

LEGISLATIVE BILL 268

Approved by the Governor April 20, 1973

Introduced by Rasmussen, 41

AN ACT to amend sections 24-342, 28-401, and 28-417, Revised Statutes Supplement, 1972, as amended by sections 1, 2, and 3, respectively, Legislative Bill 146, Eighty-third Legislature, First Session, 1973, relating to crimes and punishments; to recite a statement of intent; to redefine murder in the first degree; to redefine kidnapping; to establish a procedure for determination of the death penalty; to reenact provisions for automatic review, procedures in case of homicide, and procedures for execution of the death penalty; 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. 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 28-401 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 therefore determines that the death penalty should be imposed only for the crimes set forth in section 28-401 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 5 to 9 of this act.

Sec. 2. That section 24-342, Revised Statutes Supplement, 1972, as amended by section 1, Legislative Bill 146, Eighty-third Legislature, First Session, 1973, be amended to read as follows:

24-342. It shall be the duty of such reporter to furnish on the application of the county attorney, or any party to a suit in which a stenographic report of the proceedings has been made, upon receipt of notice from the clerk of the district court as provided in section 11

of this act, or upon the filing of a praecipe for a bill of exceptions by an appealing party in the office of the clerk of the district court as provided in section 25-1140, a transcribed copy of the proceedings so recorded, or any part thereof. The reporter shall be entitled to receive, in addition to his salary, a fee of forty-five cents per hundred words, to be paid by the party requesting the same; except (1) where such copy is required by the county attorney, his fee therefor shall be paid by the county in the same manner as other claims are paid, or (2) where the defendant in a criminal case, after conviction, shall make an affidavit that he is unable by reason of his poverty to pay for such copy, the court or judge thereof may, by order endorsed on such affidavit, direct the reporter to deliver such transcribed copy to such defendant, and his fee therefor shall be paid by the county in the same manner as other claims are allowed and paid, or (3) when such copy is prepared in any criminal case in which the sentence adjudged is capital his fees therefor shall be paid by the county in the same manner as other claims are allowed or paid. The procedure for preparation, settlement, signature, allowance, certification, filing, and amendment of a bill of exceptions shall be regulated and governed by rules of practice prescribed by the Supreme Court. The fee paid shall be taxed, by the clerk of the district court to the party against whom the judgment or decree is rendered, except as otherwise ordered by the presiding district judge.

Sec. 3. That section 28-401, Revised Statutes Supplement, 1972, as amended by section 2, Legislative Bill 146, Eighty-third Legislature, First Session, 1973, be amended to read as follows:

28-401. Whoever shall purposely and of deliberate and premeditated malice or in the perpetration of or attempt to perpetrate any rape, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary, or by administering poison, or causing the same to be done, kill another; or, whoever by willful and corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the Nebraska Penal and Correctional Complex during life. The punishment shall be determined and fixed in the manner provided by sections 5 to 9 of this act.

Sec. 4. That section 28-417, Revised Statutes Supplement, 1972, as amended by section 3, Legislative

Bill 146, Eighty-third Legislature, First Session, 1973,
be amended to read as follows:

28-417. Whoever shall kidnap or forcibly or fraudulently carry off or decoy out of this state any person or persons or shall arrest or imprison any person or persons, with the intention of having such person or persons carried out of the state, unless it be in pursuance of the laws thereof, shall be confined in the Nebraska Penal and Correctional Complex not less than three nor more than twenty years. Whoever shall unlawfully carry off or decoy, entice away, secrete, or imprison, or otherwise hold against his will any person, for the purpose of extorting from such person or from his or her relatives or friends any money, property or promise, or for the purpose of compelling the performance of any act by such person or by any other person, association or corporation, shall upon conviction be imprisoned in the Nebraska Penal and Correctional Complex for not less than three nor more than fifty years. ~~Whoever,--having--for--any--of--the--purposes---aforesaid unlawfully-carried-off-or-enticed-away,--decoyed,--secreted or-imprisoned-any-person,--shall--in--furtherance--of--any such-purpose,--do--or--threaten-to--do--any--injury--to--the person-so-carried-off,--decoyed,--enticed-away,--secreted-or imprisoned,--such--person---so---offending---shall---upon conviction--be--imprisoned--in--the--Nebraska--Penal--and Correctional-Complex-for-not-less-than-three--nor--more than-fifty-years-as-determined--by--the--court.~~ Whoever shall threaten to carry off, entice away, secrete, or imprison, or otherwise hold against his will any person for the purpose of extorting money from such person, or from his or her relatives or friends, shall upon conviction be imprisoned in the Nebraska Penal and Correctional Complex not less than one nor more than twenty years.

