STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 76-256

Mr. Robert R. Raines
Secretary of Corrections
818 Kansas Avenue
Topeka, Kansas 66612

Mr. Devon F. Knoll
Director, Kansas Adult Authority
818 Kansas Avenue
Topeka, Kansas 66612

RE: Crimes and Punishments - Sentencing - Effect of application of habitual criminal act to mandatory minimum terms for certain offenses involving firearms imposed under House Bill No. 2846.

SYNOPSIS: The application of the habitual criminal act to a sentence containing a mandatory minimum term imposed under the provisions of House Bill No. 2846 does not effect an increase in the duration of the mandatory aspect of the sentence that must be served prior to eligibility for parole consideration.

RE: Crimes and Punishments and Criminal Procedures - Sentencing and Release Procedures - Parole eligibility of one sentenced for a class B or lower class felony under both House Bill No. 2846 and the habitual criminal act vis-a-vis one sentenced for a class A felony.

SYNOPSIS: The concertive operation of House Bill No. 2846 and the habitual criminal act on a class B or lower class felony may not result in a sentence with greater parole eligibility restrictions than would attend those for a class A felony.

RE: Crimes and Punishments - Sentencing - Length of mandatory component of sentence where consecutive sentences are imposed for different crimes only one of which involves an offense designated by House Bill No. 2846.

SYNOPSIS: The aggregated minimum sentence imposed upon one sentenced to consecutive terms for several offenses, only one of which involves a crime designated by House Bill No. 2846, does not become mandatory in its totality merely because one of the sentences contains a mandatory minimum component.

RE: Crimes and Punishments - Sentencing - Length of mandatory component of sentence where consecutive sentences are imposed for separate offenses under House Bill No. 2846.

SYNOPSIS: The aggregated minimum sentence imposed upon an offender convicted of multiple offenses under House Bill No. 2846 will be mandatory in its entirety.

RE: Crimes and Punishments - Sentencing - Authority to reduce the sentence of an offender sentenced under the mandatory provisions of House Bill No. 2846.

SYNOPSIS: While the district courts retain the authority to act within 120 days to reduce the sentence of one convicted under the mandatory provisions of House Bill No. 2846 to a new sentence within statutory limits, and possess similar authority after the expiration of 120 days upon the recommendation of the secretary of corrections, the courts may not reduce such a sentence below the statutory limits for the offense during the latter period.

RE: Crimes and Punishments - Sentencing - Authority of sentencing court to choose an appropriate mandatory minimum term for an offense under House Bill No. 2846 where the applicable penalty statute prescribes a range of permissible minimum sentences.

SYNOPSIS: House Bill No. 2846 does not circumscribe the existing power of the district courts to utilize their discretion in imposing the minimum term where a range of permissible minimums is authorized by the sentencing statute.

RE: Criminal Procedure - Release Procedures - Necessity for an offender sentenced to a mandatory minimum term to achieve minimum security status under regulations of the Department of Corrections as a prerequisite to parole eligibility.

SYNOPSIS: One sentenced to a mandatory minimum sentence does not become eligibile for parole consideration until the attainment of minimum security status under the rules and regulations of the Department of Corrections.

RE: Crimes and Punishments - Sentencing - Definition of terms in House Bill No. 2846.

SYNOPSIS: The term "use" in the act means to avail oneself of or to employ. The term "firearm" as employed in the act refers to a weapon from which a shot is discharged by gunpowder or similar explosive charge.

RE: Crimes and Punishments - Sentencing - Necessity for district court to specify in journal entry that sentence was imposed under the provisions of House Bill No. 2846.

SYNOPSIS: Although House Bill No. 2846 does not mandate that the journal entry contain a specific reference to it in describing the nature of the sentence, such a practice should be employed as a matter of sound policy in order to avoid potential uncertainty concerning the nature of the sentence imposed.

RE: State Departments - Department of Corrections - Authority of Department of Corrections to interpret the journal entry of sentence.

SYNOPSIS: While the Department of Corrections has inherent authority to interpret a journal entry in order to effectuate the sentence imposed by the court, the Department should notify all interested parties where a substantial doubt exists whether the court imposed the minimum sentence under the mandatory provisions of House Bill No. 2846.

