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NO.
STATE OF NEBRASKA
OFFICIAL
NOV 24 1999
DEPT. OF JUSTICE

DATE: November 15, 1999

SUBJECT: DNA Detection of Sexual and Violent Perpetrators Act

REQUESTED BY: Harold W. Clarke, Director
Nebraska Department of Correctional Services

WRITTEN BY: Don Stenberg, Attorney General
Therese N. James, Assistant Attorney General

You have asked whether the DNA Detection of Sexual and Violent Perpetrators Act, Neb. Rev. Stat. §§ 29-4101 to 28-4115 (1997) (hereinafter "Act"), applies to people convicted of a violent or sexual offense, who were convicted prior to the enactment of the current Nebraska Criminal Code, Neb. Rev. Stat. §§ 28-100 to 28-387 (1995)(hereinafter "Code"), and thus whether these individuals have to submit a DNA sample under the Act. The reason this question is asked is because many of the offenses identified in the Act have had the criminal elements changed from the prior Code, or are new offenses created in the current Code. Therefore, the answer to your question is no; the Act would not apply. Those inmates who are incarcerated and serving time for committing a violent or sexual offense under the previous Code, i.e., prior to 1979, and as defined in §§ 28-401 to 28-419, do not have to submit a DNA sample.

In 1997, the Nebraska Legislature passed LB 278, codified as Neb. Rev. Stat. §§ 29-4101 to 29-4115, and known as the DNA Detection of Sexual and Violent Perpetrators Act ("Act"). The Act requires that a person who is convicted of a felony sex offense or other specified offense submit a blood or tissue sample for DNA identification purposes. The Act also established a DNA database for DNA records as well as a state DNA sample bank for storage of such DNA samples. The Act states in part:

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> (1) A person who is convicted of a felony sex offense or other specified offense on or after September 13, 1997, shall have a DNA sample drawn: . . .
>
> (2) A person who has been convicted of a felony sex offense or other specified offense before September 13, 1997, shall not be released prior to the expiration of his or her maximum term of confinement unless and until a DNA sample has been drawn.

Neb. Rev. Stat. § 29-4106.

The Act covers two types of offenses, "felony sex offenses" and "other specified offenses," which are enumerated as follows:

> (6) Felony sex offense means a felony offense, or an attempt, conspiracy, or solicitation to commit a felony offense, under any of the following:
> (a) Kidnapping of a minor pursuant to section 28-313, except when the person is the parent of the minor and was not convicted of any other offense in this subdivision;
> (b) Incest of a minor pursuant to section 28-703;
> (c) Sexual assault in the first or second degree pursuant to section 28-319 or 28-320;
> (d) Sexual assault of a child pursuant to section 28-320.01;
> (e) Sexual assault of a vulnerable adult pursuant to subdivision (1)(c) of section 28-386; and
> (f) False imprisonment of a minor in the first degree pursuant to section 28-314, except when the person is the parent of the minor and was not convicted of any other offense in this subdivision;

Neb. Rev. Stat. § 29-4103(6).

Neb. Rev. Stat. § 29-4103(8) provides:

> (8) Other specified offense means an offense, or an attempt, conspiracy, or solicitation to commit an offense, under any of the following:
> (a) Murder in the first degree pursuant to section 28-303;
> (b) Murder in the second degree pursuant to section 28-304;
> (c) Manslaughter pursuant to section 28-305; or
> (d) Stalking pursuant to sections 28-311.02 to 28-311.05 . . . .

As to the applicability of the Act to incarcerated persons who have committed violent or sexual offenses prior to 1979, your question hinges on whether the Act covers that class of offender when the new Code took effect. Four (4) areas were studied to properly answer your question: the Act; the legislative history surrounding the Act; the comparison

of the elements of the offenses listed in the Act under the old and new Code; and the statutory model upon which the Act was based.

First, the Legislature never articulated anything other than which offenses are covered or which class of offenders the Act covers as stated above. The plain language of the Act only lists those offenses for which incarcerated persons shall be tested. Generally, statutory language is to be given its plain and ordinary meaning, in the absence of anything contrary, when interpreting a statute. *Proctor v. Minnesota Mutual Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995); *George Rose & Son Siding & Grading Co. v. Nebraska Dep't of Rev.*, 248 Neb. 92, 532 N.W.2d 18 (1995). The original intent of the Act states in part: "LB 278 provides that DNA samples will be collected pursuant to the act from adults and juveniles who have committed a felony sex offense, murder, manslaughter, or stalking." Summary of the LB 278, February 7, 1997.

