**Opinion No. 65-164**

August 24, 1965

**BY:** OPINION OF BOSTON E. WITT, Attorney General Frank Bachicha, Jr., Assistant Attorney General

**TO:** Harold A. Cox, Warden, New Mexico State Penitentiary, P.O. Box 1059, Santa Fe, New Mexico

## QUESTION

QUESTION

Are the parole limitations contained in the Narcotic Drug Act applicable against a defendant who is convicted of an offense under said Act, and whose sentence is increased under the provisions of the Habitual Criminal Act?

CONCLUSION

Yes.

## OPINION

*{*275}* ANALYSIS

*{*276}* Section 54-7-15, N.M.S.A., 1953 Compilation, a provision of the Uniform Narcotic Drug Act, contains a limitation upon the granting of parole as follows:

"Upon conviction of any offense by an adult under the Uniform Narcotic Drug Act, the imposition or execution of a sentence shall not be suspended or probation or **parole shall not be granted until the minimum imprisonment provided for the offense shall have been served. . . ."** (Emphasis supplied).

It is well to note at the outset that the increase in the sentence of an habitual criminal does not effect the length of time during which the parole limitation is in effect. The emphasized language above indicates that parole may be granted once the minimum imprisonment **"provided for the offense"** is served. This is not in our opinion a requirement that the minimum sentence **imposed** must be served before parole eligibility.

An increase in sentence of one convicted under the Narcotic Drug Act, pursuant to the provisions of the Habitual Criminal Act does not change the fact of conviction. Nor does the Act make the conviction of prior felonies the subject of punishment, as such, as a separate offense. It is said that it provides merely that proof of the conviction of prior felonies increases the penalty to be imposed upon conviction of a subsequent felony in

New Mexico. See **French v. Cox,** 74 N.M. 593, 396 P. 2d 423 (1964). In **Lott v. Cox,** unreported, April 12, 1965, No. 7846, our Court decided that an increased sentence under the Habitual Criminal Act imposed in a case separate and apart from **the felony case** was null and void, even though the act contemplates and permits the charging of prior convictions by a separate information filed in a separate case, where the only issue is the identity of the accused as the person previously convicted of felonies. The Court said:

". . . Habitual criminality, however, is a status rather than an offense, so that allegations of prior convictions do not constitute a charge of a distinct crime but only relate to the punishment to be imposed in the last case in which the accused was convicted of a felony in this state." Citing **French v. Cox,** supra.

It is obvious then that since being a habitual criminal does not constitute a crime, a person cannot be convicted therefor. Applying this reasoning to the instant situation, we find that a person convicted under the provisions of the Uniform Narcotic Drug Act, but whose sentence is increased because of the application of the Habitual Criminal Act, would still properly be considered as convicted under the Uniform Narcotic Drug Act, though he would occupy the **status** of an habitual criminal.

The clear intent of the legislature in imposing the above mentioned restrictions on suspensions of sentence and the granting of probation or parole was to treat differently those adults convicted of an offense under the Uniform Narcotic Drug Act. See Attorney General Opinion No. 64-62, dated May 8, 1964. To say that the mere application of the Habitual Criminal Act negates those restrictions would require us to ignore the prior construction of the Habitual Criminal Law and the obvious intent of the legislature.

Based upon the above analysis, it is our opinion that a person convicted of an offense under the Uniform Narcotic Drug Act whose sentence has been increased by application of the Habitual Criminal Act is not eligible for parole until he has served the "minimum imprisonment provided for the offense," as required by Section 54-7-15, supra.