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Dear Gentlemen:

Your recent inquiry raises a number of questions concerning the interpretation of House Bill No. 2846[1] (the act) enacted by the 1976 legislative session, effective July 1, 1976. The recently enacted legislation amends the existing parole eligibility statute, K.S.A. 1975 Supp. 22-3717, and significantly restricts the authority of the courts to grant probation and the authority of the Kansas Adult Authority to grant parole for offenders convicted of certain offenses involving the use of a firearm.

Section one of the act provides that probation shall not be granted to any offender convicted of the commission of any crime specified in article 34, chapter 21 of the Kansas Statutes Annotated (crimes against the person) where a firearm was employed in the criminal enterprise. Section two, paragraph eight of the bill imposes another substantial restriction upon such offenders by providing that they shall not become eligible for parole consideration prior to having served the minimum term of confinement as sentenced by the court. In concert, these provisions have the effect of requiring that any person employing a firearm in the commission of an offense under K.S.A. 21-3401 *et seq.* serve a mandatory minimum term of confinement as prescribed by law before becoming eligible for release. The legislature contemplated that enforcement of these provisions would deter crime and protect the public from dangerous offenders.

Initially, you raise a question concerning the interrelationship of House Bill No. 2846 and the habitual criminal act, K.S.A. 21-4504, which provides for sentences of increased severity for multiple offenders. Essentially, you query whether the application of the habitual criminal act to an offender sentenced to a mandatory minimum term under §1 of the act will cause the amplified minimum term to be wholly mandatory also.[2] Although the question is not free of doubt, we believe that a mandatory minimum term increased under the recidivist statute does not result in the enhanced minimum term also being mandatory in its totality. In our opinion, this result follows from an analysis and comparison of the language and purposes of the respective statutes.

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[1]Laws 1976, ch. 168, July 1, 1976.

[2]For the purposes of this question, it has been assumed that the court would increase the minimum sentence under the habitual criminal act. However, the court is not compelled to do so. See K.S.A. 21-4504(1)(a),(2)(a).

House Bill No. 2846 is designed to require the compulsory service of the minimum term of confinement imposed by the court for those convicted of using firearms in the furtherance of certain criminal acts. On the other hand, the purpose of the habitual criminal act is the deterrence of repeated criminal behavior by those previously convicted through the imposition of greater penalties than those ordinarily provided. As applied to a multiple offender sentenced under the mandatory provisions of House Bill No. 2846, the habitual criminal act focuses upon the fact of repeated misconduct and imposes enhanced punishment therefor rather than concerning itself with the nature of the newly committed offense, in this case one involving a firearm. Thus, while increased punishment is a goal of the habitual criminal act, the fortuitous amplification of the mandatory minimum term would not serve its purposes or those of the recent enactment. The mandatory sentencing provision is a feature unique to certain crimes committed by firearms and its multiplication would proceed beyond the purposes contemplated for it by the legislature. We do not believe that that body envisioned the imposition of increased mandatory terms for firearms offenders through the operation of the habitual criminal act, especially in view of the severe restriction upon parole eligibility effected by such a sentence.

We believe that this conclusion also receives support from an examination of the provisions of the respective acts themselves. K.S.A. 21-4504, differing markedly from its predecessor, former K.S.A. 21-107a, reposes discretion with the court whether its enhanced penalty provisions should be applied after the act has been invoked by the state. The permissible range of sentences authorized by the statute, including both maximum and minimum terms, are defined by reference to the penalties prescribed for the particular offense by K.S.A. 21-4501, the statute classifying felonies and specifying terms of imprisonment therefor. Generally, the recidivist statute authorizes the court to impose maximum and minimum terms not less than the least such terms provided in §21-4501 nor greater than certain multiples of the greatest allowable maximum or minimum terms prescribed therein. Thus, application of the habitual criminal act to a certain crime operates only to provide new limits for the maximum and minimum terms without consideration of the mandatory or non-mandatory nature of the underlying sentence itself. Therefore, when the court applies the enhancement provisions to a crime covered by House Bill No. 2846, the resulting minimum term will merely be a term of years and will not become mandatory in its entirety.

