

DRUNK DRIVING

STATE v. PEIFFER: TIME IN A BOTTLE

INTRODUCTION

In *State v. Peiffer (Peiffer I)*,¹ and again upon rehearing in *State v. Peiffer (Peiffer II)*,² the Nebraska Supreme Court faced the issue of whether the penalty provisions of Nebraska's new drunk driving law, which became effective in July 1982, could be retroactively applied. The issue in the *Peiffer* cases arose because the drunk driving law, which reduced certain penalties, had become effective *after* the commission of the defendant Peiffer's offense, but *before* his case reached final judgment.³

In each case the court used different methods of analysis, which in turn led to conflicting results. The method of analysis used in *Peiffer I* focused on whether the new drunk driving provisions mitigated punishment.⁴ The court concluded that the new provisions were, in fact, less onerous than the old provisions, and retroactively applied the newly amended act.⁵ In *Peiffer II*, however, the court reexamined its earlier opinion and held that the new law could not be retroactively applied.⁶ In so holding, the court focused on the presence or absence of a statement of legislative intent as to retroactivity.⁷ Finding no such statement of intent, the court concluded that the newly enacted law should not be retroactively applied.⁸ Although this note does not advocate a particular result, it does attempt to provide a critical analysis of the methods used by the Nebraska Supreme Court in reaching these decisions.

FACTS AND HOLDING

On February 26, 1981, Nicholas R. Peiffer pled guilty to a charge of driving while intoxicated, third offense, in violation of section 39-669.07 of the Nebraska statutes.⁹ At the time of sentencing, this

1. 212 Neb. 299, 322 N.W.2d 445 (1982) (per curiam).

2. 212 Neb. 864, 326 N.W.2d 844 (1982) (per curiam).

3. *Peiffer I*, 212 Neb. at 300, 322 N.W.2d at 446.

4. See notes 27-32 and accompanying text *infra*.

5. *Peiffer I*, 212 Neb. at 302, 322 N.W.2d at 447.

6. *Peiffer II*, 212 Neb. at 869, 326 N.W.2d at 846-47.

7. See notes 36-47 and accompanying text *infra*.

8. *Peiffer II*, 212 Neb. at 865-67, 326 N.W.2d at 846.

9. *Peiffer I*, 212 Neb. at 299-300, 322 N.W.2d at 446. See NEB. REV. STAT. § 39-669.07 (Reissue 1978) (amended 1982).

offense was a Class IV felony,¹⁰ for which the maximum permissible punishment was imprisonment for up to five years, a fine of up to \$10,000, or both.¹¹ In addition, a third offender's license to drive could be revoked for a period of one year from the date of his discharge from confinement.¹² Pursuant to Peiffer's guilty plea, the District Court of Lancaster County, Nebraska, sentenced Peiffer to three years probation, on the condition that he spend a total of six weekends in jail, report on a regular basis to a probation officer and comply with several other conditions.¹³ This probation was subsequently revoked due to Peiffer's failure to report both to jail and to his probation officer.¹⁴ Peiffer was thus resentenced to an indeterminate¹⁵ term of not less than one nor more than two years imprisonment, and his license to drive was suspended for a period of one year.¹⁶ Peiffer appealed this sentence, arguing that it was excessive in light of the recent passage of L.B. 568 by the Nebraska Legislature.¹⁷ L.B. 568 became effective on July 17, 1982,¹⁸ while Peiffer's case was still on direct appeal.¹⁹ L.B. 568 amended section 39-669.07 by changing the offense of driving while intoxicated, third offense, from a Class IV felony to a Class W misdemeanor.²⁰ In addition, L.B. 568 affected significant changes in the applicable penalty provisions. The new drunk driving law: (1) *decreased* the length of imprisonment from a maximum of five years to a period

10. NEB. REV. STAT. § 39-669.07(3) (Reissue 1978) (amended 1982).

11. *Id.* § 28-105(1) (Reissue 1979).

12. *Id.* § 39-669.07(3) (Reissue 1978) (amended 1982).

13. *Peiffer I*, 212 Neb. at 300, 322 N.W.2d at 446.

14. *Id.* One of the conditions of Peiffer's three year's probation was to spend a total of six weekends in jail. *Id.* When Peiffer failed to report to the jail and failed to report to the probation officer an information was filed seeking revocation and probation. *Id.* Peiffer plead guilty to this information. *Id.*

15. An indeterminate sentence has been defined as:

[a] form of sentence to imprisonment upon conviction of crime, now authorized by statute in several states, which, instead of fixing rigidly the duration of the imprisonment, declares that it shall be for a period "not less than" so many years "nor more than" so many years, or not less than the minimum period prescribed by statute as the punishment for the particular offense nor more than the maximum period, the exact length of the term being afterwards fixed, within the limits assigned by the court or the statute, by an executive authority, (the governor, board of pardons, etc.,) on consideration of the previous records of the convict, his behavior while in prison or while out on parol, the apparent prospect of reformation and other such considerations.

BLACK'S LAW DICTIONARY 1528 (4th ed. 1968).

16. *Peiffer I*, 212 Neb. at 300, 322 N.W.2d at 446.

17. *Id.*

18. L.B. 568, 1982 Neb. Laws 517 (to be codified in NEB. REV. STAT. §§ 28-106, 39-669.07 (Supp. 1982)).

19. 212 Neb. at 300, 322 N.W.2d at 446.

20. *Id.* See L.B. 568, §§ 1, 5(3), 1982 Neb. Laws 517-18, 523 (codified as NEB. REV. STAT. §§ 28-106(1), 39-669.07(3) (Supp. 1982)).

of three to six months;²¹ (2) *decreased* the applicable fine from a maximum of \$10,000 to \$500;²² and (3) *increased* the period of license revocation from one year to a permanent revocation.²³

In his direct appeal to the Nebraska Supreme Court, Peiffer contended that he was entitled to have his sentence reduced from the "not less than one nor more than two years" he had been awarded by the district court, to the new maximum sentence of six months made applicable during the pendency of his appeal by L.B. 568.²⁴ Peiffer based this contention on section 29-2204.01 of the Nebraska statutes,²⁵ which states in part that when "the particular law under which such sentence was pronounced is . . . amended to decrease the maximum period of confinement . . . 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."²⁶

Concerning this contention, the *Peiffer I* court stated: "Appellant [Peiffer] contends that [this] statute requires that his sentence be reduced. We need not, and do not, decide this case under terms of that statute. Rather, the applicable common law principle declared [by this court] in *State v. Randolph* . . . [controls the disposition of this case]."²⁷ The doctrine announced by the Nebraska court in *State v. Randolph*²⁸ was 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."²⁹ The *Peiffer I* court went on to note, as had been stated originally in *Randolph*, that "in the absence of anything indicating a contrary legislative intent: " 'It is the *inevita-*

21. See L.B. 568, § 1(1), 1982 Neb. Laws 517-18 (codified as NEB. REV. STAT. § 28-106(1) (Supp. 1982)).

22. *Id.*

23. *Id.* § 5(3), 1982 Neb. Laws 523 (codified as NEB. REV. STAT. § 39-669.07(3) (Supp. 1982)). § 39-669.07(3) states:

If such person . . . has been convicted [under] . . . this section a total of two or more times, such person shall be guilty of a Class W misdemeanor and the court shall, as part of the judgment of conviction, order such person to never again drive any motor vehicle in the State of Nebraska for any purposes from the date of his other conviction, and shall order that the operator's license of such person be permanently revoked.

Id. (emphasis added). For a comprehensive discussion of L.B. 568, see Comment, *L.B. 568: Nebraska's New Drunken Driving Law*, 16 CREIGHTON L. REV. 90, 93-111 (1982-83).

24. *Peiffer I*, 212 Neb. at 300-01, 322 N.W.2d at 446.

25. *Id.*; NEB. REV. STAT. § 29-2204.01 (Reissue 1979).

26. NEB. REV. STAT. § 29-2204.01 (Reissue 1979).

27. *Peiffer I*, 212 Neb. at 301, 322 N.W.2d at 446 (citation omitted).

28. 186 Neb. 297, 183 N.W.2d 225, *cert. denied*, 403 U.S. 909 (1971).

29. *Id.* at 301-02, 183 N.W.2d at 228.

ble inference that the Legislature must have intended that the new statute imposing the new lighter penalty . . . should apply to every case to which it constitutionally could apply.’”³⁰ In determining that *Randolph* was applicable to Peiffer’s case, the *Peiffer I* court observed: “We find no evidence of a contrary legislative intent in [L.B. 568].”³¹ The court thus reduced Peiffer’s sentence of confinement to the newly created maximum of six months.³²

The *Peiffer I* court, however, reserved the question as to whether, as argued by the State, Peiffer’s driving privileges should be permanently revoked as required by the new law.³³ It was Peiffer’s contention that to do so would amount to an *ex post facto* application of a more onerous provision of an amended statute.³⁴

In *Peiffer II*, the court stated that the issue reserved in *Peiffer I* “was *thought to be* only whether we were to permanently revoke defendant’s driving privileges.”³⁵ However, the *Peiffer II* court continued: “It develops that the question is broader, namely, whether the penalty for third offense drunk driving . . . [under] L.B. 568, should be applied *in its entirety* to the defendant, whose sentence under the . . . [former law] was on appeal on the date L.B. 568 became effective. . . .”³⁶ The *Peiffer II* court thus indicated its intention to completely reexamine the rationale of *Peiffer I*, and in a 3-1-3 decision, the earlier case was overruled, and the sentence imposed by the trial court was affirmed.³⁷

In attempting to determine whether L.B. 568 was to be applied “in its entirety” to Peiffer, the *per curiam* opinion of the plurality in *Peiffer II* indicated that the essential question to be resolved in reexamining *Peiffer I* was whether L.B. 568 had been intended by the Unicameral to mitigate the penalty for driving while intoxicated, third offense.³⁸ The question as to whether L.B. 568 had been intended to mitigate punishment was important because the *Randolph* doctrine, which had been held dispositive by the court in *Peiffer I*,³⁹ is only applicable “where a criminal statute is amended *by mitigating the punishment*.”⁴⁰

30. *Peiffer I*, 212 Neb. at 301, 322 N.W.2d at 447 (emphasis added).

31. *Id.* at 301-02, 322 N.W.2d at 447 (quoting *Randolph*, 186 Neb. at 302, 183 N.W.2d at 228). For a comprehensive discussion of L.B. 568, see Comment, *supra* note 23, at 94-95 n.36.

32. 212 Neb. at 302, 322 N.W.2d at 447.

33. *Id.*

34. *Id.*

35. 212 Neb. at 865, 326 N.W.2d at 845 (emphasis added).

36. *Id.* (emphasis added).

37. *Id.* at 869, 326 N.W.2d at 846-47.

38. *Id.* at 866, 326 N.W.2d at 845.

39. 212 Neb. at 301, 322 N.W.2d at 446-47.

40. *Randolph*, 186 Neb. at 301-02, 183 N.W.2d at 228 (emphasis added).

