

IN THE DISTRICT COURT OF DAKOTA COUNTY, NEBRASKA

STATE OF NEBRASKA,)	CASE NO. CR14-7
Plaintiff,)	
)	MOTION TO DECLARE THE
)	NEBRASKA DEATH PENALTY
)	STATUTES UNCONSTITUTIONAL
)	
v.)	
)	
RAYMOND FRANK GONZALES,)	
Defendant.)	

Defendant moves to prohibit and quash any further proceedings relating to the death penalty for the reason that the Nebraska Death Penalty statutes, Neb. Rev. Stat. §§ 29-2519 *et seq*, as amended by LB 1, 2002 Neb. Laws, Third Special Session, are unconstitutional under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Neb. Const. art. I, §§ 3, 9, & 11, Neb. Const. art. II, § 1, Neb. Const. art. IV, § 8, and Neb. Const. art. V, §§ 19 & 25. In support of this motion the Defendant alleges as follows:

STATUTORY AND CASE HISTORY

1. On June 24, 2002, the United States Supreme Court held Arizona's judge-only capital sentencing procedure to be unconstitutional in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002).
2. As a result of the decision in *Ring v. Arizona*, *supra*:
 - a. The Nebraska death penalty statutes in effect at the time were unconstitutional because they failed to designate that aggravating circumstances were an element of capital murder, which must be proven

by the State beyond a reasonable doubt to a jury in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution,

- b. The single judge and three judge panel sentencing procedures contained in Neb. Rev. Stat. §§ 29-2519, *et seq.* (Reissue 1995), were unconstitutional under the Sixth, Eighth, and Fourteenth Amendments, and
 - c. The only constitutionally valid sentence that could be imposed following a conviction of first degree murder in violation of Neb. Rev. Stat. § 29-303 (Reissue 1995) was life in prison.
3. On October 29, 2002, then-Governor Johanns, pursuant to Neb. Const. art. IV, § 8, called the Nebraska Legislature to convene in an extraordinary session for the purpose of considering and enacting legislation, “To enact procedures for jury participation in the first degree murder sentencing process; . . .”
 4. On November 22, 2002, LB 1 was enacted during the aforementioned extraordinary session with the emergency clause and was signed by the Governor.
 5. As required by Neb. Const. Art III, § 14, section 19 of LB 1 specifically provided:

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.
 6. On November 23, 2002, LB 1 took effect and is now codified in Neb. Rev. Stat.

§§ 29-2519, *et seq.* (Reissue 2008).

7. LB 1 clarified the Legislative intent regarding application of first degree murder sentencing proceedings so that, “The determination of whether first degree murder shall be punished as a Class I or Class IA felony shall be made pursuant to sections 29-2519 to 29-2524.” Neb. Rev. Stat. § 28-303 (Reissue 2008).
8. LB 1 amended the Nebraska death penalty and first degree murder statutes to make the following substantive changes in Nebraska law:
 - a. The aggravating factors set forth in Neb. Rev. Stat. § 29-2523 are now “the functional equivalent of a greater offense.” LB 1, § 10, Neb. Rev. Stat. § 29-2519 (Reissue 2008).
 - b. Nebraska law now has the substantive crimes of both capital murder and noncapital first degree murder.
 - c. The Legislature placed exclusive jurisdiction for the determination of the elements of aggravating circumstances necessary for capital murder with the jury, unless expressly waived by the defendant. LB 1, § 11. Neb. Rev. Stat. § 29-2520 (Reissue 2008).
9. LB 1 amended the Nebraska death penalty and first degree murder statutes to make procedural changes. After November 22, 2002, Nebraska law required that:
 - a. The Information must contain a verified notice of the specific aggravating circumstances the State intends to rely on in seeking death. LB 1, §§ 4 and 5, Neb. Rev. Stat. § 29-1603 (Reissue 2008), Neb. Rev. Stat. § 29-2520 (Reissue 2008).

- b. A verified Information or amended Information containing one or more specific aggravating circumstances can only be added to or amended no later than 30 days “prior to the trial of guilt.” LB 1, § 5, Neb. Rev. Stat. § 29-1603 (Reissue 2008).
- c. A jury must unanimously determine beyond a reasonable doubt that the State has met its burden as to the alleged aggravating circumstances. LB 1, § 11, Neb. Rev. Stat. § 29-2520 (4)(f) (Reissue 2008).
- d. If the jury cannot unanimously agree on the existence of a particular aggravating circumstance alleged in the Information, then that aggravating circumstance may not be considered by the three judge panel in deciding whether to impose death. LB 1, § 11, Neb. Rev. Stat. § 29-2520 (4)(f) (Reissue 2008).
- e. The proceeding to determine the existence of aggravating circumstances shall be governed by the Nebraska Rules of Evidence. LB 1, § 11, , Neb. Rev. Stat. § 29-2520 (4)(a) (Reissue 2008).
- f. Unless there has been a jury determination of one or more aggravating circumstances that have been alleged in the Information, the only sentence that can be imposed by the three judge panel is life. LB 1, § 11, Neb. Rev. Stat. § 29-2520(4)(h) (Reissue 2008).
- g. If one or more aggravating circumstances are found to exist, then the determination of mitigating circumstances, the proportionality of the sentence, and the actual sentence to be imposed must be made by a panel of three judges selected at random by the Chief Justice of the