Thus, the mandatory portion of the sentence may not be greater than the greatest minimum provided by law for a single firearms offense.[3] For example, should a multiple offender commit a class B felony and receive a total minimum sentence of 45 years, no more than 15 years of the sentence could be made mandatory.[4]

Furthermore, it appears from a reading of §2(8) of the new act that the legislature did not contemplate the application of the recidivist statute to a sentence imposed thereunder. This section provides that any person sentenced pursuant to §1 of the act shall not be eligible for parole prior to serving the minimum term. However, a firearms offender to whom the recidivist statute is applied receives a sentence under both §1 of the act and K.S.A. 21-4504. Since such a person is not sentenced solely under §1, he is by negative inference, not subject to the parole eligibility restrictions of §2(8).

Your inquiry questions whether application of the act to a class B or lower class of felony may result in a sentence with greater parole eligibility restrictions than would accompany the penalty for a class A felony. In hypothesizing this anomalous circumstance, you obviously contemplate the added application of the habitual criminal act to the mandatory aspect of the sentence for a lower class firearms offense. Since we have heretofore concluded that the application of the habitual criminal act to a sentence under the act does not effect an increase in the duration of the mandatory term, we believe that the answer herein must naturally be no.

You next inquire whether the aggregated minimum sentence imposed upon one sentenced to consecutive terms for different crimes becomes mandatory in its totality if any one of the crimes would require a mandatory minimum sentence under the new act. In essence, you question whether the minimum and maximum sentences will continue to be aggregated where both a mandatory term and additional consecutive terms for different crimes have been simultaneously imposed. In brief, the new legislation evinces no intent to depart from the traditional sentence computation practice of aggregating the minimum and maximum terms of consecutive sentences as prescribed by K.S.A. 21-4608. While sentences thus aggregated become one for the purpose of computation, they continue to operate separately in effect

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[3]The phrase "firearms offense" or other such designation as employed in this opinion refers only to those crimes encompassed within the provisions of House Bill No. 2846.

[4]If the minimum sentence imposed by the court under the recidivist statute exceeds the greatest minimum term statutorily provided for a single offender, the mandatory component of the sentence shall be equal to the largest minimum term allowable for a single firearms offense.

and thus the mandatory minimum aspect of a firearms sentence does not transform the entirety of the aggregated minimum sentence into a mandatory term. For example, should a person receive a mandatory three year minimum and a consecutive five year minimum for a separate offense not within the act, the resulting eight year aggregated minimum sentence would have only a three year mandatory component. Thus, the mandatory nature of a minimum sentence imposed under the act will remain confined to that crime alone and will not affect other sentences.

In a related query, you ask whether an aggregated minimum sentence imposed upon an offender convicted of multiple offenses under House Bill No. 2846 will be mandatory in its entirety. The question does not require extended analysis and must be answered in the affirmative. The act mandates the imposition of a mandatory minimum term for each and every offense encompassed within its scope. Thus, when consecutive sentences imposed thereunder are aggregated according to K.S.A. 21-4608(3)(c), the resulting minimum term will be entirely mandatory.

A most significant question raised by your inquiry concerns the continuing viability of the court's power to grant a reduction of sentence under K.S.A. 21-4603[5] in view of the recent legislation. As analyzed and discussed by the Kansas Supreme Court last term in *State v. Sargent*, 217 Kan. 634, 538 P.2d 696 (1975), the powers of reduction conferred by K.S.A. 21-4603 consist of two separate categories. Within 120 days after sentencing, the court is authorized to reduce the sentence "by directing that a less severe penalty be imposed in lieu of that originally adjudged within statutory limits." This power is vested solely within the discretion of the court subject to the limitation that the modified sentence must fall within the limits of the minimum term prescribed by statute. Secondly, at any time prior to the expiration of the minimum sentence, the court, after having received the recommendation of the secretary of corrections, may reduce the minimum sentence in any manner, including a reduction below the statutory limits on the minimum term. Whether these provisions have been restricted in scope by House Bill No. 2846 is the question now to be examined.

