

Department of Correctional Services
Special Investigative Committee of the Legislature

Senators:

Steve Lathrop – Chair
Les Seiler – Vice-chair
Kate Bolz
Ernie Chambers
Bob Krist
Heath Mello
Paul Schumacher

Hearing date: 9/4/2014

Testifiers:

Linda Willard
John Freudenberg
Ron Reithmuller
Jeannene Douglass
Kyle Poppert
George Green
Sharon Lindgren
Kathy Blum



STATE OF NEBRASKA Office of the Attorney General

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DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

#96066

NO. STATE OF NEBRASKA
OFFICIAL
AUG 28 1996
DEPT. OF JUSTICE

DATE: August 28, 1996
SUBJECT: Application of Good Time to Mandatory Minimum Terms
REQUESTED BY: Senator Don Wesely
WRITTEN BY: Don Stenberg, Attorney General
Laurie Smith Camp, Deputy Attorney General

You have asked whether good time applies to mandatory minimum sentences. We conclude that good time does not apply to mandatory minimum sentences, and that an inmate may not be paroled or discharged before the completion of the mandatory minimum term.

In 1989, the Nebraska Legislature enacted LB592, which provided mandatory minimum terms for certain drug offenses. The bill specified that any person convicted of an offense carrying such a mandatory minimum term "shall not be eligible for parole prior to serving the mandatory minimum sentence." Neb. Rev. Stat. § 28-416(10) (1989).

On January 25, 1994, this office advised the Director of the Nebraska Department of Correctional Services and the Chairperson of the Nebraska Board of Parole that, whether or not the Department applied good time to mandatory minimum terms, inmates could not be paroled prior to serving their mandatory minimum sentences. Attached for your reference is a copy of my letter to Harold Clarke and Ethel Landrum.

David K. Arterburn
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Dale A. Cooner
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Melanie J. Millmore-Hantzel
Linda L. Willard

Senator Don Wesely
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In 1995, LB371 re-classified several criminal offenses, causing them to carry mandatory minimum terms. The bill noted that a "person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation", and the bill re-wrote Nebraska's good time laws, effective July 1, 1996, so that good time is no longer applicable to minimum terms:

[E]very committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term.

Neb. Rev. Stat. § 83-1,110 (Supp. 1995).

The legislative history of LB592 (1989) and LB371 (1995) makes clear the fact that the Nebraska Legislature expected inmates who were sentenced for offenses carrying mandatory minimum terms to serve the full mandatory minimum term before being paroled or discharged. The introducers' statements of intent, their introductions of the bills before the Judiciary Committee, and the discussion of the bills both before the Committee and during floor debate, support this conclusion. For example, when introducing LB592 in 1989, Senator Chris Abboud said that "the bill requires a mandatory prison sentence upon conviction . . .". In his Statement of Intent for LB371 in 1995, Senator John Lindsay described the mandatory minimum terms as "the minimum penalty" of "years imprisonment". He represented that: "No person sentenced to a mandatory term under these statutes would be eligible for probation or reductions for good time." During floor debate, there was discussion of (unsuccessful) amendments which would have allowed inmates to serve less than the mandatory minimums prescribed under LB371. Senator Kristensen said: "[Those amendments] will give them the opportunity for good time, so instead of 25 years in prison, they could be out in 12, and that is something we cannot let happen in Nebraska."

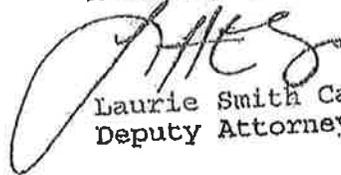
Although it is apparent from the Legislative History of LB592 and LB371 that the Nebraska Legislature expected inmates sentenced to mandatory minimum terms to be incarcerated for the full mandatory minimum term, inmates could be discharged before the expiration of a mandatory minimum term if the Department of Correctional Services were to apply good time to the inmates' maximum terms and were to use the maximum terms to determine the date of discharge, without consideration of whether or not the inmate had been sentenced to a mandatory minimum term.

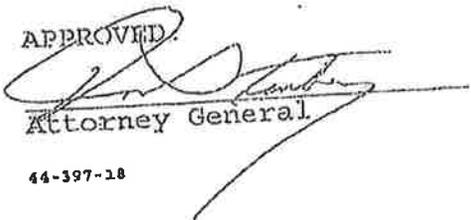
Senator Don Wesely
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Based on the Legislative History of LB592 (1989) and LB371 (1995), we conclude that an inmate who has been sentenced to a mandatory minimum term can neither be paroled nor discharged from custody of the Nebraska Department of Correctional Services prior to serving the full mandatory minimum term.