Nebraska Supreme Court and not by the presiding judge. LB 1, § 12,
Neb. Rev. Stat. § 29-2521 (Reissue 2008).

10. The repealing statute, LB 1, Neb. Laws 2002, Third Special Session, as codified at Neb. Rev. Stat. § 29-2519(2)(e) (Reissue 2008) expressly provided that:

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 Laws 2002, LB 1, Ninety-seventh Legislature, Third Special Session, shall apply to any murder in the first degree sentencing proceeding commencing on or after November 23, 2002.

11. On February 8, 2008, the Nebraska Supreme Court ruled in *State v. Mata*, 275 Neb. 1, 69 (2008) (*Mata II*), that electrocution as the sole method of conducting a judicial execution was “cruel and unusual punishment” under Neb. Const. Art. I, § 9.
12. On January 8, 2009, Speaker Flood introduced LB 36 which directed DCS to conduct judicial execution through the intravenous injection of a “substance or substances” that would cause death.
13. On May 28, 2009, LB 36 as amended, was passed and signed by the Governor. LB 36, Neb. Laws 2009, 101st Legislative Session, as codified at Neb. Rev. Stat. §§ 83-964 *et seq.* took effect on August 30, 2009, and repealed electrocution as the mode of death “in all cases.”
14. Insofar as relevant to this motion, LB 36 amended Neb. Rev. Stat. § 83-965 (Cum. Supp. 2009) to provide as follows:

(1) 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.

...

(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.

15. On January 13, 2014, an Information was filed against the Defendant charging him with count I, terroristic threats, count II, disturbing the peace, and count III, murder in the first degree. The information included a “notice of aggravation” in which the State alleged two aggravating circumstances. The State alleged the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence; and that the offender knowingly created a great risk of death to at least several persons, pursuant to Neb. Rev. Stat. § 29-2523(1)(d) and (1)(f).

GROUND ONE: THE NEBRASKA DEATH PENALTY STATUTES, NEB. REV. STAT. §§ 29-2519, ET SEQ., ARE UNCONSTITUTIONAL ON THEIR FACE.

16. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 15 above.

17. The Nebraska Death Penalty Statutes, Neb. Rev. Stat. §§ 29-2519, *et seq.*, are unconstitutional on their face because they are vague, indefinite, permit arbitrary and discriminatory application, and deprive a defendant of a fair sentencing trial and due process of law in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and art. I, §§ 3 and 11 of the Nebraska Constitution.
18. The Nebraska Death Penalty Statutes, Neb. Rev. Stat. §§ 29-2519, *et seq.*, are unconstitutional on their face because they violate a defendant's right to equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution and art. I, § 3 of the Nebraska Constitution. See, *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
19. The Nebraska Death Penalty Statutes, Neb. Rev. Stat. §§ 29-2519, *et seq.*, violate the uniformity provisions found in art. V, §§ 19 and 25 of the Nebraska Constitution.
20. The Nebraska Death Penalty Statutes, Neb. Rev. Stat. §§ 29-2519, *et seq.*, subject a defendant to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and art. I, § 9 of the Nebraska Constitution. Contra., *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).
21. The Nebraska Death Penalty Statutes, Neb. Rev. Stat. §§ 29-2519, *et seq.*, violate the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and art. I, §§ 3 and 11 of the Nebraska Constitution because they

fail to give a defendant proper notice regarding how and when they might be applied to him/her.

GROUND TWO: THE DECISION AS TO WHICH DEFENDANTS THE STATE WILL SEEK TO IMPOSE THE DEATH PENALTY AGAINST IS ARBITRARY AND CAPRICIOUS IN THAT IT IS LEFT TO THE DISCRETION OF THE INDIVIDUAL COUNTY ATTORNEY TO MAKE THAT DETERMINATION, WITHOUT ANY UNIFORM AND SPECIFIC STANDARDS TO PREVENT ARBITRARY AND DISPARATE TREATMENT OF SIMILARLY SITUATED PEOPLE, IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION, THE EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. I, §§ 3 AND 11 OF THE NEBRASKA CONSTITUTION, *FURMAN V. GEORGIA*, 408 U.S. 238, 92 S.CT. 2726, 33 L.ED. 2D 346 (1972) AND *BUSH V. GORE*, 531 U.S. 98, 121 S. CT. 525 (2000).

22. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 21 above.
23. All criminal charges are filed by the prosecuting attorney from the county in which they have jurisdiction. Neb. Rev. Stat. § 29-1601(Reissue 2008). Neb. Rev. Stat. § 29-1603(2)(a) states that any violation of section 28-303 in which the death penalty is sought must contain a notice of aggravation which alleges one or more of the aggravating circumstances listed in Neb. Rev. Stat. § 29-2523.
24. Aggravating circumstances which the prosecuting attorney may allege are set forth in Neb. Rev. Stat. § 29-2523, however, there is no uniform and specific standards set forth in the Nebraska statutes for the determination of which defendants the State will seek to impose a sentence of death. The only guidance set forth are in Neb. Rev. Stat. § 29-2519(1) which states in part: “[A]nd 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

statutes do not set forth any uniform and specific standards by which prosecuting attorneys determine against which defendants aggravating circumstances will be alleged. With no uniform and specific standards for the filing of aggravating circumstances, the decision is left to the arbitrary and capricious discretion of individual prosecuting attorneys. The decision to file aggravating circumstances can be effected by the legal experience of the prosecutor, the size and resources of the particular county, any prejudice or bias of the prosecutor, the political ambition of the prosecutor, or the outside pressure and undue influence of other elected officials, ie... the Governor of Nebraska.

25. The lack of uniform and specific standards, statutory or otherwise, for prosecutors to determine which defendants the State will seek to impose a sentence of death against violates the due process and equal protection clauses of the U.S. Constitution, the Eighth and Fourteenth Amendments to the United States Constitution, and art. I, §§ 3, 9 and 11 the Nebraska Constitution.

GROUND THREE: THE DEATH PENALTY SCHEME AS IT EXISTS IN NEBRASKA IS RACIALLY AND GEOGRAPHICALLY DISCRIMINATORY ON ITS FACE AND AS APPLIED, IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION, THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, Art. I §§ 3 AND 11 OF THE NEBRASKA CONSTITUTION, AND *FURMAN V. GEORGIA*, 408 U.S. 238, 92 S.CT. 2726, 33 L.ED. 2D 346 (1972).

26. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 25 above.

27. Since the passage of LB 1, Nebraska has imposed the death penalty in eight cases. They are:

- a) Raymond Mata, Hispanic male, out of Scotts Bluff County. Found at *State v. Mata*, 275 Neb. 1 (2008). District Court number CR99-37. Prosecuted by Doug

Warner as Deputy Scotts Bluff County Attorney and as Special Prosecutor from the Attorney Generals Office. Venue changed to Keith County.

b) Arthur Gales, Black male, out of Douglas County. Found at *State v. Gales*, 269. Neb. 443 (2005). District Court number CR10-9045654. Aggravating circumstances trial and sentencing prosecuted by Donald Kleine then with Nebraska Attorney Generals Office.

c) Jorge Galindo, Hispanic male, out of Madison County. Found at *State v. Galindo*, 278 Neb. 599 (2009). District Court number CR02-235. Prosecuted by Madison County Attorney, Joe Smith along with co-defendants Jose Sandoval, Eric Vela and Gabriel Rodriguez (the State withdrew the notice of aggravating circumstance in Rodriguez's case on the eve of trial).

d) Jose Sandoval, Hispanic male, out of Madison County. Found at *State v. Sandoval*, 280 Neb. 309 (2010). District Court number CR02-238. Prosecuted by Madison County Attorney Joe Smith. Venue changed to Grand Island.

e) Jeffrey Hessler, White male, out of Scotts Bluff County. Found at *State v. Hessler*, 274 Neb. 478 (2007). District Court number CR03-39. Prosecuted by Doug Warner as Deputy Scotts Bluff County Attorney.

f) Eric Vela, Hispanic male, out of Madison County. Found at *State v. Vela*, 279 Neb. 94 (2010). District Court number CR02-236. Prosecuted by Madison County Attorney Joe Smith.

g) Roy Ellis, Black male, out of Douglas County. Found at *State v. Ellis*, 281 Neb. 309 (2011). District Court number CR10-906452. Prosecuted by Douglas County Attorney Donald Kleine.

h) Marco Torres, Hispanic male, out of Hall County. Found at *State v. Torres*, 283 Neb. 142 (2012). District Court number CR07-202. Prosecuted by Hall County Attorney Mark Young.

