	Class ID felony	Maximum - fifty years imprisonment
15		Mandatory minimum - three years imprisonment
16	Class II felony	Maximum - fifty years imprisonment
17		Minimum - one year imprisonment
18	Class III felony	Maximum - twenty years imprisonment, or
19		twenty-five thousand dollars fine, or both
20		Minimum - one year imprisonment
21	Class IIIA felony	Maximum - five years imprisonment, or
22		ten thousand dollars fine, or both

1 Minimum - none

2 Class IV felony Maximum - five years imprisonment, or  
3 ten thousand dollars fine, or both

4 Minimum - none

5 (2) All sentences of imprisonment for Class IA, IB, IC,  
6 ID, II, and III felonies and sentences of one year or more for Class  
7 IIIA and IV felonies shall be served in institutions under the  
8 jurisdiction of the Department of Correctional Services. Sentences of  
9 less than one year shall be served in the county jail except as  
10 provided in this subsection. If the department certifies that it has  
11 programs and facilities available for persons sentenced to terms of  
12 less than one year, the court may order that any sentence of six  
13 months or more be served in any institution under the jurisdiction of  
14 the department. Any such certification shall be given by the  
15 department to the State Court Administrator, who shall forward copies  
16 thereof to each judge having jurisdiction to sentence in felony  
17 cases.

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

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

23 Sec. 2. Section 29-2204, Reissue Revised Statutes of  
24 Nebraska, is amended to read:

25 29-2204 (1) Except when a term of life imprisonment

1 ~~without parole~~ is required by law, in imposing an indeterminate  
2 sentence upon an offender the court shall:

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

8 (ii) Beginning July 1, 1998:

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

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

23 (b) Advise the offender on the record the time the  
24 offender will serve on his or her minimum term before attaining  
25 parole eligibility assuming that no good time for which the offender

1 will be eligible is lost; and

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

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

15 (2)(a) When the court is of the opinion that imprisonment  
16 may be appropriate but desires more detailed information as a basis  
17 for determining the sentence to be imposed than has been provided by  
18 the presentence report required by section 29-2261, the court shall  
19 commit an offender to the Department of Correctional Services for a  
20 period not exceeding ninety days. The department shall conduct a  
21 complete study of the offender during that time, inquiring into such  
22 matters as his or her previous delinquency or criminal experience,  
23 social background, capabilities, and mental, emotional, and physical  
24 health and the rehabilitative resources or programs which may be  
25 available to suit his or her needs. By the expiration of the period

1 of commitment or by the expiration of such additional time as the  
2 court shall grant, not exceeding a further period of ninety days, the  
3 offender shall be returned to the court for sentencing and the court  
4 shall be provided with a written report of the results of the study,  
5 including whatever recommendations the department believes will be  
6 helpful to a proper resolution of the case. After receiving the  
7 report and the recommendations, the court shall proceed to sentence  
8 the offender in accordance with subsection (1) of this section. The  
9 term of the sentence shall run from the date of original commitment  
10 under this subsection.

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

18 (3) Except when a term of life is required by law,  
19 whenever the defendant was under eighteen years of age at the time he  
20 or she committed the crime for which he or she was convicted, the  
21 court may, in its discretion, instead of imposing the penalty  
22 provided for the crime, make such disposition of the defendant as the  
23 court deems proper under the Nebraska Juvenile Code. Prior to making  
24 a disposition which commits the juvenile to the Office of Juvenile  
25 Services, the court shall order the juvenile to be evaluated by the

1 office if the juvenile has not had an evaluation within the past  
2 twelve months.

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

5 29-2520 (1) Whenever any person is found guilty of a  
6 violation of section 28-303 and the information contains a notice of  
7 aggravation as provided in section 29-1603, the district court shall,  
8 as soon as practicable, fix a date for an aggravation hearing to  
9 determine the alleged aggravating circumstances. If no notice of  
10 aggravation has been filed, the district court shall enter a sentence  
11 of life imprisonment. ~~without parole.~~

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

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

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

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

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

23 A jury required by subdivision (2)(b) of this section  
24 shall be impaneled in the manner provided in sections 29-2004 to  
25 29-2010.

1           (3) The defendant may waive his or her right to a jury  
2 determination of the alleged aggravating circumstances. The court  
3 shall accept the waiver after determining that it is made freely,  
4 voluntarily, and knowingly. If the defendant waives his or her right  
5 to a jury determination of the alleged aggravating circumstances,  
6 such determination shall be made by a panel of judges as a part of  
7 the sentencing determination proceeding as provided in section  
8 29-2521.

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

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

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



1 hearing.

