

## **28-105. Felonies; classification of penalties; sentences; where served; eligibility for probation.**

(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into ten classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class I felony	Death
Class IA felony	Life imprisonment
Class IB felony	Maximum—life imprisonment Minimum—twenty years imprisonment
Class IC felony	Maximum—fifty years imprisonment Mandatory minimum—five years imprisonment
Class ID felony	Maximum—fifty years imprisonment Mandatory minimum—three years imprisonment
Class II felony	Maximum—fifty years imprisonment Minimum—one year imprisonment
Class IIA felony	Maximum—twenty years imprisonment Minimum—none
Class III felony	Maximum—four years imprisonment and two years post-release supervision or twenty-five thousand dollars fine, or both Minimum—none for imprisonment and nine months post-release supervision if imprisonment is imposed
Class IIIA felony	Maximum—three years imprisonment and eighteen months post-release supervision or ten thousand dollars fine, or both Minimum—none for imprisonment and nine months post-release supervision if imprisonment is imposed
Class IV felony	Maximum—two years imprisonment and twelve months post-release supervision or ten thousand dollars fine, or both Minimum—none for imprisonment and none for post-release supervision

(2) All sentences for maximum terms of imprisonment for one year or more for felonies shall be served in institutions under the jurisdiction of the Department of Correctional Services. All sentences for maximum terms of imprisonment of less than one year shall be served in the county jail.

(3) Nothing in this section shall limit the authority granted in sections 29-2221 and 29-2222 to increase sentences for habitual criminals.

(4) A person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation.

(5) All sentences of post-release supervision shall be served under the jurisdiction of the Office of Probation Administration and shall be subject to conditions imposed pursuant to section 29-2262 and subject to sanctions authorized pursuant to section 29-2266.02.

(6) Any person who is sentenced to imprisonment for a Class I, IA, IB, IC, ID, II, or IIA felony and sentenced concurrently or consecutively to imprisonment for a Class III, IIIA, or IV felony shall not be subject to post-release supervision pursuant to subsection (1) of this section.

(7) Any person who is sentenced to imprisonment for a Class III, IIIA, or IV felony committed prior to August 30, 2015, and sentenced concurrently or consecutively to imprisonment for a Class III, IIIA, or IV felony committed on or after August 30, 2015, shall not be subject to post-release supervision pursuant to subsection (1) of this section.

(8) The changes made to the penalties for Class III, IIIA, and IV felonies by Laws 2015, LB605, do not apply to any offense committed prior to August 30, 2015, as provided in section 28-116.

**Source:** Laws 1977, LB 38, § 5; Laws 1989, LB 592, § 1; Laws 1995, LB 371, § 2; Laws 1997, LB 364, § 1; Laws 1998, LB 900, § 1; Laws 1998, LB 1266, § 1; Laws 2002, Third Spec. Sess., LB 1, § 1; Laws 2011, LB12, § 1; Laws 2015, LB268, § 6; Laws 2015, LB605, § 6; Laws 2016, LB1094, § 2; Referendum 2016, No. 426; Laws 2019, LB686, § 2.

## **Annotations**

### **1. Sentencing**

### **2. Miscellaneous**

#### **1. Sentencing**

A person convicted of a felony for which a mandatory minimum sentence is prescribed is not eligible for probation. *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015).

For purposes of the authorized limits of an indeterminate sentence, both "mandatory minimum" as used in section 28-319.01(2) and "minimum" as used in this section in regard to a Class IB felony mean the lowest authorized minimum term of the indeterminate sentence. *State v. Russell*, 291 Neb. 33, 863 N.W.2d 813 (2015).

A sentence of imprisonment for a term of 60 years to life for second degree murder is not excessive in the absence of an abuse of judicial discretion. *State v. Weaver*, 267 Neb. 826, 677 N.W.2d 502 (2004).

When a flat sentence of "life imprisonment" is imposed and no minimum sentence is stated, by operation of law, the minimum sentence for parole eligibility purposes is the minimum imposed by law under the statute. *State v. Gray*, 259 Neb. 897, 612 N.W.2d 507 (2000).

The Nebraska sentencing statutes do not require that the minimum sentence be for a different term than the maximum sentence. *State v. Cook*, 251 Neb. 781, 559 N.W.2d 471 (1997).

County jail was not under the jurisdiction of the Department of Correctional Services; therefore, it was plain error for district court to sentence defendant convicted of Class III felony to term in county jail. *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992).

Pursuant to subsection (2) of this section, the district court lacks statutory authority to sentence a defendant convicted of a Class III felony to a term of imprisonment in the county jail. *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990).

Under the provisions of this section and section 28-304(2), a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years. *State v. Ward*, 226 Neb. 809, 415 N.W.2d 151 (1987).

Where an indeterminate sentence is pronounced, the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term. Where maximum allowable sentence is five years, an indeterminate sentence of two to five years is excessive and must be modified to a sentence of not less than one year eight months nor more than five years. *State v. Bosak*, 207 Neb. 693, 300 N.W.2d 201 (1981).

A defendant's sentence on a Class IIIA felony needed to be an indeterminate sentence pursuant to subsection (4) of section 29-2204.02, because the defendant was also sentenced on Class II felonies. *State v. Wells*, 28 Neb. App. 118, 940 N.W.2d 847 (2020).

Under subsection (2) of this section, sentences of less than 1 year shall be served in the county jail, whereas sentences of 1 year or more for Class IIIA felonies shall be served in institutions under the jurisdiction of the Department of Correctional Services. *State v. Minnick*, 22 Neb. App. 907, 865 N.W.2d 117 (2015).

## 2. Miscellaneous

The nonretroactive provision of subsection (7) of this section applies to the changes made by 2015 Neb. Laws, L.B. 605, to penalties for Class IV felony convictions under section 29-2204.02. *State v. Benavides*, 294 Neb. 902, 884 N.W.2d 923 (2016).

The Legislature lacked constitutional authority to amend the language of the statutory penalty for a Class IA felony by inserting the phrase "without parole" after "life imprisonment" during the 2002 special session. *State v. Conover*, 270 Neb. 446, 703 N.W.2d 898 (2005).

The change of the minimum penalty for first degree murder from life imprisonment to life imprisonment without parole is presumed to be an increase in the minimum penalty that cannot be applied to acts committed prior to the change without violating constitutional ex post facto principles. *State v. Gales*, 265 Neb. 598, 658 N.W.2d 604 (2003).

This section does not impose a mandatory minimum term of incarceration for persons convicted of a Class II felony. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

A defendant found guilty of a Class III felony does not have an equal protection right to a Specialized Substance Abuse Supervision evaluation when such defendant fails to show that he was similarly situated to felony drug offenders who were eligible for the program. *State v. Borges*, 18 Neb. App. 322, 791 N.W.2d 336 (2010).

The geographic limitations on the Specialized Substance Abuse Supervision program do not violate the Equal Protection Clause because the program is rationally related to the State's interests. *State v. Borges*, 18 Neb. App. 322, 791 N.W.2d 336 (2010).