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DATE: April 3, 1995

SUBJECT: Proposed Judiciary Committee Amendment to LB 371

REQUESTED BY: E. Benjamin Nelson
Governor

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

You have asked for an opinion regarding a Judiciary Committee amendment to LB 371. The amendment would change the provisions of Neb. Rev. Stat. § 28-105(1) (Reissue 1989) so that the potential maximum sentence for Class ID felonies would be reduced from 50 years to 40 years, and the potential maximum sentence for Class II felonies would be reduced from 50 years to 30 years. This proposed amendment to § 28-105(1) is contained in section 2 of AM0747, the standing committee amendment to LB 371 issued by the Judiciary Committee on March 6, 1995.

You have asked how the committee amendment would affect those inmates currently serving sentences of more than 40 years for Class ID felonies or more than 30 years for Class II felonies.

Neb. Rev. Stat. § 29-2204.01 (Reissue 1989) states:

> "In any criminal proceeding in which a sentence of confinement has been imposed and the particular law under which such sentence was pronounced is thereafter amended to decrease the maximum period of confinement which may be imposed, then any person sentenced under the former law shall be entitled to his discharge from custody when he has served the maximum period of confinement authorized by the new law, not withstanding the fact that

> the court may have ordered a longer period of confinement under the authority of the former law."

If § 29-2204.01 is constitutional, a reduction in the proposed maximum terms for a Class ID and II felonies would apply retroactively to all inmates currently serving sentences for such crimes. It is our opinion, however, that the provisions of section 29-2204.01 quoted above are not constitutional and that the new maximum terms would apply only to those inmates whose sentences had not yet become final on the effective date of the new law.

In State v. Randolph, 186 Neb. 297 (1971), the Nebraska Supreme Court stated:

> "While there is still some divergence of opinion among the states, we believe the better rule to be and we therefore hold that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act unless the Legislature has specifically provided otherwise."

Id. at 301-02 [emphasis added].

The Nebraska Supreme Court quoted with approval language from the California Supreme Court case of In Re Estrada, 63 Cal.2d 740, 48 Cal. Rptr. 172, 408 P.2d 948 (1965):

> "It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final."

Randolph, 186 Neb. at 302 [emphasis added].

The Nebraska Supreme Court has reaffirmed its holding in Randolph many times, most recently in the case of State v. Schrein, 247 Neb. 256 (1995). In Schrein, the Nebraska Supreme Court stated:

> "Since the rule was first enunciated in State v. Randolph, 186 Neb. 297, 183 N.W.2d 225 (1971), cert. denied 403 U.S. 909, 91 S.Ct. 2217, 29 L.Ed2d 686, we have consistently held that where a criminal statute is amended by mitigating the punishment, after the commission of a prohibited act but before final judgment, the punishment is that provided by the amendatory act

> unless the Legislature has specifically held otherwise. See, State v. Peiffer, 212 Neb. 864, 326 N.W.2d 844 (1982); State v. Warner, 192 Neb. 438, 222 N.W.2d 292 (1974); State v. Ambrose, 192 Neb. 285, 220 N.W.2d 18 (1974); State v. Waldrop, 191 Neb. 434, 215 N.W.2d 633 (1974). In criminal cases, it is the sentence which is the judgment. State v. Beverlin, 244 Neb. 615, 508 N.W.2d 271 (1993); State v. Foster, 239 Neb. 598, 476 N.W.2d 923 (1991). In Warner, supra, we found that the defendant's conviction and sentence became a final judgment on the date that this court entered its mandate concerning the defendant's appeal. Thus, a conviction and sentence are not considered final judgments until after an appeal, if there indeed is an appeal."

Schrein, 247 Neb. at 258 [emphasis in original].

So, it is clear that if the Judiciary Committee's amendment to LB 371 lowering the maximum penalties for Class ID and II felonies were enacted, the new maximum terms would be applied to all offenders whose sentences were not final on the date the new law was enacted.

Although § 29-2204.01 purports to apply legislation reducing criminal penalties retroactively, regardless of whether the inmates' sentences are final, we find that such an application of section 29-2204.01 would be unconstitutional. The Legislature cannot reduce final sentences without invading the province of the Judicial Branch and of the Pardons Board within the Executive Branch.

Article II, § 1, of the Nebraska Constitution provides:

> "The powers of the government of this state are divided into three distinct departments, the legislative, the executive, and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted."

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

> "[T]he Governor, Attorney General, and Secretary of State, sitting as a board, shall have the power to remit fines and forfeitures and to grant respites, reprieves, pardons or commutations in all cases of conviction for offenses against the laws of this state, except treason and cases of impeachment."

On many occasions, the Nebraska Supreme Court has expressed its commitment to the principle of the Separation of Powers. In State ex rel. Wright v. Barney, 133 Neb. 676, 688 (1937), the Nebraska Supreme Court stated:

> "We are committed to the view that the limits of the constitutional jurisdiction thus conferred may not be increased or extended either by consent of parties or legislative enactment."

In State ex rel. Spire v. Conway, 238 Neb. 766, 773 (1991), the Nebraska Supreme Court said: "The language of Article II prohibits one branch of government from encroaching on the duties and prerogatives of the others."

In State v. Philipps, 246 Neb. 610 (1994), the Nebraska Supreme Court declared unconstitutional the provisions of Neb. Rev. Stat. § 29-2308.01 (1989) which purported to allow sentencing courts to reduce sentences within 120 days after imposing a sentence, revoking probation, or receiving a mandate following an appeal. The Nebraska Supreme Court found that the statute was an unconstitutional usurpation of the Executive authority vested in the Board of Pardons under Article IV, § 13, of the Nebraska Constitution, and violated the Separation of Powers required by Article II, § 1, of the Nebraska Constitution. The Court said:

> "[T]he essence of commutation is the substitution of a milder punishment. See Lincoln v. Sigler, 183 Neb. 347, 160 N.W.2d 87 (1968). Thus, in Boston v. Black, 215 Neb. 701, 340 N.W.2d 401 (1983), we wrote that to interpret a statute such that it would reduce, without the approval of the Board of Pardons, a sentence imposed prior to its enactment would render the statute unconstitutional, for it would permit a legislative invasion of the power of commutation constitutionally consigned to the Board. See also, Stewart v. Clarke, 240 Neb. 397, 482 N.W.2d 248 (1992)."

Philipps, 246 Neb. at 521.

Although it is our opinion that the Judiciary Committee's amendment to LB 371, reducing the maximum penalties for Class ID and II felonies, could not be applied retroactively to inmates whose sentences had become final prior to the enactment of such a law, it is not unusual for the Nebraska Supreme Court to reinstate direct appeals years after mandates are issued on inmates' original

direct appeals. The Nebraska Supreme Court has not yet addressed the question of whether an inmate's sentence is considered "final" if a direct appeal is later reinstated.

Sincerely,

DON STENBERG
Attorney General

Laurie Smith Camp
Deputy Attorney General

Approved by:

Don Stenberg, Attorney General

44-111-12