Therefore, in addressing the issue as to whether the Unicameral had intended to mitigate the punishment for third offense driving while intoxicated (DWI), the plurality focused upon L.B. 568's penalty provisions.⁴¹ Concerning the reduction in the incarceration time, from a maximum of five years under the old law, to a minimum of three and a maximum of six months under the new law, the plurality indicated that "no serious question could exist that the penalty was reduced and thus mitigated, [therefore] apparently calling into play the doctrine first enunciated by this court in *State v. Randolph*."⁴²

However, the plurality went on to hold that *Randolph* was inapplicable to Peiffer's case.⁴³ The plurality based this holding on the lack of any statement within L.B. 568, or its legislative history, from which the court could discern the Unicameral's intent with regard to the retroactive application of the new law.⁴⁴ The court thus stated: "Consequently, on further reflection, we must conclude that the *Randolph* doctrine does not apply to the case at hand, and our earlier opinion was, regrettably, erroneous in holding that it did. Our earlier opinion is therefore overruled."⁴⁵

The plurality then addressed Peiffer's original contention that he was entitled to have his sentence reduced to a maximum of six months pursuant to section 29-2204.01 of the Nebraska Statutes.⁴⁶ In addressing this issue, the plurality first reviewed the wording of the statute, and then observed that while "it may be fairly said that the Legislature intended the act to apply when incarceration time is decreased . . . [here] a weighty and different additional consequence [in the form of permanent license revocation] is provided."⁴⁷ The plurality thus concluded that "[i]n the absence of a clear expression of legislative intent, we are not inclined to interpret the statute to apply to matters other than clearly expressed within the statute itself."⁴⁸

Thus, having disposed of Peiffer's contention based on section 29-2204.01, and of the court's own application of *State v. Randolph* in *Peiffer I*, the sentence of the trial court was affirmed.⁴⁹ In its conclusion, the plurality was forced to add that should Peiffer "have been released from custody . . . under the language of [*Peif-*

41. See *Peiffer II*, 212 Neb. at 866-67, 326 N.W.2d at 845-46.

42. *Id.* at 866, 326 N.W.2d at 845. See notes 11-15 and accompanying text *supra*.

43. 212 Neb. at 865-67, 326 N.W.2d at 845-46.

44. *Id.* at 867, 326 N.W.2d at 846.

45. *Id.*

46. *Id.* at 868, 326 N.W.2d at 846.

47. *Id.*

48. *Id.* at 869, 326 N.W.2d at 846.

49. *Id.*

fer I], he is to be returned [to custody]."⁵⁰

Only three justices participated in the per curiam opinion of the plurality.⁵¹ Justice McCown wrote a separate opinion which concurred only in the result.⁵² Justice Caporale wrote a dissenting opinion which was joined by Chief Justice Krivosha and Justice Boslaugh.⁵³

BACKGROUND

In order to properly understand the analysis in *Peiffer II*, an appreciation of the common law doctrine expressed by the Nebraska Court in *State v. Randolph*,⁵⁴ and arguably codified by the Nebraska Unicameral in section 29.2204.01⁵⁵ of the Nebraska statutes, is necessary.

State v. Randolph

An understanding of *Randolph* is important because, by its terms, the doctrine announced in *Randolph*, and later refined in subsequent Nebraska cases, appears to apply to the facts of *Peiffer's* case. This is demonstrated by *Peiffer I*, wherein the court stated: "[T]he applicable common law principle declared in *State v. Randolph* . . . controls the disposition of this case."⁵⁶ When reading through the history and development of the *Randolph* doctrine, it is important to note, as the court did in *Randolph*, that in the absence of a statement of legislative intent as to the retroactive or prospective applicability: "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."⁵⁷ In other words, absent some statement to the contrary, it is *presumed* that the legislature would have wanted the lesser punishment to apply whenever constitutionally possible.

In *Randolph*, the Nebraska Supreme Court had adopted the rule 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

50. *Id.*

51. See note 37 and accompanying text *supra*.

52. *Peiffer II*, 212 Neb. at 869, 326 N.W.2d at 847 (McCown, J., concurring).

53. *Id.* at 871, 326 N.W.2d at 847.

54. 186 Neb. 297, 183 N.W.2d 225, *cert. denied*, 403 U.S. 909 (1971).

55. NEB. REV. STAT. § 29-2204.01 (Reissue 1979).

56. 212 Neb. at 301, 322 N.W.2d at 446-47.

57. *Randolph*, 186 Neb. at 302, 183 N.W.2d at 228 (emphasis added).

otherwise."⁵⁸

The doctrine laid down in *Randolph* was prompted by the following set of facts: The defendants, William Randolph and Robert Coleman, had been found guilty of imprisoning a person for the purpose of compelling the performance of an act by another and assault with intent to rob.⁵⁹ Each was sentenced to life imprisonment on the kidnapping count, and two to seven years on the assault count.⁶⁰ The defendants appealed, arguing among other things, that the sentences of life imprisonment were improper and not authorized due to the then recent amendment of section 28-417 of the Nebraska statutes.⁶¹ Prior to this amendment, and at the time of the commission of the crime, section 28-417 provided a mandatory sentence of life imprisonment for all forms of kidnapping.⁶² When the 1969 Legislature amended section 28-417, it reclassified the degrees of kidnapping and reduced the penalty for imprisoning a person for the purpose of compelling the performance of an act by another to imprisonment for not less than three nor more than fifty years.⁶³ That amendment, having been passed with an emergency clause,⁶⁴ went into effect on September 19, 1969, which was after the commission of the offense but before final judgment in Randolph's case.⁶⁵

The amended statute at issue in *Randolph* contained no specific legislative intent as to its prospective or retroactive operation.⁶⁶ The basic question facing the Nebraska court was to determine the intent of the Legislature as to which punishment to apply to a person in Randolph's position—the prior punishment of life imprisonment, which was in effect when the crime was committed, or the amendatory punishment of not less than three nor more than fifty years, which took effect while Randolph's case was on appeal.⁶⁷ The issue faced by the Nebraska court in *Randolph*

58. *Id.* at 301-02, 183 N.W.2d at 228 (emphasis added).

59. *Id.* at 297, 183 N.W.2d at 226.

60. *Id.*

61. *Id.* at 301, 183 N.W.2d at 228.

62. *Id.*

63. *Id.*

64. NEB. CONST. art. III, § 27 provides in pertinent part:

No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in case of emergency, to be expressed in the preamble or body of the act, the Legislature shall, by a vote of two thirds of all the members elected otherwise direct.

See *Wilson & Company, Inc. v. Otoe County*, 140 Neb. 518, 520-21, 300 N.W. 415, 417 (1941) (When a statute passes with an emergency clause in computing the time it takes effect, the day of passage is excluded, and it goes into effect the next day).

65. 186 Neb. at 301, 183 N.W.2d at 228.

66. *Id.*

67. *Id.*

was thus identical to that presented in *Peiffer II*, namely, to determine the intent of the Legislature.⁶⁸ In *Randolph*, the Nebraska court decided to apply the lesser punishment.⁶⁹

The Nebraska court drew support for its holding from decisions of other jurisdictions.⁷⁰ One such decision was from the California case of *In re Estrada*.⁷¹ In *Estrada*, the petitioner was committed as a drug addict to the California Rehabilitation Center.⁷² He escaped from the center but was subsequently captured and prosecuted for the escape.⁷³ He was convicted for escaping (*without* force or violence) in violation of section 4530 of the California Penal Code.⁷⁴ At the time of the escape, section 4530 provided that an escape or attempt to escape was punishable by at least a one-year period of imprisonment, said period to commence from the time the prisoner would otherwise have been discharged from prison.⁷⁵ Also applicable was section 3044 of the California Penal Code.⁷⁶ At the time of Estrada's escape, section 3044 provided that an escapee had to serve at least two years from his or her return to prison before parole could be granted.⁷⁷

One month before Estrada's subsequent conviction and sentencing for the escape, both section 4530 and section 3044 were amended to reduce the sentence applicable in those cases where an escape was made *without* the use of force or violence.⁷⁸ Specifically, both the term of imprisonment and the time necessary to spend in prison to be eligible for parole had been reduced.⁷⁹ As in *Peiffer II*, the amended sections at issue in *Estrada* contained no statement of legislative intent as to retroactive or prospective application.⁸⁰ The California court was thus faced with the question of which punishment to apply—the more severe punishment which had been in effect when the act was committed, or the lesser punishment which had taken effect after the commission of the

68. *Peiffer II*, 212 Neb. at 866, 326 N.W.2d at 845.

69. 186 Neb. at 301, 183 N.W.2d at 228.

70. *Id.* at 302, 183 N.W.2d at 228.

71. 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965).

72. *Id.* at —, 408 P.2d at 950, 48 Cal. Rptr. at 174.

73. *Id.*

74. *Id.* At the time of the prisoner's escape section 4530 of the California Penal Code did not distinguish between violent and nonviolent escapes.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at —, 408 P.2d at 950-51, 48 Cal. Rptr. at 174-75.

79. *Id.*

80. *Id.* at —, 408 P.2d at 951, 48 Cal. Rptr. at 175. See note 44 and accompanying text *supra*.

crime but before final judgment.⁸¹ The court, inferring the intent of the legislature and thus applying the lesser punishment, stated:

When the Legislature amends a statute so as to lessen the punishment 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.⁸²

In *Randolph*, the Nebraska Supreme Court also relied on the New York case of *People v. Oliver*.⁸³ In *Oliver*, the defendant, a minor under the age of fifteen, was convicted of murder.⁸⁴ The trial court rendered judgment and the defendant appealed.⁸⁵ At the time of the act, minor defendants were subject to all criminal sanctions, including the death penalty.⁸⁶ However, in *Oliver* the New York Court of Appeals held that the minor defendant was entitled to the benefits of a recently enacted statute which stated that children under fifteen should not be subject to criminal sanctions.⁸⁷ This statute had become effective after the commission of the act, but prior to final sentencing. In addition, as in *Randolph* and *Peiffer II*, the statute contained no statement of legislative intent as to retroactive applicability.⁸⁸ In reaching its decision, the New York Court of Appeals stated:

A legislative mitigation of the penalty for a particular crime represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law. . . . [I]t is safe to assume, as the modern rule does, that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts.⁸⁹

The *Randolph* court also relied on the North Carolina case of *State v. Pardon*.⁹⁰ In *Pardon*, the defendant pled guilty to a charge

81. 63 Cal. 2d —, 408 P.2d at 951, 48 Cal. Rptr. at 175.

82. *Id.*

83. 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956).

84. *Id.* at 152, 134 N.E.2d at 198, 151 N.Y.S.2d at 368.

85. *See id.* at 155, 134 N.E.2d at 198-99, 141 N.Y.S.2d at 369.

86. *Id.* at 155, 134 N.E.2d at 199, 151 N.Y.S.2d at 369.

87. *Id.*

88. *Id.* at 154-55, 134 N.E.2d at 198-99, 151 N.Y.S.2d at 368-69 (The crime was committed in April of 1945, the statute was amended in 1948, and the defendant was brought to trial in 1954 after spending a number of years in a mental institution).

89. *Id.* at 160, 134 N.E.2d at 202, 151 N.Y.S.2d at 373.

