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March 21, 1979

ATTORNEY GENERAL OPINION NO. 79- 36

Mr. Don Vsetecka
Finney County Attorney
118 West Pine Street
Garden City, Kansas 67846

Re: Criminal Procedure -- Search and Seizure -- Custody and
Disposition of Property Seized.

Synopsis: Weapons which have been used in the commission of a crime
and are no longer required as evidence may be sold by
order of the court having jurisdiction of the weapons
without placing the weapons for sale at public auction.

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Dear Mr. Vsetecka:

You inquire whether the District Court of Finney County can properly
dispose of confiscated weapons without placing the weapons for sale
at public auction. K.S.A. 1978 Supp. 22-2512 provides:

"When property seized is no longer required as
evidence, it shall be disposed of as follows: . . .
(5) Firearms, ammunition, explosives, bombs, and like
devices, which have been used in the commission of crime,
may be returned to the rightful owner, destroyed or sold
in the discretion of the court having jurisdiction of
the property. The sale and distribution of the proceeds
shall be as provided in K.S.A. 1978 Supp. 21-4206."

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This section provides the procedure for disposing of weapons which have been used in the commission of a crime and are no longer required for evidentiary purposes. As indicated, one of the options available to the court having jurisdiction of such weapons is to order the sale of the weapon. It is our opinion that in utilizing this option the court need not offer the weapons for sale at a public auction. The legislature clearly establishes separate and distinct categories for the various types of property which are seized as evidence of a crime. Each subsection of K.S.A. 1978 Supp. 22-2512 includes both a distinct category of property and an authorized method of disposal of the property. Subsection (5), which involves the disposal of weapons used in the commission of a crime, does not mention or require that the sale be accomplished by public auction. While the language of this subsection alone indicates that a public auction is not required, further support for this view is indicated in subsection (3) which governs the disposal of unclaimed property and explicitly requires the public auction method of sale. In viewing the statute as a whole, it is clear that the legislature would have explicitly stated the requirement for a public auction in the disposal of weapons if that had been the desire of the legislature. For these reasons, our opinion is that the sale contemplated in K.S.A. 1978 Supp. 22-2512(5) does not require a sale by public auction.

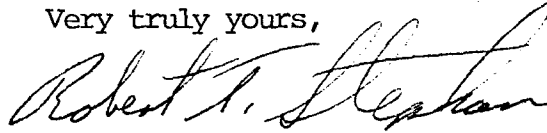
Although your inquiry does not expressly request an opinion regarding the court's option to return weapons to the rightful owner, it should be noted that this option is limited to some extent by the provisions of K.S.A. 1978 Supp. 21-4206. Whereas K.S.A. 1978 Supp. 22-2512(5) would indicate that the court could return confiscated weapons to the rightful owner in any case, the language of K.S.A. 1978 Supp. 21-4206 establishes an exception to the general provision. It is our opinion that the latter statute prohibits the return of weapons which were used in connection with the crimes described in K.S.A. 21-4201, 21-4204 or 21-4204 when a conviction was obtained, unless the weapon was stolen from the rightful owner prior to the commission of the crime. In other words the weapon may not be returned to the rightful owner if it was not a stolen weapon at the time that the crime occurred.

A final point in this area is that K.S.A. 1978 Supp. 22-2512(5) deals only with seized weapons which have been used in the commission of

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crime. As such, it would not apply to weapons in the custody of law enforcement agencies which constitute merely lost, mislaid or unclaimed property.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



James E. Flory
Assistant Attorney General

RTS:TDH:JEF:may