Sincerely,

DON STENBERG
Attorney General


Laurie Smith Camp
Deputy Attorney General

APPROVED

Attorney General

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES
Harold W. Clarke
Director

MEMORANDUM



E. Benjamin Nelson
Governor

DATE: September 18, 1996
TO: Records Staff
FROM: Ron Riethmuller, Records Administrator *[Signature]*
RE: Computing Parole Eligibility and Discharge Dates on Inmates Serving Mandatory Minimums

To comply with the recent Attorney General's Opinion concerning mandatory minimum sentences, the following procedures shall be used to insure that mandatory minimum terms are served.

We will proceed with the procedure as was discussed at the July 12, 1996 records meeting regarding parole eligibility computation. The parole eligibility date is computed based on the inmate serving the entire mandatory minimum term provided by statute plus one-half (1/2) of the balance of any court imposed minimum term beyond the mandatory minimum. For example, a total sentence of 8 to 14 years for a 1DF (mandatory minimum of 3 years) is computed as follows:

Parole Eligibility: Inmate must serve the entire three (3) years PLUS one-half (1/2) of the remaining five (5) years, a total of 5 1/2 years for parole eligibility. This procedure, which complies with the language in LB 371, prohibits awarding of good time on mandatory minimums.

The following procedure will insure that no inmate is discharged prior to serving the mandatory minimum.

1. The discharge date on the maximum term will be compared with the mandatory minimum provided by statute.
2. If the discharge date is prior to the inmate serving the entire statutory mandatory minimum, the discharge date shall be changed to reflect the later date.
Example: If an inmate is sentenced to a term of 3 to 5 years for a 1DF under LB 816, both the parole eligibility and discharge dates would be 3 years.
3. If the discharge date on the maximum term is longer than the mandatory minimum, no changes will be made on the discharge date.

I have reviewed the mandatory minimums on all active inmates; this procedure will extend the discharge dates of nine inmates. A list of the affected inmates is attached.

xc: Harold W. Clarke
Larry A. Tewes
George D. Green
Laurie Smith Camp
Manuel S. Gallardo

 [West Reporter Image \(PDF\)](#)

265 Neb. 47, 654 N.W.2d 191

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[Judges and Attorneys](#)

Supreme Court of Nebraska.
James JOHNSON, Appellee,
v.
Mike KENNEY, Appellant.

No. S-02-202.
Dec. 20, 2002.

Subsequent to Defendant pled guilty of delivery of a controlled substance and being a habitual criminal, defendant filed petition seeking habeas corpus relief. The District Court, Lancaster County, Paul D. Merritt, Jr., J., found defendant was being detained without legal authority and ordered that he be discharged. State appealed. The Supreme Court, Wright, J., held that statute requiring executive officer of correctional facility to reduce term of committed offender for good behavior did not apply to reduce mandatory minimum sentences imposed on habitual criminals.

Reversed and remanded with directions to dismiss.

West Headnotes

[\[1\] !\[\]\(b8c3076ac50760d63c68e275d920a7b7_img.jpg\) KeyCite Citing References for this Headnote](#)

- ◀ [110 Criminal Law](#)
- ◀ [110XXIV Review](#)
- ◀ [110XXIV\(L\) Scope of Review in General](#)
- ◀ [110XXIV\(L\)4 Scope of Inquiry](#)
- ◀ [110k1134.29 k. Constitutional issues in general. Most Cited Cases](#)
(Formerly 110k1134(3))

Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

[\[2\] !\[\]\(47428714a89bcbfda6d656c9384d4eef_img.jpg\) KeyCite Citing References for this Headnote](#)

- ◀ [310 Prisons](#)
- ◀ [310II Prisoners and Inmates](#)
- ◀ [310II\(F\) Duration of Confinement](#)
- ◀ [310k243 Good Conduct or Other Earned Credits Against Sentence](#)
- ◀ [310k245 Right to Credits; Eligibility and Entitlement](#)
- ◀ [310k245\(3\) k. Particular issues and applications. Most Cited Cases](#)
(Formerly 310k15(3))
- ◀ [350H Sentencing and Punishment](#)  [KeyCite Citing References for this Headnote](#)
- ◀ [350HVI Habitual and Career Offenders](#)
- ◀ [350HVI\(L\) Punishment](#)
- ◀ [350Hk1400 k. In general. Most Cited Cases](#)