Sec. 5. Whenever any person is found guilty of a violation of section 28-401, the district court shall within seven days fix a date for 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.

Sec. 6. In the proceeding for determination of sentence, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances set forth in section 8 of this act. Any such evidence which the court deems to have probative value may be received. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death. The court shall set forth the general order of procedure at the outset of the sentence determination proceeding.

Sec. 7. After hearing all of the evidence and arguments in the sentencing proceeding, the judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations:

(1) Whether sufficient aggravating circumstances exist to justify imposition of a sentence of death; or

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

In each case in which the court imposes the death sentence, the determination of the court 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 to the aggravating and mitigating circumstances involved in its determination.

Sec. 8. The aggravating and mitigating circumstances referred to in sections 6 and 7 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 history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a 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 law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(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 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 conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Sec. 9. Nothing in this act shall be in any way deemed to repeal or limit existing procedures for automatic review of capital cases, nor shall it in any way limit the right of the Supreme Court to reduce a sentence of death to a sentence of life imprisonment in accordance with the provisions of section 29-2308, nor shall it limit the right of the Board of Pardons to

commute any sentence of death to a sentence of life imprisonment.

Sec. 10. In cases when the punishment is capital, no petition in error shall be required and within the time prescribed by section 25-1931 for the commencement of proceedings for the reversing, vacating, or modifying of judgments, the clerk of the district court in which the conviction was had shall prepare and file with the Clerk of the Supreme Court a transcript of the record of the proceedings, for which no charge shall be made. The Clerk of the Supreme Court shall, upon receipt of the transcript, issue a writ of error. Such writ shall be returnable before the Supreme Court and the payment of a docket fee shall not be required.

Sec. 11. Upon receipt of the writ of error, the clerk of the district court shall notify the court reporter who shall prepare a bill of exceptions as in other cases. Such bill shall be settled in accordance with applicable statutes and rules of the Supreme Court.

Sec. 12. The cost of printing briefs on behalf of any person convicted of an offense for which the punishment adjudged is capital shall be paid by the county.

Sec. 13. In all cases of conviction when the punishment shall be capital, the judges or court shall allow such writ of error as a matter of right, and shall order a suspension of the execution until such writ of error shall be heard and determined. Upon hearing such writ of error, it shall order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence, as the nature of the case may require.

Sec. 14. Whenever it shall be brought to the knowledge of the coroner or the sheriff of any county in this state that a murder has been committed within their respective counties and the person or persons committing such murder are unknown, or, if known have fled from justice, it shall be the duty of the coroner or sheriff to make the same known to the Governor of this state, together with such facts as may have come to his knowledge going to show by whom such murder was committed, and the whereabouts of the murderer.

Sec. 15. Upon the receipt of the information as prescribed by section 14 of this act, the Governor of the state shall issue his proclamation offering such reward, not exceeding two hundred dollars for each person murdered, as he shall deem proper, for the arrest of the

person or persons committing the crime, and the delivery of the person or persons to the sheriff or the jailer of the county where the crime was committed. Upon the trial of any person for whom such reward has been offered, if the presiding judge shall, under his hand and seal of the court, certify to the Governor that the person arrested and indicted committed the acts charged in the indictment, the person or persons making the arrest shall be entitled to the reward.

Sec. 16. The Governor, upon presentation of the certificate as provided for in section 15 of this act, shall give the person holding the certificate an order on the Director of Administrative Services, who shall issue a warrant for the amount.

Sec. 17. 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. 18. When any person shall be sentenced to be electrocuted, such punishment shall be inflicted within the walls of the Nebraska Penal and Correctional Complex, or within the yard or enclosure adjacent thereto, under the supervision of the warden and in such a manner as to exclude the view of all persons save those permitted to be present as provided in sections 19 and 20 of this act.

Sec. 19. Besides the warden, the deputy warden, the executioner, in case one shall have been appointed by the warden, and his assistants, the following persons, and no others, except as provided in section 20 of this act, may be present at the execution: The clergyman in attendance upon the prisoner, such other persons, not exceeding three in number as the prisoner may designate, and such other persons, not exceeding six in number, as the warden may designate.

Sec. 20. Whenever the warden shall deem the presence of a military force necessary to carry into effect the provisions of sections 17 and 18 of this act,

he 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 judgment may be necessary for the purpose.