32. Other relevant cases in which aggravating circumstances were filed but no death sentence was imposed are:

a) Melicio Camacho-DeJesus, Hispanic male, out of Dakota County. Found at District Court number CR09-75. Two aggravating circumstances alleged, only one found by jury, and defendant sentenced to life by three judge panel. Special prosecutor Doug Warner from the Attorney General's Office.

b) Lorenzo Ramirez-Buso, Hispanic male, out of Dawson County. One aggravating circumstance alleged, found not guilty by reason of insanity. Found at District Court number CR10-221. Prosecuted by Dawson County Attorney

Elizabeth Waterman.

d) Salvador Lopez, Hispanic male, out of Sioux County. One aggravating circumstance alleged, plead to one count murder in the first degree as a result of a plea bargain, sentenced to life imprisonment. Found at District Court number CR11-1. Prosecuted by Sioux County Attorney Joe Strecher.

c) Valdeir Gonclaves-Santos, Hispanic male, out of Douglas County. Four aggravating circumstances filed on three counts of murder in the first degree. Pled to one count of murder in the second degree as a result of a plea bargain, sentenced to 20 to 20 years imprisonment. Found at District Court number CR10-9078405. Prosecuted by Douglas County Attorney Donald Kleine's office.

d) Anthony Davis and Timothy Britt, both black males, co-defendants out of Douglas County. Both charged with three counts of murder in the first degree with three aggravating circumstances alleged on each count. Both pending trial in 2013. Found at District Court numbers CR12-2369 and CR12-2370, respectively. Prosecuted by Douglas County Attorney Donald Kleine's office.

e) Jose Carlos Oliveira-Coutinho, Hispanic male, out of Douglas County. Four aggravating circumstances filed on three counts of murder in the first degree. co-defendant with Gonclaves-Santos. Convicted at trial, two aggravating circumstances found for each count. After weighing aggravating and mitigating circumstances, three judge panel sentenced Oliveira-Coutinho to life. Found at District Court number CR11-1707. Prosecuted by Douglas County Attorney Donald Kleine's office.

f) Other relevant cases are submitted as a separate exhibit due to the volume of cases to be considered.

33. The death penalty as it exists in Nebraska is racially discriminatory. Since 2002, a significant change in the race or ethnicity of defendants being sentenced to death has occurred. Eight people have been sentenced to death under LB 1, (see paragraph 27 above). Of those eight, five are Hispanic, two are Black, one is white. This means of those sentenced to death since 2002 under LB 1, 62.5% are Hispanic and 25% are black.
34. The current population on Nebraska's death row is 11. Four are White and only one was sentenced under LB 1 (36.36%), five are Hispanic (45.45%), and two

are Black (18.18%).

35. Since *Gregg v. Georgia*, 422 U.S. 153, 96 S.Ct. 2909 (1976), which reaffirmed the use of the death penalty in the United States, up to the passage of LB 1 in 2002, 19 people were sentenced to death in Nebraska. Of these, 19 were White, 73.68%; three were Black, 15.78%; two were Native American, 10.52%, and zero Hispanic, 0%.
36. According to the U.S. Census Bureau statistics for 2012 for Nebraska, 89.9% of the population is White, 9.7% is Hispanic, and 4.8% is Black.
37. The death penalty as it exists in Nebraska is geographically discriminatory. Since 2002, the death penalty appears to be only imposed on those from Douglas, Scotts Bluff, Madison, and Hall counties.
38. As discussed in Ground Two above, since there are no uniform and specific standards, statutory or otherwise, it is left up to prosecuting attorneys to determine which defendants the State should seek the death penalty against. As a result, where one commits a murder and who the prosecuting attorney is, appear to be the determining factor in whether aggravating circumstances are filed against defendants. If the prosecuting attorney is Doug Warner, Joe Smith or Donald Kleine and the defendant is Hispanic or Black, it appears the defendant is likely to have aggravating circumstances alleged. Jeff Hessler seems to be the exception. The only similarities in Hessler with other death penalty cases seems to be that Doug Warner was the prosecutor in Hessler's case as well as Mata's and Camacho-DeJesus'. Again, without standards or guidelines, whether aggravating circumstances are filed depends on where the

murder occurs and if you are being prosecuted by Donald Kleine, Joe Smith, or Doug Warner.

GROUND FOUR: THE DEATH PENALTY VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE U.S. CONSTITUTION, THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, Art. I §§ 3, AND 9 OF THE NEBRASKA CONSTITUTION, AND THE EVOLVING STANDARDS OF DECENCY THAT MARK THE PROGRESS OF A MATURING SOCIETY. *THOMPSON V. OKLAHOMA*, 487 U.S. 815 (1998) (QUOTING *TROP V. DULLES*, 356 U.S. 86 (1958)).

39. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 38 above.
40. The United States is one of the few countries in the world that still resorts to the death penalty. One hundred and forty countries have laws that do not provide for the death penalty or only provide for the death penalty for exceptional crimes. These include situations such as under military law or crimes committed in exceptional circumstances. Other countries have abolished the death penalty in practice in that they have not executed anyone in the past 10 years or are believed to have policies or practices not to carry out executions. This group includes countries that have made international commitments not to use the death penalty. Since 2002, 19 countries have abolished the death penalty for all crimes. Fifty eight countries, including the United States, retain the death penalty. Death Penalty Information Center 2014. DPIC 20 February 2014. [Http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries](http://www.deathpenaltyinfo.org/abolitionist-and-retentionist-countries).
41. In the past, our society deemed it acceptable to hang or crush to death those that we suspected of being involved in witchcraft. Society now views that

suspicion and response as absurd. As our society has matured, it has shown its increasing discomfort with the imposition of the death penalty. In the past, it was common for the condemned to be hanged, shot, killed with cyanide gas, or electrocuted. As standards evolved and society matured, these methods of execution violated those standards of decency. (See *State v. Mata*, 275 Neb. 1, 67 (2008) (“Electrocution’s proven history of burning and charring bodies is inconsistent with both the concepts of evolving standards of decency and the dignity of man.”) These methods of execution violated the standards of decency. Lethal injection has now become the “acceptable” form of state sponsored homicide. The rejection of the nooses, bullets, gas and electricity signaled not only the discomfort with the method of execution but also the death penalty itself. Our society, if civilized, must raise its criminal justice system to that level reached by most of the world’s civilized societies. Our society can no longer kill to show that killing is wrong. To become civilized we must find a way of dealing with offenders in a way other than doing to them the same thing we have condemned them for.

“In comparison to all other punishments today, then, the deliberate extinguishment of a human life by the State is uniquely degrading to human dignity.” *Furman v Georgia*, 408 U.S. 238 (1972) (Brennan concurring.)

“But the Eighth Amendment is our insulation from our baser selves. The ‘cruel and unusual’ language limits the avenues through which the vengeance can be channeled. Were it not so, the language would be empty and a return to the

rack and other tortures would be possible in a given case. The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.” *Furman, Supra* (Marshall concurring).

42. In the United States, the concept of the evolving standards of decency have been used by the United States Supreme Court in finding capital punishment unacceptable in many circumstances. This is seen in the following line of cases:
- a) *Coker v. Georgia*, 433 U.S. 584 (1977), held that the death penalty was unconstitutional under the 8th Amendment for the rape of an adult woman who was not killed.
 - b) *Edmund v. Florida*, 458 U.S. 782 (1982), held that the death penalty was not allowed for minor participants in a felony murder who does not kill, attempt to kill, or intend to kill.
 - c) *Ford v. Wainwright*, 477 U.S. 399 (1986), held the 8th Amendment’s evolving standards were consistent with the process of a maturing society, bars states from inflicting the death penalty on insane persons.
 - d) *Thomas v. Oklahoma*, 487 U.S. 815 (1988), held that the death penalty for offenders who were under 15 years of age at the time of the crime was unconstitutional under the 8th Amendment, based on the evolving standards of decency that mark the progress of a maturing society.
 - e) *Atkins v. Virginia*, 536 U.S. 304 (2002), held that the death penalty for the mentally retarded was unconstitutional under the 8th Amendment, based on the evolving standards of decency that mark the progress of a maturing society.
 - f) *Roper v. Simmons*, 534 U.S. 551 (2005), held that the death penalty for offenders who were under 18 years of age at the time of the crime was unconstitutional under the 8th Amendment, based on the evolving standards of decency that mark the progress of a maturing society.
 - g) *Kennedy v. Louisiana*, 554 U.S. 407 (2008), held that the death penalty for child rape was unconstitutional in violation of the 8th Amendment when it did not result, and was not intended to result, in the death of the victim.
43. The number of death sentences **imposed** has diminished to the point it is

unusual for such a sentence to be imposed. In 1977, the year after *Furman v. Georgia*, 21 states sentenced 141 defendants to death. In 1996, the year in which the most inmates were sentenced to death, 31 states and the U.S. Government sentenced 315 defendants to death. In 2013, the rate of death sentences imposed declined sharply compared to the 1996 numbers, with only 15 states and the U.S. government sentencing 80 defendants to death. A **335%** decrease in annual death sentences from 1996.