Statute requiring executive officer of correctional facility to reduce term of committed offender for

good behavior did not apply to reduce mandatory minimum sentences imposed on habitual criminals, given legislative history stating that no person sentenced to mandatory term under habitual criminal sentencing statutes would be eligible for reductions for good time, and other relevant statutes; intent of habitual criminal sentencing would be thwarted if good time credit were applied to maximum term of sentence before mandatory minimum sentence had been served. Neb.Rev.St. §§ 29-2221, 83-1,107.

[3]  KeyCite Citing References for this Headnote

◀ 361 Statutes

◀ 361III Construction

◀ 361III(C) Clarity and Ambiguity; Multiple Meanings

◀ 361k1101 k. In general. Most Cited Cases
(Formerly 361k190)

A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.

[4]  KeyCite Citing References for this Headnote

◀ 361 Statutes

◀ 361III Construction

◀ 361III(C) Clarity and Ambiguity; Multiple Meanings

◀ 361k1102 k. What constitutes ambiguity; how determined. Most Cited Cases
(Formerly 361k190)

◀ 361 Statutes  KeyCite Citing References for this Headnote

◀ 361III Construction

◀ 361III(G) Other Law, Construction with Reference to

◀ 361k1210 Other Statutes

◀ 361k1216 Similar or Related Statutes

◀ 361k1216(3) k. In pari materia. Most Cited Cases
(Formerly 361k190)

A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.

[5]  KeyCite Citing References for this Headnote

◀ 361 Statutes

◀ 361III Construction

◀ 361III(A) In General

◀ 361k1074 Purpose

◀ 361k1075 k. In general. Most Cited Cases
(Formerly 361k184)

◀ 361 Statutes  KeyCite Citing References for this Headnote

◀ 361IV Operation and Effect

◀ 361k1402 Construction in View of Effects, Consequences, or Results

◀ 361k1403 k. In general. Most Cited Cases
(Formerly 361k184)

In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would

defeat it.

[6]  KeyCite Citing References for this Headnote

↳ 361 Statutes

↳ 361III Construction

↳ 361III(A) In General

↳ 361k1078 Language

↳ 361k1080 k. Language and Intent, will, purpose, or policy. Most Cited Cases
(Formerly 361k184)

↳ 361 Statutes  KeyCite Citing References for this Headnote

↳ 361III Construction

↳ 361III(B) Plain Language; Plain, Ordinary, or Common Meaning

↳ 361k1091 k. In general. Most Cited Cases

(Formerly 361k184)

↳ 361 Statutes  KeyCite Citing References for this Headnote

↳ 361III Construction

↳ 361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another

↳ 361k1151 k. In general. Most Cited Cases

(Formerly 361k184)

In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

[7]  KeyCite Citing References for this Headnote

↳ 361 Statutes

↳ 361III Construction

↳ 361III(M) Presumptions and Inferences as to Construction

↳ 361k1381 Other Law, Construction with Reference to

↳ 361k1386 k. Change in Law. Most Cited Cases

(Formerly 361k212.7)

If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law.

****192 Syllabus by the Court**

***47 1. Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

2. Statutes. A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.

3. Statutes. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.

4. Statutes. In construing a statute, a court must look to the statute's purpose and give the

statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

5. Statutes: Legislature: Intent. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

6. Statutes: Legislature: Intent: Presumptions. If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law.

Don Stenberg, Attorney General, and Linda L. Willard, Lincoln, for appellant.

Stephanie J. Garner Kotik, of Cleveland Law Offices, for appellee, and, on brief, James Johnson, pro se.

***48 HENDRY, C.J.**, and WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

WRIGHT, J.

NATURE OF CASE

James Johnson pled guilty to charges of delivery of a controlled substance and being a habitual criminal, and he was sentenced to 10 years' imprisonment. Johnson subsequently filed a petition seeking habeas corpus relief, alleging that pursuant to Neb.Rev.Stat. § 83-1,107(1) (Reissue 1994), he was entitled to have his sentence reduced by 6 months for each year of the sentence and that as a result of not receiving such sentence reduction, he was being wrongfully held. (Although § 83-1,107 has subsequently been amended, all references in this opinion are to Reissue 1994.) The district court for Lancaster County found that Johnson was being detained without legal authority and ordered that he be discharged from the custody of the Department of Correctional Services (Department). Mike Kenney, warden of the Nebraska State Penitentiary, appeals.