Sec. 21. Whenever the warden shall inflict the punishment of death upon a convict, in obedience to the command of the court, he shall make return of his 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. 22. If any convict under sentence of death shall appear to be insane, the warden or sheriff having him in custody shall forthwith give notice thereof to a judge of the district court of the judicial district in which the convict was tried and sentenced, and such judge shall at once make such investigation as shall satisfy him as to whether a commission ought to be named to examine such convict. If he shall determine that there is not sufficient reason for the appointment of a commission he shall so find and refuse to suspend the execution of the convict. If the judge shall determine that a commission ought to be appointed to examine such convict, he 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 was sentenced, and, if necessary, the judge shall suspend the execution and appoint the three superintendents of the state centers at Lincoln, Hastings, and Norfolk as a commission to examine such convict; and the commission shall examine the convict with a view of determining whether he is sane or insane and shall report its findings in writing to such judge 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 place one of the assistant superintendents of such center. If two of the commission shall find the convict insane, the judge shall suspend his execution until further order. Any time thereafter, when it shall be made to appear to the judge that the convict has become sane, he shall appoint a commission in the manner aforesaid, who shall make another investigation as to the sanity of the convict, and in case said convict is again declared insane his 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 sane or incurably insane.

Sec. 23. 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. 24. The members of such commission shall each receive mileage at the rate of ten cents per mile for each mile actually and necessarily traveled in reaching and returning from the place where the convict 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 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 was tried and sentenced to death.

Sec. 25. If a female convict under sentence of death shall appear to be pregnant, the warden or sheriff 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 an insane convict.

Sec. 26. If the commission shall find that the female convict is with child, the judge 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 for her execution, which shall be carried into effect in the same manner as provided in the original sentence. The costs and expenses thereof shall be the same as those provided for in the case of an insane convict and shall be paid in the same manner.

Sec. 27. If any person who has been convicted of a crime punishable by death, and sentenced to be electrocuted, shall escape, and shall not be retaken before the time fixed for his execution, it shall be lawful for the warden, or any sheriff or other officer or person to rearrest such person and return him to the custody of the warden of the Nebraska Penal and Correctional Complex, who shall thereupon make return thereof to the Governor of the state, and the Governor shall thereupon issue a warrant, fixing and appointing a day for the execution, which shall be carried into effect by the warden in the same manner as herein provided for the execution of an original sentence of death.

Sec. 28. 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, it shall be the duty of the clerk of the court before which the conviction was had to issue his warrant, under the seal of the court, reciting therein the conviction and sentence directed to the warden of the Nebraska Penal and Correctional Complex, commanding him 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 the Nebraska Penal and Correctional Complex of the state, and there deliver him, together with the warrant, into the custody of the warden who shall receive and safely keep such convict within the Nebraska Penal and Correctional Complex until the time of execution, or until otherwise ordered by competent authority.

Sec. 29. It shall be the duty of the warden of the Nebraska Penal and Correctional Complex on receipt of such warrant, if the Supreme Court or a judge thereof shall not have ordered a suspension of the execution, and if the Board of Pardons shall not have commuted such sentence, or granted a reprieve or pardon to such convict, to proceed at the time named in the warrant to carry the sentence into execution in the manner herein provided; and of the manner of his executing the warrant, and of his doings thereon, he shall forthwith make return to the clerk, who shall cause the warrant and return to be recorded as a part of the records of the case.

Sec. 30. In case the Supreme Court, or any judge thereof, shall allow a writ of error in any case and order a suspension of the execution of sentence, and, after having heard and determined the same, the court shall appoint a day certain for, and order the execution of the sentence, it shall be the duty of the clerk of the court to issue to the warden his warrant, under the seal of the court, commanding him to proceed to carry the sentence into execution at the time so appointed by the court, which time shall be stated in the warrant. Upon receipt of the warrant it shall be the duty of the warden to cause the sentence to be executed as herein provided, at the time so appointed by the court, and to make due return of the warrant, and of his proceedings thereunder, forthwith to the clerk of the district court before which the conviction was had, who shall cause the same to be recorded as a part of the records of the case.

Sec. 31. Whenever the Supreme Court shall reverse the judgment of conviction in accordance with

which any convict has been sentenced to death and is confined in the Nebraska Penal and Correctional Complex as herein provided, it shall be the duty of the warden, 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 into the custody of the sheriff of the county in which the conviction was had, to be by him held in the jail of the county awaiting the further judgment and order of the court in the case.

Sec. 32. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration of invalidity shall not affect the validity of the remaining portions thereof.

Sec. 33. That original sections 24-342, 28-401, and 28-417, Revised Statutes Supplement, 1972, as amended by sections 1, 2, and 3, respectively, Legislative Bill 146, Eighty-third Legislature, First Session, 1973, are repealed.

Sec. 34. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.