44. The number of death sentences **carried out** has diminished to the point it is, by definition, cruel and unusual for a death sentence to be imposed. Thirty two states and the U.S. Government have active death penalty laws. In 2012 and 2013, nine states conducted 43 and 39 executions respectively. In 2013, Texas executed 16 people or **41.02%** of the executions. Two states, Texas and Florida, were responsible for 23 or **58.97%** of all the executions. Three states, Texas, Florida and Oklahoma, were responsible for **74.35%** of all the executions. The next two most prolific states for executions in 2013 are Ohio with 3 and Missouri with 2. Thus, 34 executions or **87.17%**, were conducted by five states in 2013. Of the 1359 executions in the U.S. from 1977 through 2013, Texas conducted 508 or 37.38% of all executions. Adding the next two most prolific states, Virginia with 110 and Oklahoma with 108, these three states have conducted **53.45%** of all executions. Adding Florida with 81 and Missouri with 70, the five most prolific states have conducted 871 executions, or **64.09%** of all executions. The next five most prolific states are: Alabama with 56, Georgia with

53, Ohio with 52, North Carolina with 43, and South Carolina with 43. This results in the ten most prolific states being responsible for 1118 executions or **82.26%** of all executions. The next five most prolific states are: Louisiana with 28, Arkansas with 27, Arizona with 36, Mississippi with 21, and Delaware 16. This results in the 15 most prolific states being responsible for 1246 executions or **91.68%** of all executions.

45. Ten states had abolished the death penalty before *Furman v. Georgia*: Iowa, Vermont, W. Virginia, Alaska, Hawaii, Minnesota, Maine, Wisconsin, and Michigan. Since *Furman v. Georgia*, eight states have abolished the death penalty; Massachusetts, Rhode Island, New York, New Jersey, New Mexico, Illinois, Connecticut and Maryland. Oregon still has an active death penalty law, but on November 22, 2012, Oregon Governor John Kitzhaber issued a temporary reprieve of inmate Gary Haugen. Kitzhaber stated he would no longer allow executions while he is governor. Washington still has an active death penalty law, but on February 11, 2013, Washington Governor Jay Inslee announced a moratorium on executions while he is governor. His term ends January 2017 Therefore, 18 states do not have the death penalty and two more have a moratorium on the death penalty.
46. Of the remaining 32 states with active death penalty statutes, Kansas and New Hampshire have not conducted any executions post *Furman v. Georgia*.
47. There are nine death penalty states that have not executed anyone in at least the last 12 years: Colorado, Illinois, Kansas, Nebraska, New Hampshire, New

Mexico, Oregon, Pennsylvania, and Wyoming. Seven states Arkansas, California, Connecticut, Maryland, Montana, Nevada, North Carolina and the U.S. Government have not executed anyone for the last seven years. Twenty two states: Colorado (0), Connecticut (1), Idaho (2), Illinois (1), Kansas (0), Kentucky (2), Maryland (0), Massachusetts (0), Montana (1), Nebraska (0), New Hampshire (0), New Mexico (1), New Jersey (0), New York (0), North Dakota (0), Oregon (0), Pennsylvania (1), Rhode Island (0), South Dakota (3), Utah (2), Washington (2), Wyoming (0), and the U.S. Government have conducted 3 or less executions in the last 15 years.

48. Few states have consistently carried out executions. Only Texas, Oklahoma, Florida, and Ohio, have conducted at least one execution per year since 2008. Only three states, Texas, Oklahoma, and Ohio, have conducted at least one execution every year since 2001. As set forth in paragraph 44, since 1977, Texas is responsible for 37.38% of all executions. The top three states have conducted **53.45%** of all executions. The top five states are responsible for **64.09%** of all executions. The top 10 states are responsible for **82.26%** of all executions. The top 15 states are responsible for **91.68%** of all executions. Therefore, a minority of the 32 states with the death penalty are responsible for the majority of all the executions. In the last five years, an average of 10.2 states have carried out executions.
49. The abolishment of the death penalty in many states and the declining use of the death penalty in the United States, shows an evolving standard of decency

against the use of the death penalty. As such, the imposition of the death penalty has declined to the point that it is becoming increasingly rare in all but a handful of states and its use is “cruel and unusual” under the Eighth Amendment to the United States Constitution and the Nebraska Constitution Art. I, §§ 3, 9.

GROUND FIVE: THE NEBRASKA DEATH PENALTY STATUTES’ PROHIBITION AGAINST THE JURY ASSIGNING ANY RELATIVE “WEIGHT” TO AN AGGRAVATING CIRCUMSTANCE IN COMPARISON TO ANY MITIGATING CIRCUMSTANCE WHEN THE DETERMINATION OF THE SENTENCE BY “WEIGHING” AGGRAVATING VERSES MITIGATING CIRCUMSTANCES BY THE THREE-JUDGE PANEL VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

50. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 49 above.
51. The Nebraska Death Penalty statutes restrict the jury’s function to the determination of the existence or non-existence of a statutory aggravating circumstance. Neb. Rev. Stat. § 29-2520 (Reissue 2008).
52. The jury is not required, nor is it authorized, to assign “weight” to any particular aggravating circumstances.
53. The “weight” of an aggravating circumstance under the Nebraska death penalty scheme is an essential fact finding necessary for the life/death determination.
54. The Nebraska Death Penalty statutes failure to require any jury determination regarding the “weight” of an aggravating circumstance violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

