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NO. STATE OF NEBRASKA OFFICIAL JUN 29 1992 DEPT. OF JUSTICE

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ATTORNEY GENERAL

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DEPUTY ATTORNEYS GENERAL

DATE: June 29, 1992

SUBJECT: LB 291 (1992 Legislative Session)

REQUESTED BY: Ellen L. Totzke, Hall County Attorney

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

You have asked several questions concerning the proper interpretation of LB 291, passed during the 1992 legislative session, which created a fourth offense classification for driving while intoxicated.

1. "May such sentence be served in a Department of Corrections facility, or must such a sentence be served in a county jail?"

ANSWER: Neb.Rev.Stat. §28-106(2) uses mandatory language when requiring that all sentences of imprisonment for misdemeanors be served in a county jail, except in three specific instances:

(a) If the sentence is for a term of one year upon conviction of a Class I misdemeanor or for a combined term of one year or more in the event of conviction of more than one misdemeanor offense;

(b) If the sentence is to be served concurrently with a term for a conviction of a felony; or

(c) If the Department of Correctional Services has certified as provided in §28-105 as to the availability of facilities and programs for short-term prisoners and the sentence is for a term or combined terms of six months or more.

The Department of Correctional Services has not certified the availability of facilities and programs for short-term prisoners under the provisions of Neb.Rev.Stat. §§28-105(2) and 28-106(2)(c) (Reissue 1989). So, a defendant convicted of a fourth offense Class W misdemeanor could be sentenced to the Nebraska Department of Correctional Services only if that sentence were to be served concurrently with a term for conviction of a felony, or if that sentence were combined with another sentence for a misdemeanor offense, and the combined terms equaled more than one year. If the fourth offense Class W misdemeanor were the defendant's only conviction, the defendant could not be sentenced to serve the term for that offense in the facilities of the Nebraska Department of Correctional Services, even if the defendant were to receive the full five year maximum term.

2. "If such sentence must be served in a county jail, does such sentence violate constitutional provisions against cruel and unusual punishment?"

ANSWER: Whether or not the serving of a sentence in county jail violates the Constitution's Eighth Amendment standard prohibiting cruel and unusual punishment depends upon the facts of each case. Courts look to a variety of conditions of confinement when determining whether or not an inmate is being subjected to cruel and unusual punishment. The Supreme Court's analysis of this issue can best be understood by a review of the following decisions: Rhodes v. Chapman, 452 U.S. 337, 347 (1981); Wilson v. Sieter, 501 U.S. ____, 111 S.Ct. 2321, 2326-27 (1991).

3. "Are the statutory changes for punishment of Driving Under the Influence Fourth Offense in LB 291 in conflict with Neb.Rev.Stat. §28-107(3), since the substantive offense is defined outside the Nebraska Criminal Code?"

ANSWER: Yes. The range of penalties provided for fourth offense DWI in LB 291 does present a conflict with Neb.Rev.Stat. §28-107(3) which provides:

> A misdemeanor defined by a statute outside this code, the sentence for which exceeds the sentence authorized in this code for a Class I misdemeanor, shall constitute for sentencing purposes a Class I misdemeanor. A person adjudged guilty under such law is deemed to be convicted of a Class I misdemeanor and shall be sentenced for a Class I misdemeanor in accordance with this code.

When resolving this apparent conflict it is important to acknowledge that §28-107 was enacted in 1977 as part of the new Nebraska Criminal Code. The legislative history of this section shows that it was designed to bring all criminal offenses defined elsewhere in the Nebraska statutes within the sentencing framework of the new Criminal Code, set forth in §§28-105 and 28-106. The provisions of §28-107 were intended to apply only to crimes defined elsewhere in the Nebraska statutes prior to the enactment of the new Criminal Code in 1977. This is apparent from the language in Neb.Rev.Stat. §28-108 (Reissue 1989) which was also enacted by the Legislature as part of the 1977 Criminal Code:

> Criminal laws enacted after January 1, 1979, shall be classified for sentencing purposes in accordance with §28-105 or 28-106.

So, although there is an apparent conflict in the language of §28-107(3) and the penalty provided for fourth offense DWI under LB 291, the provisions of LB 291 must control. If the provisions of §28-107(3) were to control the sentencing of a defendant convicted of fourth offense DWI, the defendant could be incarcerated within the facilities of the Nebraska Department of Correctional Services, but the defendant could not be sentenced to more than one year of imprisonment and would not be subject to any mandatory minimum term. Such an interpretation would be contrary to the intent of the 1977 Legislature when it enacted §§28-107 and 28-108 as part of the 1977 Criminal Code, and contrary to the intent of the 1992 Legislature when it enacted LB 291.

> 4. "Does an offense for which the punishment is more than one year's incarceration require equivalent treatment to a felony, i.e., preliminary hearing and a twelve person jury trial in the district court?"

ANSWER: Constitutional mandates regarding jury trials are contained in the Sixth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, as well as in Article I, Sections 6 and 11 of the Nebraska Constitution. When determining whether or not a defendant has a right to a jury trial under these constitutional provisions, the United States Supreme Court and the Nebraska Supreme Court have looked to the "possible penalties" for the offense. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Supreme Court held that crimes carrying possible penalties of up to six months do not require jury trials under the Sixth Amendment. In State v. Young, 194 Neb. 544 (1975), and State v. Kennedy, 224 Neb. 164 (1986), the Nebraska Supreme Court also looked to the "possible penalties" for offenses when

determining whether or not the defendants had a right to a jury trial under the Nebraska or federal constitutions. Because the possible penalties for a fourth offense DWI under LB 291 are equal to or greater than the possible penalties for a Class IV felony, we must conclude that the rights of preliminary hearing and a twelve person jury trial would be applicable.

Sincerely yours,

DON STENBERG
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Assistant Attorney General

Approved:

Attorney General

44-106-13