Second, four (4) offenses listed in the Act were not listed as offences in the prior Code. These new offenses were:

Stalking (Neb. Rev. Stat. § 28-311 to 28-311.05);
Sexual Assault of a Child (Neb. Rev. Stat. § 28-320.01);
Sexual Assault of a Vulnerable Adult (Neb. Rev. Stat. § 28-386); and
Incest of a Minor (Neb. Rev. Stat. § 23-703);

In addition, when the current Code took effect on January 1, 1979, the Legislature explicitly repealed the prior criminal statutes under Laws 1977 LB 38. *See State v. Fuller*, 203 Neb. 233, 242, 278 N.W.2d 756 (1979). The current Code renumbered, renamed and made obsolete the prior Code in its entirety, including the following offenses:[1]

Murder in the First Degree, Neb. Rev. Stat. § 28-401;
Murder in the Second Degree, Neb. Rev. Stat. § 28-402;
Manslaughter, Neb. Rev. Stat. § 28-403;
Kidnapping of a Minor, Neb. Rev. Stat. § 28-417;
Sexual Assault in the First or Second Degree, Neb. Rev. Stat. § 28-408.03 -408.04; and
False Imprisonment of a Minor, Neb. Rev. Stat. § 28-416, 28-419.

See Neb. Rev. Stat. §§ 28-101- 28-1348.

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[1] The new Code altered and/or eliminated other offenses listed under the prior Code as well: The recently adopted Nebraska Criminal Code provides that conduct denominated "theft" in nine specific sections of the statutes constitutes a single offense embracing the separate offenses heretofore known as larceny, embezzlement, false pretenses, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. See §. 28-510 R.S. Supp. 1977.

Modern Sounds & Systems, Inc. v. Federated Mut. Ins. Co., 200 Neb. 46, 51, 262 N.W.2d 183 186-7 (1978).

Third, if these offenses listed in the Act were previously listed as an offense in the prior Code, i.e., they had the same elements of the offense, it could be conceivable that a person convicted under the prior Code could be tested under the Act. But unfortunately, the following offenses have been changed under the current Code, or it was the first time they were codified as a specific crime: murder in the second degree, stalking, kidnapping, incest, sexual assault in the first or second degree, sexual assault with a child, and sexual assault of a vulnerable adult. See Chapter 28, Article 4, Offenses Against the Person, repealed by Laws 1977, LB 38 § 328.

In essence, the only offenses from the prior Code where the elements of the offense remained consistent, or that remained in the current Code are murder in the first degree and manslaughter. As such, it would be unreasonable to discern that the intention of the Legislature in drafting the Act was to include offenses committed under the prior Code since it was not articulated in the Act, nor was it discussed at all during the drafting and enactment of the Act.[2]

Based on an analysis of the plain language of the Act, which does not encompass a majority of offenses in the prior code, the inmates who were convicted for offenses under the prior Code do not have to submit to DNA testing under the Act.[3] Perhaps a different conclusion would be reached if offenses listed under the prior Code remained the same under the current Code; but they do not. Otherwise, applying the Act to cover a small class of offenders sentenced under the prior Code would distort the entire intention of the Act. *See State v. Urbano*, 256 Neb.194, 589 N.W.2d 144 (1999)(criminal case where court attempted to interpret the legislative intent of the Randolph doctrine in 1998 LB 1073 on determinate sentences).

Fourth, it is evident from the legislative history of the Act that it contains little reference to or discussion of any such coverage of those persons convicted under the prior Code.[4] Instead, the Legislature heard the following explanation:

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[2]Murder in the second degree, now under Neb. Rev. Stat. § 28-304, was very different from the previous Code under Neb. Rev. Stat. § 28-402. For example, the current Code states murder in the second degree in part as: "A person commits murder in the second degree if he causes death of a person intentionally but without premeditation." In contrast, the prior Code stated: "Whoever shall purposely and maliciously but without deliberation and premeditation kill another..."