GROUND SIX: THE NEBRASKA DEATH PENALTY STATUTES’ SEPARATION OF AN AGGRAVATING CIRCUMSTANCE FACT-FINDER (JURY) AND A MITIGATING CIRCUMSTANCE FACT-FINDER (THREE JUDGE PANEL) WHERE THE SENTENCE IS ULTIMATELY TO BE DETERMINED BY “WEIGHING” THE VARIOUS FACTORS IS IRRATIONAL, INCOHERENT, AND INCAPABLE OF REASONED APPLICATION AND VIOLATES THE EIGHTH

AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

55. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 54 above.
56. The Nebraska Death Penalty statutes, Neb. Rev. Stat. § 29-2519 *et seq.* (Reissue 2008) assign the exclusive authority and jurisdiction for the finding of aggravating circumstances to a jury unless waived, and the exclusive authority and jurisdiction to determine mitigating circumstances to a three-judge panel.
57. The jury makes no specific factual findings, nor does it enter any written order explaining the significance or weight to attach to any particular aggravating circumstance. The jury merely finds that an aggravating circumstance “exists.” In *State v. Dunster*, 262 Neb. 329, 366, 631 N.W.2d 879, 908 -9 (Neb.,2001) (quoting *State v. Stewart*, 197 Neb. 497, 518, 250 N.W.2d 849, 862 (1977)), the Nebraska Supreme Court interpreted the weighing process under the Nebraska death penalty scheme as follows:
- It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
58. The separation of the fact-finding process required by the Nebraska death penalty scheme is irrational, unworkable, incoherent, and incapable of a fair and just life/death determination in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

GROUND SEVEN: THE NEBRASKA DEATH PENALTY STATUTES DO NOT ALLOW THE JURY TO MAKE THE DETERMINATION OF LIFE OR DEATH IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE

UNITED STATES CONSTITUTION.

59. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 58 above.
60. The Nebraska Death Penalty statutes, Neb. Rev. Stat. § 29-2519 *et seq.* (Reissue 2008), assign to a three-judge panel the exclusive authority and jurisdiction to determine whether the sentence should be life or death.
61. The jury has absolutely no opportunity suggest, recommend, or determine whether the Defendant should be sentenced to life.
62. The total elimination of the jury from the sentencing determination violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Art. I §§ 3, 9 and 11 of the Nebraska Constitution, and *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002) (J. Breyer concurring).

GROUND EIGHT: THE NEBRASKA DEATH PENALTY STATUTES PREJUDICE THE DEFENDANT’S RIGHT TO A JURY TRIAL BECAUSE NO UNANIMOUS FINDINGS OF SPECIFIC FACTS ARE REQUIRED BEFORE THE JURY MAY FIND AN AGGRAVATING CIRCUMSTANCE. IF THE DEFENDANT WAIVES JURY, THEN THE THREE-JUDGE PANEL IS REQUIRED TO MAKE UNANIMOUS FINDING OF ANY FACT IN SUPPORT OF AN AGGRAVATING CIRCUMSTANCE. THIS UNEQUAL TREATMENT BASED ON THE ASSERTION OF A RIGHT TO A JURY TRIAL IS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND DECISION IN *UNITED STATES V. JACKSON*, 390 U.S. 570, 88 S.Ct. 1209 (1968).

63. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 62 above.
64. The aggravating circumstances set forth in Neb. Rev. Stat. § 29-2523(1) (Reissue 2008) provide for multiple “prongs” and facts that may exist to support the existence of the aggravating circumstances. The number and type of “facts”

that might support an aggravating circumstances have been expanded by Nebraska Supreme Court opinions that have attempted to define aggravating circumstances. For example, aggravating circumstance 1(d) may have between five and six different “facts” that would support a finding of the aggravator. *State v. Moore*, 250 Neb. 805, 553 N.W.2d 120 (1996), *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *State v. Harper*, 208 Neb. 568, 304 N.W.2d 663 (1981).

65. The Nebraska Death Penalty statutes provide that if the Defendant waives his right to a jury trial as guaranteed by the Sixth Amendment to the United States Constitution, the Defendant receives the benefit of a unanimous determination of each “fact” in support of an aggravating circumstance made in writing. Neb.

Rev. Stat. § 29-2521(2) (Reissue 2008) states as follows:

In the sentencing determination proceeding before a panel of judges when the right to a jury determination of the alleged aggravating circumstances has been waived, . . . 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.