While §1 of the act eliminates the court's power to grant probation and §2(8) restricts the power to grant parole until after expiration of the minimum term imposed, the act does not

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[5]House Bill 2688, Laws 1976, Ch. 156, effective July 1, 1976, amended K.S.A. 21-4603 in certain particulars which are not concerned herein.

speak, either directly or indirectly, to the court's ability to grant a reduction of sentence. After an analysis and comparison of the purposes of the respective statutes, it is our conclusion that the district court retains most of the reduction powers conferred upon it by K.S.A. 21-4603 since the general concept of reduction does not conflict with the policies expressed in the mandatory firearms legislation. However, we believe that the recent legislation has rendered inoperative that portion of the reduction statute which authorizes the court to reduce a minimum term below the limits prescribed by law insofar as mandatory firearms offenses are concerned. In our opinion, this latter conclusion follows from the clear and compelling purposes which inspired the mandatory sentencing legislation and which are expressed therein.

Initially, we believe that the court's power to authorize a reduction within statutory limits within 120 days of sentencing survives intact and coexists harmoniously with the mandatory sentencing provisions of the act. It is evident that the overriding purpose of the legislature in drafting the strict sentencing and parole provisions of the act was to require any offender employing a firearm in the commission of one of the designated crimes to serve a period of certain confinement not less than the statutorily prescribed minimum term. In this manner, it was hoped that the certainty of a prison sentence would act to deter crime and to reduce the possibility of a quick return to the streets by some of the state's most dangerous offenders. However, this policy is in no manner compromised by the continued availability of the court's 120 day reduction power. House Bill No. 2846 merely requires that an offender be sentenced to and serve a term not less than the minimum prescribed by law. Significantly, it does not mandate that such a person be sentenced to the greatest possible minimum sentence allowable where the penalty statute designates a certain range of permissible minimums. Thus, where the court acts under its 120 day power to lower the minimum initially imposed to another term not less than the limits defined for the offense, the court does not contravene the legislative design to require service of a mandatory minimum sentence. The reduction order merely has the effect of substituting one permissible minimum for another, the new sentence remaining wholly mandatory as before.

This analysis applies in similar fashion to the second aspect of the reduction power except insofar as the court is authorized to reduce the minimum term below the limits prescribed by law.

In other words, while the court may continue to act after 120 days upon the recommendation of the secretary of corrections to reduce the minimum term, the court may not utilize this power to enter a new minimum sentence for a firearms violation which would descend beneath the limits described by the penalty statute. To this extent, the two statutes are in direct conflict, and the specific policy of the legislature in the later enacted legislation toward the narrow category of firearms offenses must control over the more general reduction power conferred in the earlier statute. Should the court retain this power, the obvious policy of the legislature in mandating definite minimum terms of confinement could be defeated. We do not believe such an inconsistency in the statutory policy was intended by the legislature.

You next question whether House Bill No. 2846 permits the sentencing court to employ its discretion in imposing the minimum sentence where the penalty statute prescribes a range of permissible minimums. The response to this question was indirectly indicated above and the query must be answered affirmatively. Succinctly stated, no provision of the legislation mandates that particular minimums be imposed for firearms offenses where a range of permissible minimums is statutorily designated. Neither the greatest, the least, or any particular minimum term in-between must be mandatorily imposed and the sole requirement of the law is that the minimum term imposed be within the limits of the penalty provision. K.S.A. 21-4606, prescribing criteria for setting a minimum sentence, continues to operate in full effect to guide the court's discretion in determining the minimum sentence to be imposed.

Another important question to be addressed is whether an inmate sentenced to a mandatory term becomes eligible for parole immediately after having served the compulsory minimum or whether he must additionally achieve "minimum security" status as a prerequisite to eligibility. As you are well aware, Opinion No. 75-232 described in detail the nature of the parole eligibility system now in operation as initially prescribed by K.S.A. 22-3717, effective July 1, 1974. Without retracing the reasoning of that opinion, it suffices here to observe that parole eligibility now generally depends upon the inmate's achievement of minimum security status through good conduct in the penitentiary rather than upon the prior service of a designated period of confinement as before. The requisites of "minimum security" status are given definition by rules and regulations promulgated by the secretary of corrections. This same statutory scheme is embodied within K.S.A. 22-3717 as amended by House Bill No. 2846.

