

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA,	)	Case No. S-86-946
	)	
Appellee,	)	
	)	MOTION TO DISMISS
v.	)	FOR LACK OF JURISDICTION
	)	
MICHAEL W. RYAN,	)	
	)	
Appellant.	)	

COMES NOW THE STATE OF NEBRASKA and moves this court to summarily dismiss this appeal for lack of jurisdiction pursuant to Rule 2-107(B)(1).

STATE OF NEBRASKA, Plaintiff,

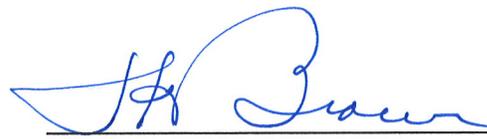
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Certificate of Service

On April 23, 2012, a copy of the above Motion to Dismiss for Lack of Jurisdiction was served electronically on the appellant's counsel Jerry L. Soucie at counsel's email address:

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J. Kirk Brown  
Solicitor General

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

STATE OF NEBRASKA,	)	Case No. S-86-946
	)	
Appellee,	)	
	)	BRIEF IN SUPPORT OF
v.	)	THE MOTION TO DISMISS
	)	FOR LACK OF JURISDICTION
MICHAEL W. RYAN,	)	
	)	
Appellant.	)	

**STATEMENT OF THE CASE**

THIS IS A CAPITAL CASE.

Michael W. Ryan is a death-sentenced prisoner who filed a document captioned a motion for postconviction relief under Neb.Rev.Stat. § 29-3001 in the District Court of Richardson County. The district court dismissed the proceeding, stating:

[T]he jurisdiction of this court is limited also by *Neb.Rev.Stat. § 29-3001*, in that it can only enter relief in cases where the prisoner in custody under sentence asserts facts that claim a right to be released on grounds that there was a denial or infringement of state or federal constitutional rights that would render the judgment of conviction void or voidable. [Citations omitted.]

. . . The grounds [Ryan] alleges . . . do not deal with the judgement of the death sentence imposed but deal with the method of inflicting the death penalty in Nebraska. . . .

Our Supreme Court has already rejected the use of the post-conviction procedure to challenge the actual method of carrying out the death penalty as separate from the actual sentence imposed. [Citations omitted.]

(T126-127)

Ryan brings this appeal.

## **ARGUMENT**

### *Introduction*

This is a death penalty case in which the validity of Ryan's judgment of conviction and sentence of death are not in dispute. Yet the enforcement of this valid judgment of the Nebraska courts has been unnecessarily delayed.

"[I]f the State is concerned about delay, and questions the merits of an appeal, then this court's rules . . . provide the State an effective means of expediting appellate review." *State v. Wells*, 277 Neb. 476, 480 (2009).

### **Rule 2-107**

This court's Rule 2-107(B)(1) provides: "A motion to dismiss for lack of jurisdiction may be filed at any time after an appeal has been docketed."

### **Standard of review**

The determination of a jurisdictional issue which does not involve a factual dispute is a matter of law which requires an appellate court to reach its conclusion independent from the trial court.

*State v. Rieger*, 257 Neb. 826, 829 (1999).

### **This court lacks jurisdiction**

The district court found that § 29-3001 did not grant the district court jurisdiction to entertain Moore's allegations. (T126-127)

Neb. Rev. Stat. § 29-3001 (Reissue 2008) provides: "A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner *as to render the judgment void or voidable* under the Constitution of this state or the Constitution of the United States. . ." (emphasis added).

A method of execution forms no part of a criminal judgment imposing a sentence of death. *State v. Mata*, 275 Neb. 1 (2008); *State v. Galindo*, 278 Neb. 599, 620 (2009); *State v. Ellis*, 281 Neb. 571 (2011); *State v. Torres*, 283 Neb. 142, 170-171 (Feb. 3, 2012).

"Absent a factual circumstance whereby the judgment is void or voidable under the state or U.S. Constitution, the court has no jurisdiction to grant postconviction relief." *State v. Boppre*, 280 Neb. 774, 783-784 (2010).

Ryan's allegations regarding Nebraska's method of execution address issues wholly separate and apart from the constitutional validity of Ryan's judgment of conviction and sentence of death. The district court accurately determined it lacked jurisdiction to reach the relative merits of Moore's motion under § 29-3001. (T127)

"Where the district court lacks jurisdiction, this court lacks jurisdiction." *State v. Dorcey*, 256 Neb. 795, 800 (1999). See also, *Vanhorn v. Neb. State Racing Comm'n*, 273 Neb. 737, 738 (2007); *State v. Rieger*, 257 Neb. 826, 829 (1999).

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