90. 272 N.C. 72, 157 N.E.2d 698 (1967).

of public drunkenness, but appealed the sentence he received as being excessive.⁹¹ Because defendant's case was on direct appeal, and therefore before final judgment, the North Carolina court held that, in the absence of a statement of legislative intent to the contrary, he was entitled to the benefit of an amended statute making chronic alcoholism a defense to public drunkenness—which amendment had taken effect after commission of the act in question.⁹² The North Carolina Supreme Court stated; "When . . . the law under which a defendant was convicted is amended *pending appeal* so as to mitigate the punishment, it is logical to assume that the legislature intended the new punishment, which it now feels fits the crime, to apply whenever possible."⁹³

On the strength of these decisions, the Nebraska Supreme Court adopted what has become known in Nebraska as the *Randolph* doctrine.

State v. Randolph as Applied in Nebraska

As previously stated, the *Randolph* doctrine, and the cases on which *Randolph* relied, seem to apply to the facts of *Peiffer II*. The present section will trace the development of the *Randolph* doctrine. A review of numerous decisions demonstrates that as the Nebraska court has employed and construed *Randolph*, the applicability of the doctrine has been narrowed.⁹⁴ However, an analysis of these cases also demonstrates that *Peiffer II* can be distinguished from and is not controlled by those situations wherein the Nebraska Court has held *Randolph* inapplicable.⁹⁵

The first Nebraska case to construe the *Randolph* doctrine was *State v. Goham*.⁹⁶ In that case, the defendants were convicted of kidnapping.⁹⁷ Before the trial date, but after commission of the crime, the laws governing kidnapping were amended to mitigate the punishment.⁹⁸ Based on *Randolph*, the Nebraska court held that where a statute prescribing punishment for kidnapping had been amended to mitigate the punishment after commission of the alleged offense, but before trial, the punishment was that provided by the amendatory act.⁹⁹ *State v. Goham* was thus a direct applica-

91. *Id.* at —, 157 S.E.2d at 700.

92. *Id.* at —, 157 S.E.2d at 700-01.

93. *Id.* at —, 157 S.E.2d at 702. (emphasis added).

94. See notes 147-52 and accompanying text *infra*.

95. *Id.*

96. 187 Neb. 34, 38, 187 N.W.2d 305, 308 (1971).

97. *Id.* at 35, 187 N.W.2d at 306.

98. *Id.* at 38, 187 N.W.2d at 307-08.

99. *Id.* Accord *State v. Blunt*, 197 Neb. 82, 93, 246 N.W.2d 727, 734 (1976) (court applied amended statute providing that the minimum term of imprisonment shall

tion of *Randolph*.

In *State v. Warner*¹⁰⁰ the applicability of the *Randolph* doctrine was narrowed. In *Warner*, the defendant filed a petition to vacate his previously imposed criminal sentence of imprisonment under the Nebraska Post Conviction Act.¹⁰¹ The defendant's conviction, however, was already final, having been previously affirmed on direct appeal by the Nebraska Supreme Court.¹⁰² The *Warner* court was thus required to distinguish, for purposes of applying the *Randolph* doctrine, those cases made on *direct* appeal from those cases made on appeal in or from a collateral or related proceeding.¹⁰³ The court stated:

[W]here an amendatory statute serving to mitigate criminal punishment becomes effective after conviction and sentence, but before final judgment, while the cause is pending on appeal, an "appeal" means a *direct* appeal from the criminal conviction and sentence. Such an "appeal" does not include an appeal in or from a collateral or related proceeding.¹⁰⁴

The *Warner* court thus held that an appeal under the Post Conviction Act was not a direct appeal from a conviction and sentence in a criminal case,¹⁰⁵ and therefore, that the *Randolph* doctrine was

not be more than one-third of the maximum term thus rendering defendants robbery conviction to a minimum of 16½ years, one-third the 50-year maximum for robbery); *State v. Jones*, 192 Neb. 548, 549-50, 222 N.W.2d 831, 832 (1974) (statute controlling punishment of possession of heroin was amended); *State v. Patterson*, 192 Neb. 308, 309, 317, 220 N.W.2d 235, 236, 240 (1974) (statute which provided for punishment of persons convicted of possession of heroin with intent to distribute was amended by mitigating the punishment after the defendant committed the crime, but before final judgment); *State v. Ambrose*, 192 Neb. 285, 289-90, 220 N.W.2d 18, 21 (1974) (defendant charged with sale of cocaine and other narcotics offenses, had his sentence reduced due to amended statute which provided for a less severe minimum sentence); *State v. Waldrop*, 191 Neb. 434, 435-36, 215 N.W.2d 633, 634 (1974) (concerning amended statute mitigating the punishment as to first offenders); *State v. Rubek*, 189 Neb. 141, 143-44, 201 N.W.2d 255, 257 (1972) (allowing use of statute which provided that minimum limit of an indeterminate sentence shall not be more than one-third of maximum term); *State v. Roberts*, 188 Neb. 209, 210, 196 N.W.2d 118, 118-19 (1972) (concerning amended statute mitigating the penalty for the sale of marijuana).

100. 192 Neb. 438, 222 N.W.2d 292 (1974).

101. *Id.* Postconviction relief is limited to cases in which there was a denial or infringement of the rights of the accused such as to render the punishment void or voidable under state and Federal Constitutions. NEB. REV. STAT. § 29-3001 (Reissue 1979).

102. *Id.* at 439, 222 N.W.2d at 294. See *State v. Warner*, 187 Neb. 335, 190 N.W.2d 786 (1971).

103. *Warner*, 192 Neb. at 440, 222 N.W.2d at 294.

104. *Id.* at 440-41, 222 N.W.2d at 294.

105. *Id.* at 441, 222 N.W.2d 294. See *People v. Chupich*, 53 Ill. 2d 572, —, 295 N.E.2d 1, 8 (1973); *People v. Gonzales*, 15 Ill. App. 3d 265, —, 304 N.E.2d 294, 296 (1973)

not applicable.¹⁰⁶

The applicability of the *Randolph* doctrine was further defined and narrowed in *State v. Russell*.¹⁰⁷ In *Russell*, the defendant was a minor who had been tried and convicted of murder as an adult.¹⁰⁸ The defendant appealed, challenging the jurisdiction of the district court.¹⁰⁹ *Russell* based his challenge on the then recently enacted amendments to sections 43-202.01 and 43-202.02 of the Nebraska statutes.¹¹⁰ Those sections set specific standards for the county attorney to follow in determining whether to file criminal charges against a minor in juvenile or in adult court.¹¹¹ The defendant argued that these statutes should have been interpreted as constituting a statutory mitigation of punishment, and thus within the scope of *Randolph*.¹¹² The court, however, stated that the amendments at issue merely affected procedural changes, and did not serve to mitigate punishment.¹¹³ The court thus held that *Randolph* did not apply.¹¹⁴

The *Randolph* doctrine's applicability was also cut back in a series of rape cases,¹¹⁵ wherein the Nebraska Supreme Court held that a statute which redefined most nonconsensual sexual crimes did not mitigate punishment.¹¹⁶ The first of these cases was *State v. Country*.¹¹⁷ In *Country*, the defendant had entered a plea of nolo contendere to a charge of forcible rape.¹¹⁸ He was sentenced to a term of ten to thirty years in the Nebraska Penal and Correctional Complex.¹¹⁹ While the defendant's case was pending appeal, L.B. 23¹²⁰ was enacted and took effect.¹²¹ Since L.B. 23

(wherein the courts held that they do not consider an appeal from a post-conviction proceeding to be a direct appeal).

106. 192 Neb. at 441, 222 N.W.2d at 294.

107. 194 Neb. 64, 230 N.W.2d 196 (1975).

108. *Id.* at 65, 68, 230 N.W.2d at 199-200.

109. *Id.* at 73, 230 N.W.2d at 202.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 73, 230 N.W.2d at 203. *See also* New Orleans Pub. Serv. Inc. v. Brown, 369 F. Supp. 702, 709 (E.D. La. 1974) (the entire trial had already been completed before the amendatory procedural act became effective).

114. *See* 194 Neb. at 73, 230 N.W.2d at 202-03.

115. *See* *State v. Crisp*, 195 Neb. 833, 241 N.W.2d 129 (1976); *State v. Ashby*, 194 Neb. 585, 234 N.W.2d 600 (1975); *State v. Trowbridge*, 194 Neb. 582, 234 N.W.2d 598 (1975); *State v. Country*, 194 Neb. 570, 234 N.W.2d 593 (1975).

116. *Country*, 194 Neb. at 571, 234 N.W.2d at 594.

117. *Id.* at 570, 234 N.W.2d at 593.

118. *Id.* at 571, 234 N.W.2d at 594.

119. *Id.*

120. 1975 Neb. Laws 92 (repealed NEB. REV. STAT. § 28-407 [Reissue of 1943], and NEB. REV. STAT. § 28-408 (Supp. 1974), and amended NEB. REV. STAT § 28-409 (Reissue 1943)).

reduced the punishment applicable to his crime, the defendant argued that the doctrine announced in *Randolph* entitled him to the benefits of the new statute.¹²²

The court listed four reasons why *Randolph* was inapplicable: First, the court stated that L.B. 23 was not merely an amendatory statute, but that it defined new crimes.¹²³ Second, the court pointed out that the requirements contained in the new statute, regarding punishment, tended to show that the legislature had not contemplated retroactive applications to convictions under former statutes.¹²⁴ Third, the court noted that the reduction of penalties in L.B. 23 was simply a part of the general overhaul of the statute, and that the mitigation of punishment was not the Unicameral's primary purpose.¹²⁵ Fourth, the court held that it would have been unfair to apply *Randolph* in a case such as this, where certain counts had been dismissed as a part of a plea bargain, the bargain having been made in light of the penalties which existed at that time.¹²⁶

Another situation wherein the *Randolph* doctrine has been held not to apply is demonstrated by the case of *Brown v. Sullivan*.¹²⁷ In *Brown*, the defendant appealed an order which suspended his driver's license.¹²⁸ The defendant had been convicted of operating a motor vehicle without a valid driver's license in his possession, and was assessed two points under the point system as provided in section 39-669.26 of the Nebraska Statutes.¹²⁹ He later accumulated five more points on two speeding charges, which brought his two-year total to thirteen points, one over the twelve-point limit.¹³⁰ The court, therefore, suspended his license,¹³¹ and the defendant appealed.¹³²

During the pendency of this appeal, an amendment to section 39-669.26 took effect.¹³³ The amended statute exempted those persons convicted of operating a motor vehicle without a valid operator's license in his possession from the assessment of points.¹³⁴ In

121. 194 Neb. at 571, 234 N.W.2d at 594.

122. *Id.* at 572, 234 N.W.2d at 594.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 572, 234 N.W.2d at 594-95.

127. 195 Neb. 729, 240 N.W.2d 51 (1976).

