CRIMINAL LAW -
HABITUAL CRIMINAL ACT: Death sentence may be imposed on charge under habitual criminal act.

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Honorable Michael W. O'Hern,
First Assistant Prosecuting Attorney,
Kansas City, Missouri.

Dear Sir:

We are in receipt of your inquiry, which is as follows:

> "I would like to have your interpretation of a portion of Section 4461 R. S. 1929, known as the Second Offense Act, and also the case of State vs Krebs, 80th S. W. 2nd, 196, if it is your custom to give such an opinion to a prosecuting attorney.
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> "The point in question can be stated briefly:
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> "A person is charged with Murder in the first degree. He had previously been convicted of a felony and complied with his sentence as provided in Section 4461.
>
> "Can he be charged and tried under the Second Offense Act and given the death penalty by the jury?"

We construe your inquiry to be based on the following facts:

The defendant has heretofore been convicted of a felony under the laws of Missouri, sentenced to the penitentiary, and has been regularly discharged therefrom. This defendant is now accused of murder in the first degree. May he be properly charged and prosecuted under the habitual criminal act?

Section 4461, R. S. Mo. 1929, reads as follows:

> "If any person convicted of any offense punishable by imprisonment in the penitentiary, or of any attempt to commit an offense which, if perpetrated would be punishable by imprisonment in the penitentiary, shall be discharged, either upon pardon or upon compliance with the sentence, and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life; second, if such subsequent offense be such that, upon a first conviction, the offender would be punished by imprisonment for a limited term of years, then such person shall be punished by imprisonment in the penitentiary for the longest term prescribed upon a conviction for such first offense; third, if such subsequent conviction be for an attempt to commit an offense which, if perpetrated, would be punishable by imprisonment in the penitentiary, the person convicted of such subsequent offense shall be punished by imprisonment in the penitentiary for a term not exceeding five years."

It will be noted that this section says:

> "If any person convicted of any offense punishable by imprisonment in the penitentiary * * * shall be discharged * * * and shall subsequently be convicted of any offense committed after such pardon or discharge, he shall be punished as follows: First, if such subsequent offense be such that, upon a first conviction, the offender would be punishable by imprisonment in the

> penitentiary for life, or for a term which under the provisions of this law might extend to imprisonment for life, then such person shall be punished by imprisonment in the penitentiary for life."

In the case of State v. Krebs, 80 S. W. (2d) 196, the Supreme Court of this state had this question under consideration, and the defendant there was contending that to hold that the habitual criminal section has any application to capital offenses is to reach an absurdity, and contended that under such a view, a person accused of a capital offense and found to have a criminal record could only be sentenced to life imprisonment; whereas, a person accused of a capital offense, but without any criminal record, could be executed. The court, speaking as to that, said (l. c. 198):

> "We do not agree with appellant. It is not true that a person charged with and convicted of a capital offense under the habitual criminal section can only be sentenced to life imprisonment. When a defendant is charged under that statute and it is found that he has not been convicted before, the punishment prescribed for the crime generally may be assessed. State v. Sumpter, supra, 335 Mo. 620, loc. cit. 627, 73 S. W. (2d) 760, loc. cit. 763. If the punishment for the crime in the first instance includes the death penalty, the court or jury can impose it. Why should they be bound to assess a less punishment (life imprisonment) merely because they find the defendant has previously been convicted of one or more felonies and has served penitentiary sentences, especially when it is remembered that the obvious intent of the habitual criminal statute is to impose <u>heavier</u> penalties on defendants with felony records?
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> "We understand this point was expressly decided in State v. Taylor, 323 Mo. 15, 23, 18 S. W. (2d) 474, 476. In that case this court was discussing alleged conflicts

> between three statutes: What is now section 4061, fixing the punishment in the first instance for robbery in the first degree with a dangerous and deadly weapon; what is now section 4428 (Mo. St. Ann., sec. 4428, p. 3043), fixing increased punishments to be added by the trial judge for successive convictions of felonies committed while armed with a pistol or deadly weapon; and what is now section 4461 (Mo. St. Ann., sec. 4461, p. 3063). The appellant was contending that section 4428 (Laws Mo. 1927, p. 173 (Mo. St. Ann., sec. 4428, p. 3043) by implication repealed section 4461, the habitual criminal statute. This court said: 'We fail to find any conflict between the two statutes, although it is perfectly apparent that both cannot be effectively applied to the punishment in all cases at the same time. For example, a defendant might be sentenced to death for robbery in the first degree, accomplished by means of a dangerous and deadly weapon, under the provisions of section 3310, p. 174, Laws 1927 (Mo. St. Ann., sec. 4061, p. 2863), so that such defendant could undergo no additional punishment under section 3702 (Mo. St. Ann., sec. 4461, p. 3063), although it was alleged and proved that he had previously been convicted of a felony.'"

In the case of State v. Taylor, 18 S. W. (2d) 474, the court, speaking of the habitual criminal act, says (l. c. 476):

> "In substance, section 3702, R. S. 1919, requires the jury, upon conviction for any offense, to impose as punishment the maximum penalty provided by law for such offense, providing it is alleged and shown that the defendant has previously been sentenced upon a conviction of any offense punishable by imprisonment in the penitentiary or of an attempt to commit such an offense,

> has thereafter served out his sentence, and has been finally discharged. The character of the prior conviction and the nature of the subsequent charge are not controlling, so long as the first offense was punishable by imprisonment in the penitentiary, or was an attempt to commit such an offense."

As stated in the Krebs case, the object of this statute was to impose heavier penalties on the offender who has a previous criminal record.

If the jury, on having the question submitted to them of whether the defendant is guilty of the homicide charge, regardless of his criminal record theretofore, believe the facts justify it, they may assess the punishment at death.

Statutes should be given a reasonable construction, and it would be contrary to reason to contend that a defendant should be punished with a lighter sentence if he had been formerly convicted than if he had not.

CONCLUSION

It is our opinion that the defendant, under the circumstances set forth by your inquiry, is subject to being charged under the habitual criminal act, and if the jury have submitted to them by proper instructions the commission of the former felony, conviction thereof, service of the sentence and discharge, and they find that the same has occurred, and that defendant is guilty of the immediate charge, the jury may legally assess the death penalty and must, at all events, assess the defendant's punishment at as much as life imprisonment.

Very truly yours,

DRAKE WATSON,
Assistant Attorney General.

APPROVED:

JOHN W. HOFFMAN, Jr.,
(Acting) Attorney General.

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