SCOPE OF REVIEW

[1]  Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. State v. Mather, 264 Neb. 182, 646 N.W.2d 605 (2002).

**193 FACTS

On September 16, 1996, Johnson pled guilty to charges of delivery of a controlled substance and being a habitual criminal. Thereafter, he was sentenced to a term of 10 years' imprisonment with credit for 243 days previously served.

On March 12, 2001, Johnson filed a pro se petition for writ of habeas corpus, seeking relief under Neb.Rev.Stat. § 29-2801 et seq. (Reissue 1995). Johnson alleged that pursuant to Nebraska's "good time statute," § 83-1,107(1), he was entitled to have his sentence reduced by 6 months for each year of the sentence, and that Kenney had failed to give him that credit. Johnson claimed that as a result of Kenney's failure to give Johnson good time credit, he was being wrongfully held by the Department.

***49** Johnson was sentenced pursuant to Neb.Rev.Stat. § 29-2221(1) (Reissue 1995), which requires a mandatory minimum term of 10 years in prison for a habitual criminal conviction. Throughout these proceedings, Kenney has maintained that good time credit required by § 83-1,107(1) does not apply to a mandatory minimum sentence imposed under § 29-2221(1).

The trial court found that Johnson was entitled to receive good time credit of 6 months for each year of the sentence imposed. The court concluded that with a proper application of good time credit, the maximum portion of Johnson's sentence should have been reduced to 5 years. Finding that no

evidence had been presented to establish that Johnson had lost any of his good time credit, the court determined that Johnson was being detained without legal authority and ordered that he be discharged. Kenney filed a timely notice of appeal, and we granted Johnson's petition to bypass.

ASSIGNMENT OF ERROR

Kenney asserts, restated, that the trial court erred in finding that good time credit applies to mandatory minimum sentences imposed on habitual criminals under § 29-2221(1).

ANALYSIS

The Issue presented is one of statutory interpretation: whether the good time credit set forth in § 83-1,107(1) applies to the mandatory minimum sentence imposed upon Johnson pursuant to § 29-2221(1). We first set forth the relevant portions of each statute.

Before it was amended by 1995 Neb. Laws, L.B. 371, § 29-2221 provided that the minimum sentence imposed on a person found to be a habitual criminal was a term of not less than 10 years. See § 29-2221 (Cum.Supp.1994). As amended by L.B. 371, § 29-2221(1) provides that a habitual criminal "shall be punished by imprisonment ... for a mandatory minimum term of ten years and a maximum term of not more than sixty years." L.B. 371 became operative on September 9, 1995, and is applicable to Johnson's case.

The relevant version of § 83-1,107 provides:

(1) The chief executive officer of a facility shall reduce the term of a committed offender by six months for each *50 year of the offender's term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:

- (a) From the minimum term, to determine the date of eligibility for release on parole; and
- **194 (b) From the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.

In granting Johnson habeas corpus relief, the trial court stated it was clear that § 29-2221(1) required a sentencing court in every case to impose a mandatory minimum sentence of 10 years. It noted, however, that such a requirement did not answer the question of whether Johnson, who received a straight sentence of 10 years, which represented both the mandatory minimum and the maximum sentence, was entitled to receive good time credit against his sentence.

The trial court stated that although the imposition of a mandatory minimum sentence affects a person's eligibility for probation and parole, § 83-1,107 does not address the effect imposition of a mandatory minimum sentence has on the application of good time credit to the maximum portion of the sentence. In essence, the court concluded that § 83-1,107 does not specifically exclude application of good time to the maximum portion of the sentence when a mandatory minimum sentence has been imposed. Finding no ambiguities in § 83-1,107, the court stated there was no need to resort to judicial interpretation nor any need to look to the legislative intent.

[2] [3] [4] We disagree with the trial court's finding that § 83-1,107 is not ambiguous. A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. State v. Hochstein and Anderson, 262 Neb. 311, 632 N.W.2d 273 (2001). A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. Premium Farms v. County of Holt, 263 Neb. 415, 640 N.W.2d 633 (2002). It is undisputed that a *51 habitual criminal sentenced under § 29-2221 may not be released on parole until the individual has served the mandatory minimum sentence of 10 years. The fact that § 83-1,107 does not address whether good time may be applied to the maximum term of the sentence when the mandatory minimum and the maximum term are the same number of years gives rise to the ambiguity.

