

March 26, 2018  
*VIA Fax and Email*

Mr. Douglas Peterson  
Attorney General of Nebraska  
2115 State Capitol  
Lincoln, NE 68509



Nebraska

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Lincoln, NE 68508  
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Re: **Attorney General's Request for an Execution Warrant  
for Mr. Carey Dean Moore**

Dear Mr. Peterson:

We write on behalf of the Reverend Stephen C. Griffith and Senator Ernie Chambers regarding the potential execution of Mr. Carey Dean Moore via lethal injection.

On January 19, 2018, Nebraska Department of Correctional Services (“NDCS”) Director Scott R. Frakes provided Mr. Moore notice of the state’s intention to carry out his execution using a four drug cocktail consisting of diazepam, fentanyl citrate, cisatracurium besylate, and potassium chloride. To date, Mr. Moore has not filed any litigation to forestall his execution. However, there are pending legal proceedings in which Mr. Moore has been named as a party that challenge the legality of executing Mr. Moore and of the procedures through which the state proposes to do so. Thus, we ask that the Attorney General refrain from making any request for an execution warrant for Mr. Moore pending the final determinations of such legal proceedings.

Each of the following four proceedings challenge the legality of Mr. Moore’s capital sentence or Nebraska’s protocols and procedures for carrying out a capital sentence:

- *Sandoval v. Ricketts*, Case No. CI 17-4302 (Lancaster County District Court): This is a declaratory judgment action regarding LB 268, Laws 2015—a measure to repeal the death penalty—and the subsequent repeal of LB 268 under Referendum 426. The action is brought by eight death row prisoners who allege that no death row prisoner may be executed because (i) LB 268 went into effect before Referendum 426 became effective, which essentially changed all death sentences as of August 30, 2015 (including Mr. Moore’s) into sentences of life imprisonment; and (ii) Referendum 426 is statutorily and constitutionally void. Mr. Moore has been joined as a necessary and indispensable party to this action because



his rights will be affected by the outcome. The district court dismissed this action on February 13, 2018, but a hearing on the plaintiffs' motion to alter the judgment was held this past Friday, March 23, 2018. We await the judge's ruling on that motion now. It is also our plan to appeal the significant issues in this case regardless of the district court's decision on the pending motion;

- The American Civil Liberties Union of Nebraska ("ACLU") filed a complaint with the United States Drug Enforcement Administration ("DEA") alleging that NDCS failed to comply with federal law in connection with its use of DEA registrations to obtain, store, and dispense lethal injection drugs;
- Reverend Steve Griffith and Senator Ernie Chambers commenced an action today in the District Court in Lancaster County contending that NDCS's January 26, 2017 Lethal Injection Protocol (the "Lethal Injection Protocol" or "Protocol") was promulgated in violation of Nebraska's Administrative Procedure Act ("APA"). These claims arise out of NDCS's failure to keep and make publicly available a complete rule-making record containing the materials and information considered in the formation of the Lethal Injection Protocol. The materials and information excluded from the publicly available rule-making record include drafts and working copies of proposed revisions to the Lethal Injection Protocol, and records of consultation with individuals in preparing the Protocol. Reverend Griffith and Senator Chambers further contend that if the materials and information made publicly available by NDCS in fact constitute the complete rule-making record, NDCS's promulgation of the Lethal Injection Protocol is unreasonable, arbitrary, and untethered to a factual foundation. Thus, the agency's enactment of the Protocol violates the Due Process Clause of Article I, section 3 of the Nebraska State Constitution; and
- Senator Chambers filed an internal legislative complaint about NDCS's Lethal Injection Protocol, which incorporates the ACLU's complaint to the DEA, Reverend Griffith and Senator Chambers' litigation regarding the Lethal Injection Protocol, and questions about the constitutionality of the four-drug cocktail NDCS intends to use in Mr. Moore's execution.