128. *Id.* at 729, 240 N.W.2d at 52.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

his appeal, the defendant relied on *Randolph*, arguing that the amended statute should be applied retroactively so as to negate the two points he had received earlier,¹³⁵ thus bringing his point total to eleven, one under the twelve-point limit. The court rejected this argument pointing out that the *Randolph* doctrine only applied in situations where an amendatory act reduced a *penalty*. The court went on to point out that since the revocation of a driver's license was not a *penalty*,¹³⁶ but was rather the denial a privilege granted by the state, the *Randolph* rationale was not applicable.¹³⁷

The Nebraska court also held that the *Randolph* doctrine did not apply in situations represented by the case of *State v. Weinacht*.¹³⁸ In *Weinacht*, the defendant had been sentenced to three to fifty years for robbery, the minimum sentence in effect at the time of the offense.¹³⁹ The defendant appealed, arguing that based on *Randolph* he should have been sentenced under the provisions of sections 28-324 and 28-104(1)¹⁴⁰—which had become effective while his case was on direct appeal, rather than under section 28-414—which was in effect at the time of the commission of the crime.¹⁴¹

The court conceded that, if *Randolph* were applicable, the

135. *Id.* at 729-30, 240 N.W.2d at 52.

136. *Id.* at 730, 240 N.W.2d at 52. See *Durfee v. Ress*, 163 Neb. 768, 81 N.W.2d 148 (1957). In *Durfee*, the plaintiff challenged an amended statute that increased the period of mandatory license revocation application when a driver accumulated 12 points under the "point system." *Id.* at 770-71, 81 N.W.2d at 149-50. The plaintiff contended that such an *increase* would amount to a more severe penalty, thereby constituting an *ex post facto* application of the amended statute. *Id.* at 771, 81 N.W.2d at 150. The court rejected this *ex post facto* argument, holding:

A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege.

. . . . The purpose of the revocation is to protect the public, and not to punish the licensee. . . . Such an application [of the amended statute] is not an *ex post facto* application within the prohibition of the United States and the state Constitutions.

Id. at 772-73, 81 N.W.2d at 150-51. See also *State v. Amick*, 173 Neb. 770, 114 N.W.2d 893 (1962). In *Amick*, the Nebraska Supreme Court held that the revocation of a license to operate a motor vehicle is not "punishment." *Id.* at 774, 114 N.W.2d at 895. In *Amick*, the DWI defendant believed he was entitled to a trial by jury. *Id.* at 773, 114 N.W.2d at 895. He argued that because the ordinance authorized license revocation, the crime was outside the classification of a petty offense. *Id.* The court ruled that the DWI defendant was *not* entitled to a trial by jury because the revocation of a license was an incidental consequence, and was not "punishment" and therefore did not effect the right to trial by jury. *Id.* at 774, 114 N.W.2d at 895.

137. *Brown*, 195 Neb. at 730, 240 N.W.2d at 52.

138. 203 Neb. 124, 277 N.W.2d 567 (1979).

139. *Id.* at 133, 277 N.W.2d at 572.

140. NEB. REV. STAT. §§ 28-105(1), 28-324 (Reissue 1979).

141. 203 Neb. at 132, 277 N.W.2d at 572.

punishment to be applied would have been that provided by the amendatory act.¹⁴² The court went on to point out, however, that the *Randolph* doctrine was applicable "unless the Legislature has specifically provided otherwise."¹⁴³ The court noted that in this case the legislature *had* specifically provided otherwise.¹⁴⁴ The court quoted section 28-301(a): "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."¹⁴⁵ The court held that since the legislature clearly had intended that the amended act not apply to offenses committed prior to January 1, 1979, the *Randolph* doctrine was not applicable.¹⁴⁶

In summary, in construing the applicability of *Randolph*, the Nebraska court has held that the doctrine does not to apply in situations where: (1) the judgment is final,¹⁴⁷ (2) the amendatory act does not mitigate punishment, but simply affects procedural changes,¹⁴⁸ (3) the amendatory act does not mitigate punishment, but rather defines new crimes,¹⁴⁹ (4) the amendatory act does not reduce a *penalty*,¹⁵⁰ or (5) the legislature has specifically provided for non-applicability.¹⁵¹ It is important to note that none of these situations applies to the fact situation presented in *Peiffer II*.¹⁵²

Section 29-2204.01

Section 29-2204.01 was Peiffer's original basis for appeal in *Peiffer I*.¹⁵³ Although the constitutionality of section 29-2204.01 has been challenged,¹⁵⁴ the latest indications are that it is still a viable statute.¹⁵⁵ Since this is so, and because this statute, by its terms, appears to apply to *Peiffer II*, a discussion of its background and development is deemed appropriate.

On April 5, 1972, the Nebraska Unicameral, by a margin of

142. *Id.*

143. *Id.* at 133, 277 N.W.2d at 572.

144. *Id.*

145. *Id.* NEB. REV. STAT. § 28-103(1) (Reissue 1979).

146. 203 Neb. at 132-33, 277 N.W.2d at 572.

147. See notes 103-06 and accompanying text *supra*.

148. See notes 106-14 and accompanying text *supra*.

149. See notes 115-23 and accompanying text *supra*.

150. See notes 130-37 and accompanying text *supra*.

151. See notes 138-46 and accompanying text *supra*.

152. See notes 9-19 and accompanying text *supra*.

153. 212 Neb. at 301, 322 N.W.2d at 446.

154. See notes 184-91 and accompanying text *infra*.

155. See notes 193-201 and accompanying text *infra*.

thirty-nine to four, voted to pass L.B. 1202.¹⁵⁶ The bill was signed by Governor Exon on April 8, 1972,¹⁵⁷ and having been passed without an emergency clause, went into effect on July 6, 1972.¹⁵⁸

L.B. 1202, codified as section 29-2204.01, provides:

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, notwithstanding the fact that the court may have ordered a longer period of confinement under the authority of the former law.¹⁵⁹

The first time the Nebraska Supreme Court dealt with section 29-2204.01 was in the case *State v. Rubek*.¹⁶⁰ In this case, two defendants who had been convicted of rape claimed that their sentences were excessive in light of the recent passage of L.B. 1499,¹⁶¹ which had become effective while their case was on appeal.¹⁶² L.B. 1499 provided that when an indeterminate sentence was imposed, the minimum limit should not be less than the minimum provided by law, nor more than one-third of the maximum term.¹⁶³ The defendants had been sentenced under a section which provided for a period of confinement of not less than two nor more than fifteen years.¹⁶⁴ Under this section, the defendants were given a sentence of not less than eight years nor more than twelve years.¹⁶⁵ The defendants argued that based on section 29.2204.01, the provisions of L.B. 1499 were applicable, and that a reduction in their minimum sentence, from eight years to five years, was required.¹⁶⁶

156. 1972 Neb. Legis. J. 1699.

157. *Id.* at 1761.

158. The second session of the Eighty-second Legislature adjourned on April 5, 1972, the act going into effect three calendar months following the adjournment. Thus, the new law became effective on July 6, 1972. See notes 64 and accompanying text *supra*.

159. NEB. REV. STAT. § 29-2204-01 (Reissue 1979).

160. 189 Neb. 141, 201 N.W.2d 255 (1972).

161. *Id.* at 143-44, 201 N.W.2d at 257.

162. *Id.* at 143, 201 N.W.2d at 257.

163. L.B. 1499, 1972 Neb. Laws 1427, 1429 (codified as NEB. REV. STATS. §§ 83-1, 105(1) (Supp. 1972)).

164. 189 Neb. at 143, 201 N.W.2d at 257.

165. *Id.*

166. See Brief of Appellants at 12-13, *State v. Peiffer*, 212 Neb. 299, 322 N.W.2d 445 (1982).

The Nebraska Supreme Court did not agree.¹⁶⁷ The court explained that section 29-2204.01 applied only to cases where "the *particular law* under which such sentence was pronounced is thereafter amended to decrease the *maximum* period of confinement which may be imposed."¹⁶⁸ The court pointed out that in this case there had been no change in the *particular law* dealing with rape under which the two defendants were charged.¹⁶⁹ Rather the change was in L.B. 1499, a separate law dealing with limits on jail sentences.¹⁷⁰ In addition, the court pointed out that a further reason for the nonapplicability of section 29-2204.01 was the fact that this case dealt with a change in the *minimum* limit, and not a reduction in the *maximum* period of confinement, as specified in the statute.¹⁷¹ It should be noted, however, that even though section 29-2204.01 was held inapplicable, that the court found the *Randolph* doctrine on point, and the sentences were vacated.¹⁷²

Less than three months later, in the case of *Clarke v. Wolff*,¹⁷³ the District Court of Lancaster County, Nebraska, held that section 29-2204.01 violated the doctrine of separation powers, as expressed in Article II, Section I of the Nebraska Constitution.¹⁷⁴ In *Clarke*, the petitioner had been sentenced to an indeterminate term of imprisonment, with a maximum of three years, after having pled guilty to the charge of possession of narcotics.¹⁷⁵ However, since the Uniform Controlled Substance Act,¹⁷⁶ which had become effective after sentencing,¹⁷⁷ had lowered the maximum penalty for possession of narcotics to two years,¹⁷⁸ the parties had stipulated that if section 29-2204.01 was constitutional, then the petitioner would be entitled to release since he had already served the new maximum of two years.¹⁷⁹

In addressing this issue, the district court stated that the Constitution of Nebraska provided that the Board of Pardons had the

167. 189 Neb. at 144, 201 N.W.2d at 257.

168. *Id.* (emphasis added).

169. *Id.*

170. *Id.* at 143-44, 201 N.W.2d at 257.

171. *Id.* at 144, 201 N.W.2d at 257.

172. *Id.* at 144, 201 N.W.2d at 257-58.

173. No. 35-145 (Dist. Ct. of Lancaster County, Neb. Jan. 3, 1973) (on file with Creighton Law Review).

174. *Id.*

175. *Id.*

176. See L.B. 326, 1971 Neb. Laws — (codified as NEB. REV. STAT. § 28-4115 (Supp. 1972)).

177. *Clarke v. Wolff*, No. 35-145 (Dist. Ct. of Lancaster County, Neb. Jan. 3, 1973) (on file with Creighton Law Review).

178. *Id.*

179. *Id.*

exclusive power to commute sentences after final conviction¹⁸⁰ and that such power belonged to the executive rather than the legislative branch of government.¹⁸¹ The court further stated that "section 29-2204.01 [was] an attempt by the Legislature to *commute sentences* by the 'substitution of a milder punishment for the one inflicted by the Court.'"¹⁸² The district court thus concluded that section 29-2204.01 was in violation of the doctrine of separation of powers, and held that the petitioner was not entitled to release.¹⁸³

Notwithstanding the holding of the district court in *Clarke*, it should be noted that the Nebraska Supreme Court has not ruled on the constitutionality of section 29-2204.01.¹⁸⁴ In addition, it is significant that this statute has been referred to by the court—with no hint of unconstitutionality—in several cases that followed *Clarke*. One such case was *State v. Country*,¹⁸⁵ where the majority held that the *Randolph* doctrine did not apply because the particular rape statute involved had not been amended by way of mitigation of punishment.¹⁸⁶ Dissenting, Justice McCown made an arguably favorable reference to section 29-2204.01, stating that, "the legislative approval of the principle of evenhanded justice and the doctrine of *Randolph* is already apparent *in other statutes*."¹⁸⁷ One of the other statutes referred to by Justice McCown was section 29-2204.01.¹⁸⁸

A second, and more recent, case in which the Nebraska Supreme Court has referred to section 29-2204.01 is *State v. Fuller*.¹⁸⁹ In *Fuller*, the Nebraska court once again dealt with a challenge based on the *Randolph* doctrine, holding that due to specific language contained in the new criminal code, the defendant was not entitled to a reduced penalty.¹⁹⁰ The court then referred to section 29-2204.01, stating: "By statute, an imposed sentence is to be reduced to the new maximum whenever the Legislature decreases the maximum period of confinement. . . . However, that

180. *Id.* See NEB. CONST. art. IV, § 13.