When the relevant statutes are considered *in pari materia*, the intent of habitual criminal sentencing is thwarted if good time credit is applied to the maximum term of the sentence before the mandatory minimum sentence has been served. The minimum portion of the sentence would have no meaning.

In 1992, the Legislature passed L.B. 816, which made significant changes to the law regarding good time credit for criminal offenders under § 83-1,107. In explaining one of the purposes of the changes, the Introducer, Senator Ernie Chambers, stated:

The other significant effects of this bill is [sic] that no one will become eligible for parole after their mandatory discharge date.... Under the current law, a person can reach a date when they must be discharged before they are even eligible to be considered for parole. Since they must mandatorily be discharged before the Parole Board can even consider their case, there is no way for there to be Parole Board supervision.

Floor Debate, 92d Leg., 2d Sess. 7678 (Jan. 14, 1992).

Under the trial court's interpretation, the application of good time credit to the maximum portion of the sentence would result in a mandatory discharge before Johnson was eligible for parole under the minimum portion of the sentence. Johnson's maximum sentence and mandatory ****195** minimum sentence are both 10 years. Although he could not be released on parole, Johnson would receive a mandatory discharge from custody after only 5 years if good time reductions were applied to the maximum portion of the sentence.

Section 29-2221(1) requires that a habitual criminal "shall be punished by Imprisonment ... for a mandatory minimum term of ten years." It is clear the Legislature intended that imposition of a mandatory minimum sentence would result in a person's not being eligible for parole until the mandatory minimum sentence had been served. It would not serve the legislative intent if a ***52** defendant could be mandatorily discharged before being eligible for parole.

[5] [6] The language of § 83-1,107 cannot be adequately understood when considered *in pari materia* with related statutes. See Premium Farms v. County of Holt, 263 Neb. 415, 640 N.W.2d 633 (2002). In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. State v. Portsche, 261 Neb. 160, 622 N.W.2d 582 (2001). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. State v. Baker, 264 Neb. 867, 652 N.W.2d 612 (2002).

[7] Prior to its amendment, § 29-2221 provided that the sentence for a habitual criminal would be not less than 10 years. Section 29-2221 was subsequently amended to state that the sentence would be a mandatory minimum term of 10 years. If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. State v. Portsche, 258 Neb. 926, 606 N.W.2d 794 (2000).

Therefore, presuming that the Legislature intended a change in § 29-2221, we look to the legislative history concerning L.B. 371 in order to determine the Legislature's intent. The "Summary of L.B. 371 Referenced to the Judiciary Committee," which accompanied the Introducer's Statement of Intent, provided: "Habitual Criminal Sentencing ... No person sentenced to a mandatory term under these statutes would be eligible for probation or reductions for 'good time.'" Judiciary Committee Hearing, 94th Leg., 1st Sess. (Feb. 8, 1995). The floor debate concerning L.B. 371 also supports this position.

From our review of the legislative history, we conclude the Legislature did not intend that good time credit under § 83-1,107(1) would apply to reduce mandatory minimum sentences imposed on

habitual criminals under [§ 29-2221](#). Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to *53 reach an independent conclusion irrespective of the decision made by the court below. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

CONCLUSION

The trial court erred in finding that good time credit under [§ 83-1,107\(1\)](#) applies to mandatory minimum sentences imposed on habitual criminals pursuant to [§ 29-2221\(1\)](#). The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss Johnson's petition for writ of habeas corpus.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

Neb., 2002.

Johnson v. Kenney

265 Neb. 47, 654 N.W.2d 191

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- [2002 WL 34402541](#) (Appellate Brief) Brief of Appellant (May 7, 2002)

Judges and Attorneys ([Back to top](#))

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Judges

- **Connolly, Hon. William M.**

State of Nebraska Supreme Court
Lincoln, Nebraska 68509

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- **Gerrard, Hon. John Melvin**

United States District Court, Nebraska
Lincoln, Nebraska 68508-3803

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- **Hendry, Hon. John V.**

State of Nebraska Supreme Court
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- **McCormack, Hon. Michael**

State of Nebraska Supreme Court
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- **Merritt, Hon. Paul D. Jr.**

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Lincoln, Nebraska 68508

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- **Stephan, Hon. Kenneth C.**

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• **Wright, Hon. John F.**

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• **Kotik, Stephanie Garner**

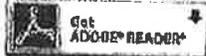
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STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES

Robert P. Houston

Director



Dave Heineman
Governor

MEMORANDUM

DATE: April 8, 2005
 TO: Douglas County District Court Judges
 FROM: Ron Riethmuller, Records Administrator 
 RE: Procedure for Calculating Mandatory Minimum Terms

The department uses the following method to calculate parole eligibility and mandatory discharge dates on sentences with mandatory minimum terms.