**We call upon your office to not seek the issuance of Mr. Moore's death warrant as appropriate and necessary under Nebraska law.** The Nebraska Supreme Court's prior stay of Mr. Moore's execution in *State v. Moore*, 273 Neb. 495 (2007) is instructive. In *Moore*, the Nebraska Supreme Court *sua sponte* withdrew a warrant for Mr. Moore's execution by electrocution pending its final determination of the constitutionality of Nebraska's use of electrocution in *State v. Mata*. It held that "[t]he purpose of a stay is to prevent a state from doing an act which is challenged and may be declared unlawful in a pending proceeding." *Id.* at 499. The Court determined that Mr. Moore—and the integrity of Nebraska's judicial process—would be irreparably harmed if it were to hold that



electrocution was cruel and unusual *after* Mr. Moore had been electrocuted.<sup>1</sup> *Id.* at 498. Here, the above-referenced legal proceedings challenge whether Nebraska’s death row prisoners—including Mr. Moore—may be subject to execution and whether the state’s Lethal Injection Protocol and procedures are legally valid, and the execution of Mr. Moore pursuant to the Lethal Injection Protocol may be declared unlawful in each. Mr. Moore and the integrity of Nebraska’s judicial system would be irreparably harmed if he were executed prior to a final determination that: (i) Mr. Moore’s death sentence has been legally converted to one of life imprisonment; (ii) NDCS illegally obtained the lethal injection drugs to be used in his execution; or (iii) the Lethal Injection Protocol is statutorily and/or constitutionally void.

That Mr. Moore has not requested a stay in no way affects whether the Attorney General should refrain from seeking a warrant for his execution. As the Nebraska Supreme Court noted in *Moore*—in which Mr. Moore also did not request a stay—whether a stay of execution is appropriate does not turn on whether a death row prisoner requests a stay, but whether the state should be allowed to go forward with a potentially illegal and/or unconstitutional execution. *See Moore*, 273 Neb. at 499. Nebraska’s judicial system “simply [is] not permitted to avert [its] eyes from the unfairness of a proceeding in which a defendant has received the death sentence” merely because a prisoner has not challenged the legality of his or her death sentence. *Id.* The state “must adhere to [its] heightened obligation to ensure the lawful and constitutional administration of the death penalty, regardless of the wishes of the defendant in any one case.” *Id.*

Similarly, as you are undoubtedly aware, the ethical rules guiding the special role and responsibilities for prosecutors note: “prosecutors ha[ve] the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice...”. Neb. Sup. Ct. R. 3-503.8 (comment). The Nebraska rules cite the ABA Standards of Criminal Justice Relating to the Prosecution Function as additional authority. The ABA Standards state “It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.” Standard 3-1.2(d). In other words, regardless of your office’s ultimate role in seeking a death warrant when appropriate, the ethical rules governing our profession requires your office to ensure that the administration of justice is pursued and no rush to judgment results in the ultimate legal error – the death of a prisoner under a system that a court has been asked to declare invalid and unconstitutional. Given the multiple legal, legislative and administrative proceedings that are in progress, we respectfully submit it is appropriate for you

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<sup>1</sup> Tellingly, the Nebraska Supreme Court ruled in *State v. Mata* that death by electrocution violated the state’s prohibition against cruel and unusual punishment. 275 Neb. 1 (2008).

to “exercise sound discretion in the performance of [your] functions” and not seek a death warrant in these circumstances. Standard 3-1.2(b).

Accordingly, we ask that you refrain from requesting an execution warrant for Mr. Moore pending the final determination of all legal proceedings that implicate the legality of Nebraska’s execution of Mr. Moore, including but not limited to the above-referenced proceedings. To the extent that, despite this request, you file an application for issuance of a death warrant with the Nebraska Supreme Court, we ask that you attach this letter to that application and explain to the Court why you and your office are rejecting this request, including the arguments and case law set forth herein.



A handwritten signature in blue ink, which appears to read "Amy Miller". The signature is fluid and cursive, with a long horizontal stroke at the end.

Amy A. Miller  
Legal Director

cc: Orrick, Herrington & Sutcliffe LLP  
Senator Ernie Chambers  
Reverend Stephen C. Griffith