181. *Clarke v. Wolff*, No. 35-145 (Dist. Ct. of Lancaster County, Neb. Jan. 3, 1973) (on file with CREIGHTON L. REV.).

182. *Id.*

183. *Id.*

184. As of the time of publication, the writer has been unable to locate any case where the Nebraska Supreme Court has directly addressed this question.

185. 194 Neb. 570, 234 N.W.2d 593 (1975).

186. *Id.* at 572, 234 N.W.2d at 594. For a discussion of rape cases in which the statute involved defined new crimes see notes 115-25 and accompanying text *supra*.

187. 194 Neb. at 576, 234 N.W.2d at 597 (McCown, J., dissenting).

188. 212 Neb. at 870, 326 N.W.2d at 847.

189. 203 Neb. 233, 278 N.W.2d 756 (1979).

190. See *id.* at 242, 278 N.W.2d at 761 ("The provision of this code shall not apply to any offense committed prior to January 1, 1979.").

provision is limited to the amendment of 'the particular law under which such sentence was pronounced.'"¹⁹¹ The *Fuller* court went on to note that the "particular law" under which Fuller had been sentenced had not been amended; thus he was not entitled to the application of section 29-2204.01.¹⁹²

In line with the arguably favorable references to section 29-2204.01 by the Nebraska Supreme Court in *Rubek* and *Fuller*, and by Justice McCown in *State v. Country*,¹⁹³ the District Court of Lancaster County, Nebraska, in the recent case of *Solomon v. Black*,¹⁹⁴ upheld the constitutionality of section 29-2204.01.¹⁹⁵ In *Solomon*, each of the three habeas corpus petitioners had been sentenced to a term of one year or more for the offense of driving while intoxicated, third offense, under the prior law.¹⁹⁶ Each had served more than six months, the new maximum sentence under L.B. 568, and sought release under section 29-2204.01.¹⁹⁷ Conceding the applicability of section 29-2204.01,¹⁹⁸ the issue before the district court was whether this statute was constitutional—which the state had challenged as an impermissible legislative infringement on the executive branch's power to grant pardons, in violation of the Nebraska Constitution.¹⁹⁹ In addressing this issue, the court stated:

Although the District Court of Lancaster County in the case of *Clarke v. Wolff* . . . has held the above statute to be unconstitutional, consistent with the respondent's argument [in this case], that decision was not appealed to the Nebraska Supreme Court, and is not necessarily binding on this court. A presumption exists in favor of the constitutionality of all the statutes, by requiring that five justices of the Nebraska Supreme Court rather than a normal majority of four, must hold a statute to be unconstitutional. Although the Supreme Court has not expressly ruled upon the constitutionality of Section 29-2204.01, reference was made to the same in *State v. Fuller* . . . without any suggestion of unconstitutionality.²⁰⁰

The district court thus overruled its earlier opinion in *Clarke v.*

191. *Id.* (quoting *State v. Rubek*, 189 Neb. 141, 144, 201 N.W.2d 255, 257 (1972)).

192. *Id.*

193. See notes 161-72, 185-92, and accompanying text *supra*.

194. No. 362-43 (Dist. Ct. of Lancaster County, Neb. Sept. 21, 1982) (on file with CREIGHTON L. REV.).

195. *Id.* slip. op. at 3.

196. *Id.* at 1-2.

197. *Id.* at 2.

198. See *id.* at 3.

199. *Id.* at 2.

200. *Id.* at 3-4.

Wolff and held that section 29-2204.01 was, in fact, constitutional, and ordered that the petitioners be discharged from custody.²⁰¹

In conclusion, although the Nebraska Supreme Court has never directly addressed the constitutionality of section 29-2204.01, the provision has been referred to in dicta without any suggestion of unconstitutionality.²⁰² In addition, the latest district court to address the issue held that section 29-2204.01 did not violate the doctrine of separation of powers, and was thus constitutional.²⁰³ Therefore, the statute appears viable, and as a result, bears directly on the analysis of *Peiffer II*.

ANALYSIS

The Per Curiam Opinion of the Plurality

As stated earlier, the per curiam opinion of the plurality in *Peiffer II* affirmed the sentence originally imposed by the trial court.²⁰⁴ The plurality based its holding on two grounds, namely, that neither the *Randolph* doctrine nor the provisions of section 29-2204.01 were applicable.²⁰⁵ Each of these rationales will be discussed below.

The Plurality's Analysis of State v. Randolph

In *Peiffer I*, the Nebraska Supreme Court had held that the *Randolph* doctrine was applicable to Peiffer's case,²⁰⁶ and that he was entitled to be sentenced according to the provisions of L.B. 568, the new drunk driving law.²⁰⁷ As discussed earlier, L.B. 568 had: (1) *decreased* the length of imprisonment from a maximum of five years to a period of three to six months; (2) *decreased* the applicable fine from a maximum of \$10,000 to \$500; and (3) *increased* the period of license revocation from one year to a permanent revocation.²⁰⁸ The court in *Peiffer I* had held, based on the applicability of the *Randolph* doctrine, that Peiffer was entitled to have his sentence of confinement reduced from the "not less than one nor more than two years" he had been sentenced by the district court, to the new maximum of six months.²⁰⁹ The *Peiffer I* court had reserved, however, the question as to whether Peiffer's driving privi-

201. *Id.*

202. See notes 188-91 and accompanying text *supra*.

203. See notes 194-201 and accompanying text *supra*.

204. *Peiffer II*, 212 Neb. at 865, 326 N.W.2d at 845.

205. *Id.* at 869, 326 N.W.2d at 846.

206. *Peiffer I*, 212 Neb. at 301, 322 N.W.2d at 446.

207. See *id.* at 302, 322 N.W.2d at 447.

208. See notes 19-23 and accompanying text *supra*.

209. *Peiffer I*, 212 Neb. at 302, 322 N.W.2d at 447.

leges should be permanently revoked.²¹⁰ Although this was to have been the sole issue in *Peiffer II*, the plurality announced its intention to completely re-examine the rationale of its earlier decision.²¹¹

As discussed previously, the *Randolph* doctrine states that when an amendment mitigates punishment after the commission of a crime but before final judgment, the punishment to be imposed is that contained in the amendatory act unless the legislature had specifically indicated otherwise.²¹² As noted by the court in *Peiffer II*, “[t]he judicial doctrine announced in *Randolph* . . . is bottomed on the premise that the Legislature intended the new punishment . . . to apply whenever constitutionally possible.”²¹³ Since L.B. 568 was enacted after *Peiffer’s* act, but before final judgment,²¹⁴ and because the new law contained no statement prohibiting retroactive application,²¹⁵ the first issue to be addressed in attempting to determine the applicability of the *Randolph* doctrine to *Peiffer’s* case, was whether L.B. 568 mitigated the punishment for the crime of third offense DWI. The plurality in *Peiffer II* thus stated: “The essential question in this case is whether L.B. 568 was intended by the Legislature to mitigate the penalty for the offense of driving while intoxicated, third offense.”²¹⁶

In addressing the issue as to whether the Unicameral had intended L.B. 568 to mitigate punishment, the plurality examined the new law’s penalty provisions.²¹⁷ Concerning the reduction in the incarceration time, from a maximum of five years under the old law, to a minimum of three and a maximum of six months under the new law, the plurality indicated that “no serious question could exist that the penalty was reduced and thus mitigated.”²¹⁸ Although the plurality did not specifically address the new law’s monetary penalties, an analogous line of reasoning could be applied to L.B. 568’s reduction in the fine, from a maximum of \$10,000 under the old law to \$500 under the new, thus indicating that this provision had similarly been reduced, and thus mitigated.²¹⁹

The plurality then discussed the new law’s license revocation provision, which increased the period of revocation from one year

210. *Id.*

211. *Peiffer II*, 212 Neb. at 865, 326 N.W.2d at 845.

212. See notes 30-32 and accompanying text *supra*.

213. *Peiffer II*, 212 Neb. at 866-67, 326 N.W.2d at 845.

214. *Peiffer I*, 212 Neb. at 300, 322 N.W.2d at 446.

215. See *id.* at 301-02, 322 N.W.2d at 447.

216. *Peiffer II*, 212 Neb. at 866, 326 N.W.2d at 845.

217. *Id.*

218. *Id.*

219. *Cf. id.*

to a permanent revocation.²²⁰ The plurality stated: “[V]iewed in light of the permanent suspension of driving privileges, the scene becomes cloudy.”²²¹ The plurality went on to suggest two reasons for the lack of clarity cast by L.B. 568’s revocation provision on the essential question of whether the Unicameral had intended the new law to mitigate punishment.²²² First, the plurality indicated that there was some question as to whether a driver’s license was a “limited property right,”²²³ the denial of which would in fact be a penalty,²²⁴ or whether a driver’s license was a “privilege,”²²⁵ the deprivation of which, arguably, would not be a “penalty” as that term was used in the plurality’s framing of the “essential question in this case.”²²⁶ Second, the plurality recognized, as had been argued by Peiffer, that the retroactive application of a permanent revocation raised the issue as to whether such application would render the increased provision void as an *ex post facto* law.²²⁷ After discussing the concept of *ex post facto* legislation, the plurality stated: “A serious question exists whether the increase in the penalty of one of the consequences of a criminal act punishable by multiple consequences is thereby rendered non *ex post facto* by the reduction of one of the consequences.”²²⁸

Although the plurality recognized the existence of these two questions, neither of them was resolved.²²⁹ Instead, the plurality focused upon the presence, or lack thereof, of a statement within L.B. 568 of legislative intent concerning the new law’s retroactive application.²³⁰ The plurality stated: “We have not in the past been called upon to discern legislative intent with respect to the retroactivity of a multipenalty punishment which offsets a reduced period of maximum incarceration against the permanent revocation of driving privileges and the imposition of a fine.”²³¹ Therefore, the plurality concluded:

We have found no specific statement of intent in the legislative history of L.B. 568, and none has been pointed out

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. See notes 127-37 and accompanying text *supra* (discussing whether a driver’s license is property right or a privilege).

225. 212 Neb. at 866, 326 N.W.2d at 845.

226. *Id.* See notes 127-37 and accompanying text *supra* (discussion whether a driver’s license is property right or a privilege).

227. 212 Neb. at 866, 326 N.W.2d at 845.

228. *Id.*

229. See *id.* at 867-68, 326 N.W.2d at 846.

230. *Id.* at 867, 326 N.W.2d at 845-46.