In our judgment, consistency in interpretation of statutory purpose impels the conclusion that an inmate must achieve minimum custody status after service of the mandatory minimum term as a prerequisite to parole eligibility. Undoubtedly, the legislative purpose in substituting the new parole eligibility scheme was to individualize parole eligibility consideration by making it dependent upon the inmate's conduct within the institution. Should an inmate acculturate favorably to the institutional environment and demonstrate a substantial capacity to function in the future as a law-abiding member of society, he may obtain parole eligibility quite rapidly and need not await the expiration of a fixed period of time prior to parole consideration.

House Bill No. 2846 does not alter this express policy of the parole eligibility system but merely requires that the mandatory minimum term be served as a prerequisite to attainment of parole eligibility through satisfaction of the rules and regulations of the secretary of corrections. The language of §2(8) itself supports this construction since it does not affirmatively confer parole eligibility after expiration of the minimum term but only precludes parole eligibility prior thereto.[6] Were the recent legislation construed to authorize immediate parole eligibility for firearms offenders after service of the minimum term, an irrational dichotomy would be introduced into the parole system whereby some of the state's most dangerous felons would be eligible for parole despite their possible inability to demonstrate a record of institutional behavior indicating their capacity to function cooperatively in society. Thus, we believe the interpretation given §2(8) herein achieves the consistency of statutory purpose intended by the legislature in erecting the present parole eligibility structure.

Additional inquiry is made concerning the definitions of the terms "used" and "firearm" as employed in §1 of the act, neither of which is defined therein. As defined by Websters Second International Dictionary, the word "use" means "to convert to one's service, to avail oneself of, to employ." We are confident that the legislature utilized the term in this commonly understood manner. To constitute use of a firearm under the act, the offender must have employed the weapon at some point to facilitate the commission of the crime. The term contemplates more than mere possession of a firearm during the commission of the crime.

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[6]This same reasoning also applies to the latter portion of the section concerning parole eligibility for class A felonies involving crimes covered by the act.

The definition to be given the term "firearm" presents a question of some difficulty since the word is not elsewhere defined in the Kansas Criminal Code. However, an examination of K.S.A. §§21-4201-4206, concerning the subject of weapons control, seems to indicate that the term has been previously employed in a relatively broad sense by the legislature. K.S.A. 21-4203, regulating the disposal of firearms, prohibits the sale or transferral of "any firearm with a barrel less than twelve inches long" to certain classes of persons. Similar phraseology appears in K.S.A. 21-4204 concerning the possession of firearms. It thus appears that when the legislature intended to narrow the application of the term, they specifically so provided. It also appears that the term in its generic sense applies to certain larger types of weaponry such as machine guns. See K.S.A. 21-4201(1)(g) and the Judicial Council Notes following K.S.A. 21-4202.

While Webster's Third International Dictionary (1966 G.&C. Merriam Co.) defines the term as "a weapon from which a shot is discharged by gunpowder-usually used only of small arms," the definition does not necessarily exclude its application to larger types of arms, and the term as commonly understood suggests no inherent limitation to mere handguns or pistols. Moreover, some further guidance is provided by the Judicial Council Notes attending K.S.A. 21-4206 which state that the weapons control provisions enacted by the legislature were designed to enlarge the scope of the law to include all weapons "commonly used in connection with crime." Unfortunately, resort to the court decisions of other states for guidance has proved to be of little benefit in this analysis since they reveal that the judgment usually rests ultimately upon the interpretation of the varying particulars of different state statutes.

Although it is indeed unfortunate that the legislature failed to define this significant term in House Bill No. 2846, we believe that it intended to apply the term "firearm" to weapons beyond mere handguns which are discharged by gunpowder or similar explosive charge.[7] Several difficult questions concerning the furthest extent of the term will undoubtedly be presented to the courts of this state in the future and must ultimately be determined by them after an analysis of the circumstances of each case.