[3]"'The provisions of this code shall not apply to any offense committed prior to January 1, 1979. Such an offense shall be construed *and punished* according to the provisions of the law existing at the time of the commission thereof in the same manner as if this code had not been enacted. ' (Emphasis supplied.) We believe the foregoing language is clear, unequivocal, and not subject to interpretation." *State v. Weinacht*, 203 Neb.124, 133, 277 N.W.2d 567, 572 (1979).

> The initial bill provides that the DNA collection and matching shall provide for matching based on felony sex crimes, including kidnapping of a minor, incest of a minor, sexual assault in the first and second degree, sexual assault of a child, sexual assault of a vulnerable adult, false imprisonment in the first and second degree, as well as other specified offenses which include murder, first or second degree, manslaughter, stalking, attempt, conspiracy, solicitation. The crimes with the committee amendment as well as with the amendment that will follow the committees amendment that I'm offering will specifically provide that the only types of offenses which could be used to collect this information for would be felony offenses and would exclude all misdemeanors.

Statement made by Sen. Abboud, sponsor of the Act, on April 2, 1997, Floor Debate 1977 LB 278, page 3111. The intent of such coverage cannot be inferred without sufficient discussion on the designation of what class of people would be covered under the Act.

> . . . The State claims, however, that we should treat § 83-1,105.01 as having been impliedly amended by the 1998 amendments because the "two statutes are essentially identical . . . "
> . . . Even a casual reading of the two statutes shows that [the statutes] are not "essentially identical," as claimed by the State, with respect to, inter alia, their titles, purposes, or terms.
> . . . .
> . . . Absent evidence of legislative intent to modify existing statutes or ordinances, we ordinarily do not assume the existence of such intent. . . . .

State. v. Urbano, 256 Neb. at 211-2, 588 N.W.2d at 144, 157.

Fifth, if a piece of legislation is based on another state's statute, then the statute's coverage could be inferred from that model legislation. In this case, the Act was originally based on a similar statute enacted in Pennsylvania.[5] But the statutory intent and coverage

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[5] "The offenses for which an individual convicted in adult court or adjudicated in a juvenile court for which the DNA sample would be obtained are listed on page 3. . . .The original bills at least do provide that it is . .. They are sex offenses although the expanded authority at the end may well be for crimes of violence." Statement by Richard Boucher, Lobbyist for the Nebraska County Attorney's Association, appearing before the Committee on Judiciary, February 7, 1997, LB 278, Page 122.

"It would be used to exclude individuals who are subject of criminal investigations or prosecutions and to deter and detect individuals that had committed three different types of acts. This particular bill is based upon Pennsylvania law that was enacted a number of years ago that established DNA data bank." Sen. Abboud, Committee on Judiciary, February 7, 1997, LB 278 Page 114.

of that Pennsylvania statute only covered those offenses specific to Pennsylvania's jurisdiction. [6] Since each state's criminal code and the history behind it is particular to that jurisdiction, there is no correlation and no intent inferred thereon.

Absent plain language of the Act and the legislative history, if the Legislature intended to include a class of offenders, it would have done so. "The Legislature is presumed to know the law . . . when passing new legislation." *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). *See also, State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998).

In conclusion, it is the Attorney General's opinion that the Act does not include the taking of DNA samples of those persons convicted of the same or similar crimes under the prior Code.

DON STENBERG
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APPROVED BY:

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[6]House Bill No. 3 General Assembly of Pennsylvania (Special Session No. 1 of 1995): May 2, 1995: Section 102: .. [i]t is therefore in the best interest of the Commonwealth to establish a DNA data base and DAN data bank containing DNA samples submitted by individuals convicted of felony sex offenses and other specified offenses. Section 103: Definitions: . . ."felony sex offense" A felony offense, or an attempt, conspiracy or solicitation to commit a felony offense, under any of the following:

18 Pa.C.S.. Ch. 31 (relating to sexual offenses).
18 Pa.C.S. § 6312 (relating to sexual abuse of children). . . .

"Other specified offense." An offense. or an attempt, conspiracy or solicitation to commit an offense, under any of the following:

18 Pa.C.S. § 2502 (relating to murder).
18 Pa.C.S. § 2709(x)(2)(ii) (relating to harassment and stalking).
18 Pa.C.S. § 3126 (relating to indecent assault).

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