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#95013

DATE: February 22, 1995

SUBJECT: LB 753 (1995)

REQUESTED BY: Senator Paul D. Hartnett

WRITTEN BY: Don Stenberg, Attorney General
J. Kirk Brown, Assistant Attorney General

This is in response to your opinion request of January 27, 1995 concerning LB 753 (1995).

I.

You first inquire whether the repeal of language from Neb. Rev. Stat. § 29-2523(1)(d) (1989) which has come to be identified as the second or "exceptional depravity" element of statutory aggravating circumstance (d) would provide Nebraska with a constitutional death penalty statute.

Before addressing that specific concern one needs to understand the context within which this statutory language exists and is interpreted. The current statutory language upon which you focus has routinely been found to be too vague to meet the objective sentencing requirements of the Cruel and Unusual Punishment Clause of the federal constitution. However, that does not end our inquiry.

The federal courts have long recognized that state statutory language which is unconstitutionally vague on its face may be saved from invalidation by a sufficiently objective state judicial interpretation of that statutory language, and it is in the context of the interpretation of the current statutory language by the Nebraska Supreme Court that your inquiry must be addressed.

As you note, the Nebraska Supreme Court last comprehensively addressed an appropriate judicial interpretation of the "exceptional depravity" element of aggravator (d) in ***State v. Palmer***, 224 Neb. 282, 399 N.W.2d 706 (1986), ***cert. denied***, 484 U.S. 872 (1987). It was the ***Palmer*** definitions of that aggravating circumstance which the Nebraska Supreme Court employed in its review and affirmance of John Joubert's sentences of death in ***State v. Joubert***, 224 Neb. 411, 399 N.W.2d 237 (1986), ***cert. denied***, 484 U.S. 905, ***reh'g denied***, 484 U.S. 971 (1987).

The ***Palmer*** definitions of exceptional depravity have not been found to be in violation of the federal constitution. The United States Court of Appeals for the Eighth Circuit issued two opinions on this question in the course of deciding ***Moore v. Clarke***, 904 F.2d 1226 (8th Cir. 1990), ***reh'g denied***, 951 F.2d 895 (8th Cir. 1991), ***cert. denied***, ___ U.S. ___, 112 S.Ct. 1995, 118 L.Ed.2d 591 (1992).

In its 1990 opinion the panel found the ***Palmer*** definitions to be unconstitutional. However, upon a motion for rehearing filed by this office, that court reconsidered its 1990 opinion in light of recent decisions of the United States Supreme Court, and did not rely upon its 1990 analysis of the ***Palmer*** definitions in finally resolving Moore's case. The ultimate result of ***Moore*** was invalidation of pre-***Palmer*** attempts by the Nebraska Supreme Court to satisfactorily define "exceptional depravity", nothing more.

Therefore, the ***Palmer*** definitions of the "exceptional depravity" element of statutory aggravator (d) are presently viable and capture significant concepts of aggravating behavior which are not described by the first or "especially heinous" element of aggravator (d) or by any other statutory aggravating circumstances. Thus, the repeal of the current statutory language of the "exceptional depravity" element of aggravator (d) would deprive the state of currently viable and unique aggravating factors to be weighed in the determination of whether a sentence of death or life imprisonment is appropriate under the facts of a particular case.

We can assure you that no matter what language is adopted or repealed by the Nebraska Legislature with respect to statutory aggravating circumstances, prisoners will continue to challenge such language on the grounds that it is unconstitutionally vague. Due to the vagaries of the state and federal litigation process we cannot offer any firm assurance that any language might not ultimately be struck down, but our present evaluation of the law is that most, if not all, of the ***Palmer*** definitions of "exceptional depravity" will survive federal constitutional challenge.

II.

You next inquire whether the language proposed by LB 753 is adequately "directed and limited" so as to withstand federal constitutional challenge on vagueness grounds.

The answer to that question is complicated by the fact that the concept of physical or psychological torture which is proposed as a replacement for the second or "exceptional depravity" element of statutory aggravating circumstance (d) has historically been considered by the Nebraska Supreme Court as an element of the first or "especially heinous" element of aggravator (d). See ***State v. Rust***, 197 Neb. 528, 250 N.W.2d 867 (1977). We hasten to add that as a definition of the "especially heinous" element of aggravator (d) the concept of "torture" of the victim has repeatedly been upheld against federal constitutional challenges based upon a claim of vagueness.

Therefore, we are as confident as one can be that the proposed language would pass federal constitutional muster. However, we feel obliged to note that by adopting this language no new element of aggravation will be added to our sentencing process, some currently viable elements of aggravation will be lost if the present statutory language regarding "exceptional depravity" is repealed, and confusion may be injected into the definitions of the "especially heinous" element of aggravator (d) by the proposed amendment.

Yours truly,

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Approved By:

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