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[7]Several other bills introduced in the 1976 legislative session addressing the subject of mandatory sentences for firearms offenses attempted to define the term "firearm" but none were enacted. Senate Bill No. 428, House Bill No. 2771, House Bill No. 2783, and House Bill No. 3043 proposed broad definitions of the term while House Bill No. 2746 limited the definition to firearms less than twelve inches in length.

Your final two questions are closely related and shall be considered jointly. Initially, you inquire whether the sentencing court must specifically set forth in the journal entry that sentence is being imposed under the act's mandatory provisions. Should the court fail to so specify, you then ask whether Department of Corrections personnel are authorized to examine the journal entry and any other relevant information of record in an effort to determine whether the offense committed was one specified by the act. As you realize, the answers to these questions are significant since a misinterpretation could wrongfully subject an offender to the substantial parole eligibility restrictions provided by the act.

Unfortunately, the statute itself provides no guidance whatsoever in resolving the questions raised as the legislature apparently did not contemplate any particular problems in this regard. Hopefully, the courts, prosecutors, and defense counsel of the state will anticipate the potential problem by specifically providing in the journal entry that sentence is being imposed under the act. This effort could be readily accomplished by either specific reference to the act or by affixing the word mandatory or other such descriptive term to the minimum sentence as provided in the journal entry. A mere description of the crime and reference to the use of a firearm in the journal entry without specific reference to the act would introduce some degree of uncertainty into the sentence and should be avoided.

However, it is virtually inevitable that situations will arise where the difficult task of interpretation of the journal entry will be required. Although we believe that the power to analyze the journal entry and to compute the sentence imposed therein is inherently within the authority of the Department of Corrections, it would seem that where a substantial question exists concerning the mandatory nature of the sentence the question would best be resolved by the court which imposed the sentence. The preferred course would be to notify the court of the sentencing ambiguity with appropriate notice also to both the prosecuting attorney and defense counsel. Such a procedure, though more formalized, would seem to be justified where serious doubt persists because of the significant parole eligibility restrictions effected by a mandatory sentence under the act.

To recapitulate, we have reached the following conclusions concerning the questions submitted in your joint inquiry: (1) The application of the habitual criminal act to an offender

sentenced to a mandatory minimum term under House Bill No. 2846 does not cause the amplified minimum term to be wholly mandatory also; (2) The concertive operation of House Bill No. 2846 and the habitual criminal act on a class B or lower class felony may not result in a sentence with greater parole eligibility restrictions than would attend those for a class A felony; (3) The aggregated minimum sentence imposed upon one sentenced to consecutive sentences for different crimes does not become mandatory in its totality if any one of the crimes would require a mandatory minimum sentence under House Bill No. 2846; (4) The aggregated minimum sentence imposed upon an offender convicted of multiple offenses under House Bill No. 2846 will be mandatory in its entirety; (5) A district court is authorized to grant a reduction of sentence within 120 days of sentencing to an offender sentenced under House Bill No. 2846 provided the new minimum term is within the limits prescribed by law; (6) After the expiration of 120 days from the date of sentencing, a district court, upon the recommendation of the Secretary of Corrections, is authorized to grant a reduction of sentence to an offender sentenced under House Bill No. 2846 but may not authorize a reduction below the minimum term provided by statute; (7) House Bill No. 2846 permits the sentencing court to utilize its discretion in imposing the minimum sentence where the penalty statute prescribes a range of permissible minimums; (8) An inmate serving a mandatory minimum term under House Bill No. 2846 must also achieve minimum security status under the regulations of the department of corrections as a prerequisite to parole eligibility; (9) The term "use" in House Bill No. 2846 means to avail oneself of or to employ; (10) The term "firearm" in House Bill No. 2846 refers to a weapon from which a shot is discharged by gunpowder or similar explosive charge; (11) Although House Bill No. 2846 does not require that the district court specify in the journal entry that sentence is being imposed thereunder, the court should be scrupulously specific concerning the nature of the sentence imposed as a matter of policy; (12) The Department of Corrections possesses inherent authority to interpret a journal entry and to compute the sentence imposed therein but difficult interpretative questions involving the nature of firearms sentences should be referred to the sentencing court.

Very truly yours,

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CURT T. SCHNEIDER
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