231. *Id.*

to us. On further reflection we find no valid basis upon which we can presume to know the Legislature's intent with regard to the retroactive application of the punishments contained in L.B. 568 for acts committed before its enactment to cases which are awaiting final judgment. Consequently, on further reflection, we must conclude that the *Randolph* doctrine does not apply to the case at hand, and our earlier opinion was, regrettably, erroneous in holding that it did. Our earlier opinion is therefore overruled.²³²

Therefore, by holding that the doctrine in *State v. Randolph*, which had been applied by the court in *Peiffer I*, was in fact not applicable—because of the absence of a statement of legislative intent as to L.B. 568's retroactive applicability—the plurality was able to avoid the question reserved in *Peiffer I*.²³³ The plurality stated: "We thus avoid the larger question of whether persons whose appeal was pending at the time L.B. 568 was enacted [like *Peiffer*] may constitutionally be subjected to lifetime suspension of driving privileges."²³⁴

It is suggested that the plurality's handling of the *Randolph* issue is subject to criticism. As discussed earlier, the applicability of the *Randolph* doctrine turns on whether the amendatory legislation mitigates punishment.²³⁵ The plurality itself recognized this fact, stating: "The essential question in this case is whether L.B. 568 was intended by the Legislature to mitigate the penalty for the offense of driving while intoxicated, third offense."²³⁶ And when the plurality considered the incarceration provisions of the new law, the focus was appropriately placed on mitigation of punishment.²³⁷ However, when the plurality addressed L.B. 568's license revocation provisions, the focus shifted from the legislature's intent to mitigate punishment to its intent as to retroactivity: "On further reflection we find no valid basis upon which we can presume to know the Legislature's intent with regard to the retroactive application of the punishments contained in L.B. 568. . . . Consequently . . . the *Randolph* doctrine does not apply. . . ."²³⁸

It is suggested that the question of the applicability of *Randolph* should not have turned upon whether the legislature had

232. *Id.* at 867, 326 N.W.2d at 846.

233. *Id.* at 867-68, 326 N.W.2d at 846.

234. *Id.*

235. See notes 34-40 and accompanying text *supra*.

236. 212 Neb. at 866, 326 N.W.2d at 845.

237. See notes 41-42 and accompanying text *supra*.

238. *Peiffer II*, 212 Neb. at 867, 326 N.W.2d at 846.

included a statement as to retroactivity. This suggestion is supported by the Nebraska Supreme Court's own statement:

As observed in *Randolph*, in the absence of anything indicating a contrary legislative intent: "It is an *inevitable inference* that the Legislature must have intended that the new statute imposing the lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply."²³⁹

This suggestion is also supported by the cases upon which the Nebraska court relied when it adopted *Randolph*. In *People v. Oliver*,²⁴⁰ the New York Court of Appeals stated that in the absence of a contrary legislative intent, "It is *safe to assume* . . . that it was the legislative design that the lighter penalty should be imposed in all cases that subsequently reach the courts."²⁴¹ And in *State v. Pardon*,²⁴² the North Carolina Court stated: "[I]t is *logical to assume* that the legislature intended the new punishment, which it now feels fits the crime, to apply whenever possible."²⁴³ Thus, the *Randolph* doctrine is bottomed on the premise that absent specific legislative intent as to an amended statute's retroactivity, it is *assumed* that the amended statute imposing a lighter penalty should be applied to every case to which it constitutionally could apply.²⁴⁴

It is suggested that the court's analysis, which correctly began by focusing on intent as to mitigation of punishment, should have been extended and applied similarly to the license revocation provisions of L.B. 568. An example of the line of reasoning which such an extension might have followed is provided below.

L.B. 568 increased the period of license revocation for third offenders from one year to a permanent suspension.²⁴⁵ In attempting to address the question as to whether the intent of the legislature in adopting L.B. 568 had been to mitigate punishment, as applied to this provision, the threshold question would be whether license revocations are "*punishment*" within the meaning of that term as used in the *Randolph* doctrine.²⁴⁶ In *Randolph*, as noted earlier, the court had stated: "[W]here a criminal statute is

239. *Peiffer I*, 212 Neb. at 301, 322 N.W.2d at 447 (quoting *State v. Randolph*, 186 Neb. 297, 302, 183 N.W.2d 225, 228, *cert. denied*, 403 U.S. 909 (1971) (emphasis added) (*Randolph* quoting *In re Estrada*, 63 Cal. 2d 740, —, 408 P.2d 948, 951, 48 Cal. Rptr. 172, 175 (1965)).

240. 1 N.Y.2d 152, 134 N.E.2d 197, 151 N.Y.S.2d 367 (1956).

241. *Id.* at 160, 134 N.E.2d at 201-02, 151 N.Y.S.2d at 373 (emphasis added).

242. 272 N.C. 72, 157 S.E.2d 698 (1967).

243. *Id.* at —, 157 S.E.2d at 702 (emphasis added).

244. See notes 30-32 and accompanying text *supra*.

245. L.B. 568, § 5, 1982 Neb. Laws 521 (codified as NEB. REV. STAT. § 39-669.07 (Supp. 1982)).

246. See notes 127-37 and accompanying text *supra*.

amended by mitigating the *punishment*, after the commission of a prohibited act but before final judgment, the *punishment* [applicable to the defendant at bar] is that [lesser punishment] provided by the amendatory act."²⁴⁷ Therefore, if license revocation is *not* a punishment, then it can be concluded that the intent and effect of the legislature in enacting L.B. 568 was to mitigate punishment—since both the incarceration and fine provisions had been reduced—and that the *Randolph* doctrine was applicable.

Concerning this issue, the Nebraska Supreme Court has held that the revocation of a license to operate a motor vehicle is not "punishment." In *Durfee v. Ress*,²⁴⁸ the plaintiff's drivers license was suspended under the point system.²⁴⁹ The "point system" statute had been amended on September 18, 1955, to *increase* the period of mandatory license revocation applicable when the driver accumulated twelve points.²⁵⁰ Prior to September 18, 1955, the plaintiff had accumulated nine points under the old law.²⁵¹ On November 28, 1955, after the effective date of the new law, he accumulated three more points.²⁵²

The additional three points gave the plaintiff a total of twelve points requiring mandatory revocation of his license.²⁵³ The plaintiff argued that to impose the amended statute's more severe penalty would be an unconstitutional *ex post facto* application of the amended act.²⁵⁴

The court concluded that the retroactive application of the amended statute was not unconstitutional as an *ex post facto* violation, holding:

A license to operate a motor vehicle in this state is issued, not as a contract, but as a privilege, with the understanding that such license may be revoked for cause by the state. . . . The purpose of the revocation is to protect the public, and not to punish the licensee. . . . Such an application is not *ex post facto* application within the prohibitions of the United States and the state Constitutions.²⁵⁵

247. 186 Neb. at 301-02, 183 N.W.2d at 228 (emphasis added).

248. 163 Neb. 768, 81 N.W.2d 148 (1957).

249. *Id.* at 770, 81 N.W.2d at 150.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.* at 771, 81 N.W.2d at 150.

254. *Id.*

255. *Id.* at 772-73, 81 N.W.2d at 150-51. It should be noted that Senator Newell, during the floor debate on L.B. 568, expressed that the reason for the increase in license revocation was because of a concern for the protection of the public. He stated, "[w]hat we are trying to do with this law [L.B. 568], with this legislation, is to keep them [third offense, drunk drivers] from being behind that automobile

The Nebraska court reached a similar conclusion in *State v. Amick*.²⁵⁶ In *Amick*, the issue was whether the DWI defendant was entitled to a trial by jury.²⁵⁷ It was the defendant's contention that the offense charged was not a petty offense, thus entitling him to his constitutional right to a jury trial.²⁵⁸ The defendant argued that the crime was outside the classification of a petty offense because the ordinance authorized the revocation of his driver's license.²⁵⁹ The court disagreed, holding that the revocation of the defendant's driver's license was an incidental consequence and was not "punishment," and therefore, it did not affect the right to trial by jury.²⁶⁰ Finally, and perhaps most significantly, in *Brown v. Sullivan*,²⁶¹ the Nebraska Court specifically held that the revocation of a license was not a penalty within the purview of *State v. Randolph*.²⁶²

The foregoing analysis leads to the conclusion that the revocation of a driver's license is not "punishment," at least within the meaning of that term in the *Randolph* doctrine; and as a result, the fact that L.B. 568 increased the period of license revocation does not bear on the doctrine's applicability to the case at hand.²⁶³ Therefore, it is suggested that the *Randolph* doctrine is applicable if Peiffer's case is a situation "to which it constitutionally could apply."²⁶⁴ Whether the provisions of L.B. 568 can constitutionally be applied to Peiffer's circumstance involves an analysis of certain ex post facto considerations, which are discussed below.

The Constitution of the United States states that "[n]o state shall . . . pass any . . . ex post facto Law."²⁶⁵ The Constitution of Nebraska has a similar prohibition.²⁶⁶ In *Weaver v. Graham*,²⁶⁷ the Supreme Court of the United States construed the ex post facto prohibition contained in the United States Constitution. The Court stated: "The *ex post facto* prohibition forbids the Congress

while they are intoxicated and stop them from being a danger to us all." LEGISLATIVE HISTORY OF L.B. 568, 87th Leg., 2d Sess. 8660-61 (1982) (statement of Sen. Newell).

256. 173 Neb. 770, 114 N.W.2d 893 (1962).

257. *Id.* at 771, 114 N.W.2d at 894.

258. *Id.* at 773, 114 N.W.2d at 895.

259. *Id.*

260. *Id.* at 773-74, 114 N.W.2d 895.

261. 195 Neb. 729, 240 N.W.2d 51 (1976). See notes 127-37 and accompanying text *supra*.

262. 195 Neb. at 730, 240 N.W.2d at 52.

263. See notes 127-37 and accompanying text *supra*.

264. *Randolph*, 186 Neb. at 302, 183 N.W.2d at 228.

265. U.S. CONST. art. I, § 10, cl. 1.

266. NEB. CONST. art I, § 16.

267. 450 U.S. 24 (1981).

and the States to enact any law 'which imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'"²⁶⁸ The *Weaver* Court also stated that in order for a penal or criminal law to be considered ex post facto: (1) the law must be retroactive; and (2) it must *disadvantage* the offender affected by it.²⁶⁹

The Supreme Court of Nebraska has adopted a similar interpretation. In *State v. Steemer*,²⁷⁰ the court stated: "An ex post facto law is one which imposes a punishment for an act which was not punishable when it was committed, imposes *additional* punishment, or changes the rules of evidence, by which less or different testimony is sufficient to convict."²⁷¹

Therefore, in attempting to determine whether the retroactive application of L.B. 568's license revocation provisions violates the ex post facto law prohibitions, it must be determined whether such provisions can be considered "additional *punishment*," or whether an offender affected thereby would be "disadvantaged." Concerning the "additional punishment" criterion, the fact that the Nebraska court has consistently held that a license revocation is not a "punishment" might suggest that this aspect of the ex post facto prohibition would not be violated by retroactively applying the new law.²⁷² However, even if a license revocation is not "punishment," such a result does not necessarily foreclose the conclusion that an offender could be considered "disadvantaged" by the retroactive imposition of a life-time suspension of driving privileges.