66. However, if the Defendant exercises his Sixth Amendment right to a jury trial as provided in Neb. Rev. Stat. § 29-2520 (e & f) (Reissue 2008), the jury is not required to unanimously find each “fact” in support of an aggravating circumstance. The jury is not required to make any written findings regarding the facts necessary to support the finding of an aggravating circumstance.

67. A statutory scheme that penalizes a Defendant who exercises his constitutional right to a jury trial under the Sixth Amendment is itself unconstitutional under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the decision in *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209 (1968) and its progeny.

GROUND NINE: LB 36 IMPROPERLY DELEGATES A LEGISLATIVE FUNCTION TO THE EXECUTIVE BRANCH IN VIOLATION OF NEB. CONST. ART II, § 1.

68. The Defendant hereby incorporates by reference the allegations contained in paragraphs 1 through 67 above.

69. LB 36, Neb. Law 2009, § 9, changing the method of execution to “lethal injection” provides no guidelines, procedures, standards, or policies for the Nebraska Department of Correctional Services regarding:

- a. Whether the lethal substance should be a fast or slow acting poison, opiate, barbiturate, benzodiazepine, arsenic, cyanide, mercury, methanol, ethylene glycol, warfarin, atropine, organophosphate, shell fish toxin, digitalis, snake venom, bacterial toxin, potassium chloride, sulfuric acid, other toxic substance, or a carcinogen like dimethylnitrosamine employed by the defendant in *State v. Harper*, 208 Neb. 568 (1981).
- b. Whether there is any time, between the injection of the substance into the condemned prisoner and when he or she should be rendered unconscious,
- c. Whether the substance may or may not inflict unnecessary pain,
- d. Whether the substance shall cause brain or heart/respiratory death as defined by Neb. Rev. Stat. § 71-7202 (Reissue 2003), or

- e. Whether death can be caused by suppression of the condemned prisoner's nervous system, paralysis of the diaphragm, seizure of the heart, shock, massive hemorrhaging, kidney failure, liver failure, or other physiological mechanism that will terminate life.
70. LB 36 provides no statutory guidance regarding what guidelines, procedures, standards, or policies are to be followed by DCS in adopting a lethal injection protocol, or whether DCS must follow the rule-making procedures set forth in the Administrative Procedures Act. Neb. Rev. Stat. §§ 84-901 *et seq.* (Reissue 2008), *McAllister v. Nebraska Dep't of Corr. Servs.*, 253 Neb. 910 (1998).
71. The Legislature's delegation of its legislative responsibility to determine the guidelines, procedures, standards, or policies associated with lethal injection to the executive branch of government to DCS violates Neb. Const. Art. II, § 1, the decisions in *Lincoln Dairy v. Finigan*, 170 Neb. 777, 104 N.W.2d 227 (1960), *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994), *Kwik Shop, Inc., v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993), *See Hobbs v. Jones*, 2012 Ark. 293, ___ S.W.3d ____ (2012), (Arkansas Supreme Court found unconstitutional a law which delegated to the department of corrections the authority to determine which drugs to use for lethal injection to implement the death penalty), and their progeny, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

WHEREFORE the Defendant moves that this motion be granted and the Nebraska Death Penalty statutes, in whole or in part, be declared unconstitutional for the reasons stated herein.

Respectfully submitted,

RAYMOND FRANK GONZALES, Defendant.

By: /s/ Todd W. Lancaster
Todd W. Lancaster, #21507
Nebraska Commission on Public Advocacy
P.O. Box 98932
140 N. 8th Street, Suite 270
Lincoln, NE 68509-8932
(402) 471-8026
Tlancaster@ncpa.ne.gov
Attorney for Defendant

NOTICE OF HEARING

To: Kim Watson:

You are hereby notified that the motion herein shall be heard in the Dakota County District Court on the 7th day of March, 2014, at 9:00 a.m., or as soon thereafter as counsel may be heard.

CERTIFICATE OF SERVICE

I, Todd W. Lancaster, hereby certify that on this 20th day of February, 2014, a true and correct copy of the foregoing Motion was delivered by U.S. mail and email to Kim Watson, Dakota County Attorney, P.O. Box 117, Dakota City, NE 68731, dakotacountyattorney.watson@gmail.com

/s/Todd W. Lancaster
Todd Lancaster

Certificate of Service

I hereby certify that on Friday, February 21, 2014 I provided a true and correct copy of the Motion to Quash to the following:

Gonzalez, Raymond, Frank, represented by Public Defender (Bar Number: 9) service method: First Class Mail

State of Nebraska represented by Watson, Kimberly Marie (Bar Number: 23129) service method: Electronic Service to dakotacountyattorney.watson@gmail.com

Signature: /s/ Lancaster, Todd, W (Bar Number: 21507)