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#95084

STATE OF NEBRASKA
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DEPT. OF JUSTICE

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DEPUTY ATTORNEYS GENERAL

DATE: November 7, 1995

SUBJECT: Application of Neb. Rev. Stat. § 83-1,123(3) as Revised by LB 371

REQUEST BY: Ronald L. Bartee, Chairman
Nebraska Board of Parole

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

You have asked for guidance regarding the proper application of Neb. Rev. Stat. § 83-1,123(3) as revised by LB 371 during the 1995 Legislative session. The revision which became effective on September 9, 1995, provides:

> A parolee whose parole has been revoked shall be considered by the Board for reparole at any time in the same manner as any other committed offender eligible for parole, <u>except that no offender whose parole has been revoked as a result of a conviction of a felony committed while on parole shall receive another parole on the original sentence</u>. [Emphasis added to new language provided in LB 371].

You suggest that the new language in § 83-1,123(3) might be applied only to inmates who committed their original offense, or were sentenced on their original offense, or were paroled on that original offense after the effective date of the revision. We conclude that the new language in § 83-1,123(3) applies to <u>any</u> inmate who commits a new felony while on parole on or after September 9, 1995; is subsequently convicted of that felony; and suffers a parole revocation as a result of that conviction.

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Article IV, § 13, of the Nebraska Constitution provides in part:

> The Legislature shall provide by law for the establishment of a Board of Parole and the qualifications of its members. Said board, or a majority thereof, shall have power to grant paroles after conviction and judgment, <u>under such conditions as may be prescribed by law</u>, for any offenses committed against the criminal laws of this State, except treason and cases of impeachment. [Emphasis added].

The amendment to § 83-1,123(3) contained in LB 371 was a new condition prescribed by law, modifying the Board's power to grant parole. The new language in § 83-1,123(3) applies to <u>all</u> offenders except to the extent that its application would constitute an *ex post facto* law. *Ex post facto* laws are prohibited by Article I, § 16, of the Nebraska State Constitution. The Nebraska Supreme Court has defined *ex post facto* laws as those which "inflict a greater punishment than the law annexed to the crime when committed." ***State v. Duran***, 224 Neb. 774, 775 (1987).

If the new language in § 83-1,123(3) were applied to inmates who had committed a new felony while on parole prior to September 9, 1995, then such a retroactive application could be considered an *ex post facto* law if the loss of parole eligibility were viewed as "punishment." The application of the new language to offenders who commit felonies while on parole on or after September 9, 1995, however, does not constitute an *ex post facto* law. Such offenders had notice of the consequences of committing a new felony while on parole and had an opportunity to avoid the consequences of the new statutory provision by refraining from committing a new felony while on parole.

In sum, any offender who commits a new felony on or after September 9, 1995, while on parole; is convicted of that felony; and receives a parole revocation as a result of that felony; may not be paroled again on the original sentence. Reference is made to our opinion #95080 dated October 19, 1995, for an interpretation of the term "original sentence".

Sincerely,

DON STENBERG
Attorney General

APPROVED:

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Deputy Attorney General

44-28-18