Therefore, it becomes apparent that the question reserved in *Peiffer I*, and avoided by the plurality in *Peiffer II*, namely, "whether persons whose appeal was pending at the time L.B. 568 was enacted may constitutionally be subject to lifetime suspension of driving privileges,"²⁷³ is surrounded by difficult ex post facto considerations. The fact that the plurality avoided these questions is troublesome, especially in light of the fact that although both the concurrence and the dissent based their conclusions as to *Randolph*²⁷⁴ on the ex post facto issue, they applied *different tests*.²⁷⁵

268. *Id.* at 28 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)).

269. 450 U.S. at 29.

270. 175 Neb. 342, 121 N.W.2d 813 (1963).

271. 175 Neb. at 344, 121 N.W.2d at 815 (quoting *In re Estate of Rogers*, 147 Neb. at 344, 121 N.W.2d at 815 (quoting *In re Estate of Rogers*, 147 Neb. 1, 22 N.W.2d 297 (1946))).

272. See notes 127-37 and accompanying text *supra*.

273. *Peiffer II*, 212 Neb. at 867-68, 326 N.W.2d at 846.

274. See notes 327-34 and accompanying text *infra*.

275. See notes 327-31; 356 and accompanying text *infra*.

Therefore, should this type of ex post facto situation arise in the future, the practitioner, the lower court judge, and perhaps even the Nebraska court itself, are without any guidelines.

In conclusion, the majority started its analysis of the applicability of *State v. Randolph* by focusing on whether the Unicameral had *intended to mitigate* the punishment for the offense of DWI.²⁷⁶ However, after considering the new law's incarceration provision, and impliedly, the fine provisions, the majority shifted its focus. This focus was shifted from a consideration of whether the legislature had intended to mitigate punishment to a consideration of whether the new law contained an expression of legislative intent as to *retroactive application*.²⁷⁷ As the caselaw development of *Randolph* demonstrates, the applicability of that doctrine is not contingent upon an expression within the amendatory legislation as to retroactivity.²⁷⁸ Rather, *Randolph* focuses entirely on the intent of the Unicameral to mitigate the punishment. Thus, it is suggested that the plurality should not have switched the emphasis dictated by *Randolph*, but should have extended that portion of its inquiry which focused on intent to mitigate to the license revocation provisions. In providing an example of the line of reasoning such an extension might have followed, this author's point is not to advocate a particular result, but rather, to demonstrate that the reasoning of the plurality as to the applicability of *Randolph* was inappropriate. It is suggested that the applicability of *Randolph* should have been based entirely on an analysis of the Unicameral's intent as to mitigation of punishment, which ultimately would have led to an analysis of the aforementioned ex post facto considerations. Based on this reasoning, it is concluded that the approach adopted in *Peiffer II* by both the concurrence and the dissent more appropriately addressed this issue.

The Plurality's Analysis of Section 29-2204.01

Having decided that the *Randolph* doctrine was not applicable, the plurality turned its attention to Peiffer's challenge under section 29-2204.01 of the Nebraska statutes, the sole error assigned by the defendant in *Peiffer I*.²⁷⁹ However, before the plurality directly addressed this issue, the court noted that *Peiffer II* was a direct appeal, and that the judgment was not yet final.²⁸⁰ There-

276. See notes 217-19 and accompanying text *supra*.

277. See notes 218-34 and accompanying text *supra*.

278. See notes 30-32 and accompanying text *supra*.

279. *Peiffer I*, 212 Neb. at 301, 322 N.W.2d at 446.

280. *Peiffer II*, 212 Neb. at 868, 326 N.W.2d at 846.

fore, not considered was the question of whether section 29-2204.01 intruded on the parole power granted to the Board of Parole by the Nebraska Constitution.²⁸¹ Also not considered was the question of whether, absent an agreement to exercise the court's discretionary power to reduce sentences, the legislature had any right to order a reduction in the penalties applicable to a final judgment of the court.²⁸²

In directly addressing the question as to whether section 29-2204.01 applied to Peiffer's case, i.e. to a case where the judgment was not final, the plurality noted that, based on the wording of the statute, it could fairly be concluded that the legislature had intended the statute to apply when incarceration time had been decreased.²⁸³ The court noted, however, that in this case, not only had incarceration time been decreased, but "a weighty and different additional consequence . . . [had been] provided,"²⁸⁴ that consequence being the addition of a permanent period of license revocation.²⁸⁵ Concerning section 29-2204.01's applicability to such a circumstance, the plurality noted that "[n]othing in the legislative history of the statutes casts light on this determination."²⁸⁶ The plurality thus concluded: "In the absence of a clear expression of legislative intent, we are not inclined to interpret the statute to apply to matters other than clearly expressed within the statute itself."²⁸⁷

In reaching this conclusion, the plurality referred to two earlier cases that had construed section 29-2204.01, stating: "Previously, we have held that § 29-2204.01 did not apply unless the 'particular law' under which the defendant was sentenced was amended . . . or when only the minimum term has been decreased, but the maximum term remains the same."²⁸⁸ It should be noted, however, that an analysis of these cases appears to indicate that neither directly supports the court's holding.²⁸⁹

In the first case, *State v. Fuller*,²⁹⁰ the defendant was convicted and sentenced to life imprisonment under the homicide statutes for his part in assisting in a suicide.²⁹¹ The defendant argued that

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. See notes 127-37 and accompanying text *supra*.

286. 212 Neb. at 868, 326 N.W.2d at 846.

287. *Id.* at 869, 326 N.W.2d at 846.

288. *Id.* at 868-69, 326 N.W.2d at 846.

289. See notes 9-19 and accompanying text *supra*.

290. 203 Neb. 233, 278 N.W.2d 756 (1979).

291. *Id.* at 241-42, 278 N.W.2d at 761.

he was entitled to the benefits of the then newly enacted 1979 Nebraska Criminal Code.²⁹² The new Code made assisting suicide a criminal offense with a maximum penalty of five years imprisonment, or a \$10,000 fine, or both.²⁹³ Noting that the defendant had been convicted and sentenced under the homicide statutes, the court noted that section 29-2204.01 "is limited to the amendment of 'the particular law under which such sentence was pronounced.'" ²⁹⁴ Because the penalty contained within the homicide statutes remained unchanged, the defendant was not entitled to a reduction in sentence.²⁹⁵ That case, however, appears to have little bearing on *Peiffer II*, because section 39-669.07, the law under which the defendant was sentenced, was one of the "particular law[s]" which was amended by L.B. 568.²⁹⁶ Specifically, L.B. 568 amended section 69-669.07 by changing the offense of driving while intoxicated, third offense, from a class IV felony to a class W misdemeanor.²⁹⁷

The second case cited by the plurality, *State v. Rubek*,²⁹⁸ also has little bearing on *Peiffer II*. In *Rubek*, the court held that Section 29-2204.01 did not apply when only the *minimum* term of incarceration had been decreased, but not the maximum.²⁹⁹ In *Peiffer II*, however, the maximum term of imprisonment had in fact been decreased; L.B. 568 decreased the maximum period of confinement from five years to six months.³⁰⁰

Therefore, it appears that the cases cited by the plurality in *Peiffer II* are not on point. The court's conclusion as to the nonapplicability of section 29-2204.01 thus appears to rest primarily on the absence of a "clear expression of legislative intent."³⁰¹

It is suggested that this rationale is subject to criticism for the following reasons: First, section 29-2204.01 is clear on its face, and by its plain language appears to apply.³⁰² In addition, assuming that resort to the legislative history of section 29-2204.01 is deemed necessary, a similar conclusion can be drawn therefrom, namely, that the section was intended to apply to this type of situation.

292. *Id.*

293. *Id.*

294. *Id.* at 242, 278 N.W.2d at 761.

295. *Id.*

296. *Peiffer II*, 212 Neb. at 865, 326 N.W.2d at 845.

297. *Peiffer I*, 212 Neb. at 300, 322 N.W.2d at 446.

298. 189 Neb. 141, 201 N.W.2d 255 (1972).

299. *Id.* at 144, 201 N.W.2d at 257.

300. 212 Neb. at 865-66, 326 N.W.2d at 845.

301. *Id.* at 867, 326 N.W.2d at 846.

302. See note 26 and accompanying text *supra*.

Senator Stahmer, who introduced L.B. 1202,³⁰³ stated that the purpose of the legislation was:

[T]o eliminate the possibility of any incarcerated person being held in any state or local jail for a length of time determined by a previous statute or ordinance for a longer period than subsequent offenders would be detained for the identical crime under a new statute or ordinance that would call for a lesser maximum penalty.³⁰⁴

In conclusion, L.B. 568 decreased the maximum period of incarceration of third time DWI offenders.³⁰⁵ The wording of section 29-2204.01 indicates that the statute applied to the facts of Peiffer's case.³⁰⁶ In addition, it can be argued that the objective of, and intention behind section 29-2204.01, as specified in the legislative history, can only be served by allowing Peiffer the benefits of the amended statute.³⁰⁷ This argument is especially persuasive in light of the rules of statutory construction as enunciated in Nebraska by cases such as *Adkisson v. City of Columbus*.³⁰⁸ In *Adkisson* the court noted: "The obligation of the court in the consideration and application of a statute is to determine and give effect to the purpose and *intention of the Legislature* as ascertained from the entire language thereof considered in its *plain, ordinary, and popular sense*.'"³⁰⁹ Therefore, it is suggested that the statute should have been applied, or in the alternative, declared unconstitutional.³¹⁰

Concurrence

As stated previously, *Peiffer II* was a 3-1-3 per curiam decision³¹¹ in which Justice McCown concurred. The first part of his concurrence deals with the power of different branches of the government to alter sentences that have become final.³¹² Concerning this issue, Justice McCown stated:

No branch of government can increase a sentence, or any part of it, once the sentence has become *final*. Neither the

303. 1972 Neb. Legis. J. 170.

304. JUDICIARY COMMITTEE STATEMENT ON L.B. 1202, 82d Leg., 2d Sess., at 1 (Comm. Print 1972).

305. See notes 43-44 and accompanying text *supra*.

306. See note 26 and accompanying text *supra*.

307. See notes 24-26 and accompanying text *supra*.

308. 214 Neb. 129, 333 N.W.2d 661 (1983).

309. *Id.* at 133, 333 N.W.2d at 664 (quoting *Landwidth v. Bankers Life Ins. Co.*, 156 Neb. 107, 115-16, 54 N.W.2d 409, 416 (1952)).

310. See notes 320-22 and accompanying text *infra*.

311. 212 Neb. at 864, 326 N.W.2d at 844-45. See note 37 and accompanying text *supra*.

312. *Id.* at 869-70, 326 N.W.2d at 847 (McCown, J., concurring).

Legislature nor this court can reduce a sentence, or any part of it, once the sentence has become *final*, because the power of clemency and the power to grant respites, reprieves, pardons, or commutation of sentence is vested solely in the Board of Pardons under the provisions of . . . the Nebraska Constitution.³¹³

With this introduction, Justice McCown then quoted section 29-2204.01,³¹⁴ and stated that “[i]nsofar as that section purports to apply to any sentence which has become *final*, the section is clearly an invasion of the powers of the executive and judicial branches of government and is unconstitutional.”³¹⁵ Since the judgement at issue in *Peiffer II* was not final,³¹⁶ this part of the concurrence was apparently dicta.

