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NO.
STATE OF NEBRASKA
OFFICIAL
AUG 15 1994
DEPT. OF JUSTICE

DATE: August 12, 1994

SUBJECT: Application of Neb. Rev. Stat. § 29-1401 (1989) to inmate executions

REQUESTED BY: Gary E. Lacey, Lancaster County Attorney

WRITTEN BY: Don Stenberg, Attorney General
Laurie Smith Camp, Assistant Attorney General

You have asked several questions regarding the application of Neb. Rev. Stat. § 29-1401 (1989) to the execution of inmates sentenced to death. Your questions, and our responses are set forth below.

1. "Is it necessary to conduct a grand jury investigation under § 29-1401 R.R.S. 1943 when an execution occurs in my county?"

No. The last two sentences of § 29-1401 provide:

> District courts shall call a grand jury in each case upon certification by the county coroner or a coroner's physician that an individual has died while being apprehended by or while in the custody of a law enforcement officer or detention personnel. Any grand jury called pursuant to this section shall be limited in its charge, powers, duties, proceedings, indictment, and report to the review of the incident or incidents which caused it to be called.

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This language is the product of LB 676 passed by the legislature in the 1988 Session. As originally introduced by Senator Chambers, the purpose of the bill was to require the convening of a grand jury upon certification by the county coroner that an individual had died of "unnatural" cause while being apprehended by or in the custody of a law enforcement officer. The bill specifically excluded deaths by alcohol or drug overdose, or injuries sustained in an automobile accident. The bill was amended by the judiciary committee to eliminate the drug, alcohol, and automobile accident exceptions and to include deaths of persons in the custody of "detention personnel." The committee amendments also limited the scope of the grand jury's inquiry to the cause of death only. The impetus for the bill was the questionable death of an inmate in the Douglas County Jail, and concern about the subsequent police investigation of the death. Because the cause of death in the case of executions is patently obvious, and because LB 676 made no changes to Nebraska's statutes regarding death penalty procedures [Neb. Rev. Stat. §§ 29-2519 *et seq.* (1989)], it is apparent that the legislature did not intend LB 676, including the final sentences of § 29-1401, to apply to executions.

2. "<u>Should the coroner of Lancaster County, or his designee, or coroner's physician of Lancaster County be present at the execution of Mr. Otey</u>?"

3. "<u>Should an autopsy be performed</u>?"

Because your second and third questions are interrelated, we will address them together. As you note, Neb. Rev. Stat. § 23-1821(1) (1991), which was also enacted through LB 676 during the 1988 Session, provides:

> Every hospital, emergency care facility, physician, nurse, emergency medical technician, or law enforcement officer shall immediately notify the county coroner in all cases when it appears that an individual has died while being apprehended by or while in the custody of a law enforcement officer or detention personnel.

Neb. Rev. Stat. § 23-1822 (1991), also enacted through LB 676, provides:

> In each instance when the county coroner is given notice in accordance with Section 23-1821, the coroner or coroner's physician shall perform an examination, a test, or an autopsy as he or she may deem necessary to establish, by a reasonable degree of medical certainty, the cause or causes of death and shall thereafter certify the cause or causes of death to the presiding judge of the district court.

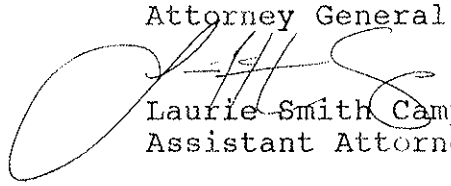
Because we have concluded that the provisions of LB 676 were not intended to apply to the execution of inmates sentenced to death, these provisions would also be inapplicable to executions.

4. "<u>If the coroner's physician or coroner is not present at the execution, who will sign the death certificate</u>?"

You state that the Director of the Department of Correctional Services has informed you that he does not plan to have a licensed medical doctor present at executions. Neb. Rev. Stat. § 23-1820 (1991) provides that in counties having a coroner's physician, that physician "shall certify the cause of death in every case of death in such county not certified by an attending physician . . . . " So, if no other physician attends the execution of an inmate sentenced to death and executed in Lancaster County, the Lancaster County coroner's physician would be responsible for certifying the cause of death of that inmate, regardless of whether the coroner's physician actually attends the execution.

Sincerely,

DON STENBERG
Attorney General



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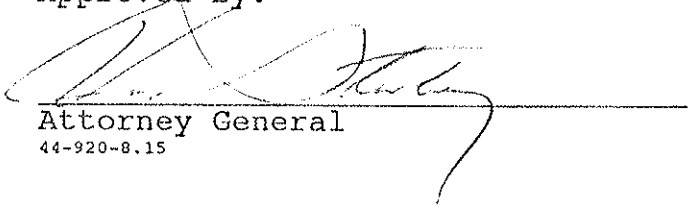

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