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

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

11 (f) The jury at the aggravation hearing shall deliberate  
12 and return a verdict as to the existence or nonexistence of each  
13 alleged aggravating circumstance. Each aggravating circumstance shall  
14 be proved beyond a reasonable doubt. Each verdict with respect to  
15 each alleged aggravating circumstance shall be unanimous. If the jury  
16 is unable to reach a unanimous verdict with respect to an aggravating  
17 circumstance, such aggravating circumstance shall not be weighed in  
18 the sentencing determination proceeding as provided in section  
19 29-2521.

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

22 (h) If no aggravating circumstance is found to exist, the  
23 court shall enter a sentence of life imprisonment, ~~without parole~~. If  
24 one or more aggravating circumstances are found to exist, the court  
25 shall convene a panel of three judges to hold a hearing to receive

1 evidence of mitigation and sentence excessiveness or  
2 disproportionality as provided in subsection (3) of section 29-2521.

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

5 29-2522 The panel of judges for the sentencing  
6 determination proceeding shall either unanimously fix the sentence at  
7 death or, if the sentence of death was not unanimously agreed upon by  
8 the panel, fix the sentence at life imprisonment. ~~without parole.~~  
9 Such sentence determination shall be based upon the following  
10 considerations:

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

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

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

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

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

25 Sec. 5. Section 29-2524, Reissue Revised Statutes of

1 Nebraska, is amended to read:

2           29-2524 Nothing in sections 25-1140.09, 28-303, 28-313,  
3 and 29-2519 to 29-2546 shall be in any way deemed to repeal or limit  
4 existing procedures for automatic review of capital cases, nor shall  
5 they in any way limit the right of the Supreme Court to reduce a  
6 sentence of death to a sentence of life imprisonment ~~without parole~~  
7 in accordance with the provisions of section 29-2308, nor shall they  
8 limit the right of the Board of Pardons to commute any sentence of  
9 death to a sentence of life imprisonment. ~~without parole.~~

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

12           83-1,105.01 Except when a term of life imprisonment  
13 ~~without parole~~ is required by law, in imposing an indeterminate  
14 sentence upon an offender the court shall:

15           (1) Fix the minimum and maximum limits of the sentence to  
16 be served within the limits provided by law for any class of felony  
17 other than a Class IV felony, except that when a maximum limit of  
18 life is imposed by the court for a Class IB felony, the minimum limit  
19 may be any term of years not less than the statutory mandatory  
20 minimum. If the criminal offense is a Class IV felony, the court  
21 shall fix the minimum and maximum limits of the sentence, but the  
22 minimum limit fixed by the court shall not be less than the minimum  
23 provided by law nor more than one-third of the maximum term and the  
24 maximum limit shall not be greater than the maximum provided by law;

25           (2) Impose a definite term of years, in which event the

1 maximum term of the sentence shall be the term imposed by the court  
2 and the minimum term shall be the minimum sentence provided by law;  
3 or

4 (3)(a) When the court is of the opinion that imprisonment  
5 may be appropriate but desires more detailed information as a basis  
6 for determining the sentence to be imposed than has been provided by  
7 the presentence report required by section 29-2261, the court shall  
8 commit an offender to the Department of Correctional Services for a  
9 period not exceeding ninety days. The department shall conduct a  
10 complete study of the offender during that time, inquiring into such  
11 matters as his or her previous delinquency or criminal experience,  
12 social background, capabilities, and mental, emotional, and physical  
13 health and the rehabilitative resources or programs which may be  
14 available to suit his or her needs. By the expiration of the period  
15 of commitment or by the expiration of such additional time as the  
16 court shall grant, not exceeding a further period of ninety days, the  
17 offender shall be returned to the court for sentencing and the court  
18 shall be provided with a written report of the results of the study,  
19 including whatever recommendations the department believes will be  
20 helpful to a proper resolution of the case. After receiving the  
21 report and the recommendations, the court shall proceed to sentence  
22 the offender in accordance with any applicable provision of law. The  
23 term of the sentence shall run from the date of original commitment  
24 under this subdivision.

25 (b) In order to encourage the use of this procedure in

1 appropriate cases, all costs incurred during the period the offender  
2 is held in a state institution under this subdivision shall be the  
3 responsibility of the state and the county shall be liable only for  
4 the cost of delivering the offender to the institution and the cost  
5 of returning him or her to the appropriate court for sentencing or  
6 such other disposition as the court may then deem appropriate.

7           Sec. 7. Original sections 28-105, 29-2204, 29-2520,  
8 29-2522, 29-2524, and 83-1,105.01, Reissue Revised Statutes of  
9 Nebraska, are repealed.