The next part of Justice McCown’s concurrence discussed the power to reduce or increase sentences that were *not final*. Concerning the power to reduce sentences, Justice McCown stated that, “The power to reduce . . . [a] sentence, or any part of it, rests in the judicial discretion of this court.”³¹⁷ Furthermore, “[i]n exercising . . . [such] power this court will attempt to ascertain the intent of the Legislature as to amendments relating to punishment in accordance with *State v. Randolph*.”³¹⁸ In discussing the power of the court to increase a sentence, Justice McCown stated:

This court has no power to increase a sentence, or any part of it, but even if we had the power, a sentence could not be increased beyond the maximum allowed by law at the time of the commission of the crime. Any attempt by this court, or by the Legislature, to increase a sentence, or *any part of it*, by retroactive action of that sort would be clearly *ex post facto*.³¹⁹

In analyzing the concurrence, it appears clear that Justice McCown concluded that section 29-2204.01, *as applied to final judgments*, was an unconstitutional violation of the doctrine of separation of powers.³²⁰ Further, since Justice McCown concurred, it must be concluded that he determined that the statute was inapplicable to the case at hand, even though it involved a judgement that was *not final*. What is not clear, however, is the reasoning he used in reaching this determination. This is because

313. *Id.* at 869, 326 N.W.2d at 847 (emphasis added).

314. *Id.* at 870, 326 N.W.2d at 847.

315. *Id.* (emphasis added).

316. *Id.* at 868, 326 N.W.2d at 846.

317. *Id.* at 870, 326 N.W.2d at 847.

318. *Id.* at 870-71, 326 N.W.2d at 847.

319. *Id.* at 871, 326 N.W.2d at 847 (emphasis added).

320. *See* notes 317-319 and accompanying text *supra*.

although Justice McCown specifically addressed the unconstitutionality of section 29-2204.01 as applied to *final judgments*,³²¹ he did not discuss the applicability of the statute to judgments short of finality. It can thus be concluded that Justice McCown agreed with the reasoning of the plurality that section 29-2204.01 was inapplicable due to the absence of "a clear expression of legislative intent." As was suggested above, the plurality's reasoning on this point is subject to criticism.

Justice McCown directly addressed the applicability of the *Randolph* doctrine.³²² As was discussed above, the plurality had held that this doctrine was inapplicable because of the absence of a specific statement of legislative intent with regard to the retroactive application of the punishments contained in L.B. 568.³²³ As was suggested above, the plurality's reasoning on this point is also subject to criticism.³²⁴ This criticism does not, however, extend to the concurrence—although Justice McCown agreed that *Randolph* was inapplicable, his conclusion was based on a different line of reasoning. Justice McCown held that *Randolph* could not be applied in *Peiffer II* because to do so would result in a violation of the prohibition against ex post facto laws.³²⁵ Justice McCown's ex post facto argument was based on the premise that "[a]ny attempt by this court, or by the Legislature, to increase a sentence; or any part of it, by retroactive action . . . would be clearly ex post facto."³²⁶ Justice McCown's approach, which focused on an increase in "any part" of a retroactive punishment, is to be contrasted with that of the dissent, which similarly had recognized the importance of the ex post facto question.

Dissent

Justice Caporale wrote the dissent in *Peiffer II*.³²⁷ Chief Justice Krivosha and Justice Boslaugh joined.³²⁸ Justice Caporale framed the issue in *Peiffer II* as being "whether application of the sanctions imposed by L.B. 568 to the defendant . . . would invoke elements of ex post facto legislation."³²⁹

Justice Caporale began his analysis of this issue with a discus-

321. 212 Neb. at 870, 326 N.W.2d at 847 (McCown, J., concurring) (emphasis added).

322. *Id.* at 870-71, 326 N.W.2d at 847.

323. *Id.* at 867, 326 N.W.2d at 845-46.

324. See notes 30-32 and accompanying text *supra*.

325. 212 Neb. at 870-71, 326 N.W.2d at 847 (McCown, J., concurring).

326. *Id.* at 871, 326 N.W.2d at 847 (emphasis added).

327. *Id.* (Caporale, J., dissenting).

328. *Id.* at 875, 326 N.W.2d at 849.

329. *Id.* at 871, 326 N.W.2d at 848.

sion of the constitutional prohibitions against ex post facto legislation.³³⁰ He defined an ex post facto law as "one which applies to events occurring prior to enactment of the law and which disadvantages the offender affected by it."³³¹ Noting that the element of retroactivity was present in *Peiffer II*, Justice Caporale stated: "The sole ex post facto issue then becomes whether such application would be to the defendant's disadvantage."³³²

In addressing this issue, the dissent, rather than individually comparing the separate penalty provisions of L.B. 568 with the corresponding provisions of the old law, compared the *entire* effect of the new law with that of the old.³³³ The dissent based the use of this *in toto* approach on two recent United States Supreme Court cases.

In *Weaver v. Graham*,³³⁴ the United States Supreme Court declared unconstitutional a state statute reducing the amount of "gain time for good conduct" which accrued to a prisoner as a result of good behavior.³³⁵ The Court held that the new law "constricts the inmate's opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment"; it, therefore, violated the prohibition against ex post facto laws.³³⁶ In rendering this decision, the Court compared the entire effect of the new statute, not just the good conduct provision, with the entire effect of the repealed statute.³³⁷ Justice Rehnquist, concurring in the judgment, stated: "We must compare the two statutory procedures *in toto* to determine if the new may be fairly characterized as more onerous."³³⁸

In *Dobbert v. Florida*,³³⁹ an *in toto* comparison was also utilized. That case dealt with a new statute which changed the jury's

330. *Id.* at 871, 326 N.W.2d at 847.

331. *Id.*

332. *Id.* at 871, 326 N.W.2d at 848.

333. *Id.* at 873, 326 N.W.2d at 848-49. It should be noted that the appellant argued that the "in toto" approach should not be used in analyzing this case. *Id.* at 871-72, 326 N.W.2d at 848. As the dissent noted early in its opinion, the appellant argued "that where parts of a sentence are divisible, each part is to be viewed separately." *Id.* at 872, 326 N.W.2d at 848 (citing as support to this proposition, *State v. Holloway*, 212 Neb. 426, 322 N.W.2d 818 (1982); *Olson v. State*, 160 Neb. 604, 71 N.W.2d 124 (1955); *Kroger v. State*, 158 Neb. 73, 62 N.W.2d 312 (1954)). The court held that "[t]he cases cited by him do not so hold." 212 Neb. at 872, 326 N.W.2d at 848.

334. 450 U.S. 24 (1981).

335. *Id.* at 25.

336. *Id.* at 35-36.

337. *See id.* at 34-35.

338. *Id.* at 38 (Rehnquist, J., concurring) (quoting *Dobbert v. Florida*, 432 U.S. 282, 294 (1977)).

339. 432 U.S. 282 (1977).

role regarding the death penalty.³⁴⁰ Under the old statute, in force at the time of the crime, the death penalty was presumed unless the jury made a recommendation of mercy.³⁴¹ Under the new statute, which was in effect at the time of trial, the jury could make an advisory opinion, but the final determination was left to the trial court, which determination was then subject to review.³⁴² In comparing these statutes, the Court stated that the two statutes were to be compared *in toto* in order to determine if one was more onerous than the other.³⁴³ After making such a comparison, the Court concluded that the new statute was ameliorative, and thus not *ex post facto*.³⁴⁴

An analysis of these two cases reveals that the use of the *in toto* approach by the dissent was justified. It should be noted, however, that neither *Weaver* nor *Dobbert* applied the "in toto" approach to a multipenalty provision.³⁴⁵ However, as the dissent pointed out, "they [*Weaver* and *Dobbert*] do nonetheless establish the principle that for purposes of determining whether the constitutional prohibition against *ex post facto* laws has been violated, the proper method is to consider the total effect of the old punishment as compared to the total effect of the new punishment."³⁴⁶

In applying this approach to the facts of *Peiffer II*, Justice Caporale stated:

The *in toto* effect of L.B. 568 upon defendant would be to restore to him 18 months of liberty in exchange for the payment of \$500 and the permanent loss of the privilege to drive. I find the *in toto* effect of L.B. 568 upon defendant to be less onerous than the sentence imposed under the former provisions.³⁴⁷

Having concluded that the "in toto" effect of the new statute was ameliorative, and therefore not *ex post facto*, Justice Caporale stated that the applicability of *Randolph* was inescapable.³⁴⁸ Justice Caporale based this conclusion on the fact that, in the absence of a statement of legislative intent as to retroactivity, "The intent of the Legislature may fairly be presumed to be that . . . [the lesser punishment] is to be applied retroactively to all constitu-

340. *Id.* at 292.

341. *Id.* at 288.

342. *Id.* at 290-92.

343. *Id.* at 294.

344. *Id.* at 296-97.

345. *Peiffer II*, 212 Neb. at 873, 326 N.W.2d at 848-49 (Caporale, J., dissenting).

346. *Id.*

347. *Id.* at 874, 326 N.W.2d at 849.

348. *Id.* at 875, 326 N.W.2d at 849.

tionally permissible cases."³⁴⁹

CONCLUSION

The plurality and the concurrence in *Peiffer II* agreed as to the nonapplicability of *State v. Randolph*, but for different reasons. The plurality identified the central issue in *Peiffer II* as being whether the new law contained an expression of legislative intent as to retroactive application. Finding no such expression, the majority held the *Randolph* doctrine not to apply. The concurrence, on the other hand, defined the issue as to *Randolph's* applicability as being whether the retroactive application of the provisions of L.B. 568 would be void, as violative of the prohibitions against ex post facto laws. This was the same analysis used by the dissent. It is suggested that the ex post facto question was the central issue in *Peiffer II*, and that the plurality should have extended its analysis to address this question. Its failure to do so has created the potential for confusion should a similar ex post facto situation arise in the future. This is because, while both the concurrence and the dissent focused on the ex post facto issue, they applied different tests. Consequently, there is no clear guideline as to how to approach this type of question.

Section 29-2204.01, the second issue in *Peiffer II*, was held not to apply in spite of the fact that both the language of the statute and its legislative history arguably would have supported a contrary result. Section 29-2204.01 was held inapplicable because L.B. 568 contained a multipenalty provision, and because the court refused to construe the statute to apply to a situation that involved more than simply a reduction in the maximum period of confinement. However, if section 29-2204.01 is to be applied only in single penalty cases which mitigate prison time, and only to cases short of final judgment, as suggested by Justice McCown, then the provision appears to be unnecessary. This is because the Nebraska Supreme Court has held that *State v. Randolph* controls in such situations. Therefore, since there is no need for the statute in situations short of final judgment where the *Randolph* doctrine controls, it is suggested that if the statute is not going to be applied in other situations, then it should be invalidated by the court. In this regard, the approach adopted by the concurrence seems most persuasive.

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349. *Id.*