There are currently three felony statutes that have mandatory minimum terms:

1C felony	Mandatory minimum term of 5 years
1D felony	Mandatory minimum term of 3 years
Habitual Criminal	Mandatory minimum term of either 10 or 25 years

Nebraska Revised Statute §83-1,110 (1) states *"that every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term."* If the court imposed minimum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his parole eligibility. If the court-imposed minimum is longer than the statutory minimum term, the inmate must serve the entire mandatory minimum portion plus $\frac{1}{2}$ of any years above the mandatory minimum term. For example, if the court imposed a minimum term of 10 years for a 1C felony, the inmate would serve 5 years on the mandatory minimum portion and $2\frac{1}{2}$ years on the remaining 5 years, for a total of $7\frac{1}{2}$ years. Any credit for time previously served, would also be deducted.

To calculate the mandatory discharge date, the department relies on the Nebraska Supreme Court ruling in Johnson v. Kenney 265 Neb. 47 (2002) which concluded that good time credit under Nebraska Revised Statute §83-1,107 (1) would not apply to reduce a mandatory minimum term. If the court-imposed maximum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his mandatory discharge. If the court imposed maximum term is longer than the mandatory minimum term, the mandatory discharge date with good time is compared to mandatory minimum without good time. The mandatory discharge date will be the longer of the two dates. For example, if the court imposed a maximum term of 15 years for a habitual criminal conviction, the discharge date would be changed to 10 years. If the court imposed maximum term was 20 years or longer, then the discharge date would be calculated in the normal manner. This method insures that no inmate will be discharged prior to serving the mandatory minimum portion of the sentence.

The method listed above in calculating the mandatory discharge date is departmental policy. To date, there have not been any court decisions that have specifically addressed calculating discharge dates on maximum terms that are longer than the mandatory minimum.

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES
 Robert P. Houston
 Director



Dave Heineman
 Governor

MEMORANDUM

DATE: April 23, 2007
 TO: George Green, General Counsel
 FROM: Ron Riethmuller, Records Administrator *RR*
 RE: Clarification on Procedure for Calculating Discharge Dates on Mandatory Minimum Terms

I have had recent discussions with several District Judges concerning the method the department uses for calculating discharge dates on inmates serving mandatory minimum terms. There is consensus among the Judges and the department on the method used to calculate the parole eligibility date on inmates serving mandatory minimum terms. However, I have been questioned concerning the method the department uses in calculating the discharge date. The purpose of this memo is to seek clarification to determine if the current departmental method is correct or whether the procedure should be changed.

There are currently three felony statutes that have mandatory minimum terms:

1C felony	Mandatory minimum term of 5 years
1D felony	Mandatory minimum term of 3 years
Habitual Criminal	Mandatory minimum term of either 10 or 25 years

The issue is whether or not good time applies to the inmate's maximum term when computing their discharge date.

Currently the department relies on Nebraska Attorney General's Opinion #96066 which concluded that an inmate could not be discharged prior to serving their mandatory minimum term. Based on that opinion, the following procedure was adopted. If the court-imposed maximum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his mandatory discharge. If the court imposed maximum term is longer than the mandatory minimum term, the mandatory discharge date with good time is compared to mandatory minimum without good time. The mandatory discharge date will be the longer of the two dates.

For example, if the court imposed a maximum term of 15 years for a habitual criminal conviction, the discharge date would be changed to 10 years. If the court imposed maximum term was 20 years or longer, then the discharge date would be calculated in the normal manner. This method insures that no inmate will be discharged prior to serving the mandatory minimum portion of the sentence.

The Nebraska Supreme Court ruling in Johnson v. Kenney, 265 Neb.47 (2002) concluded that good time credit under Nebraska Revised Statute §83-1,107 (1) would not apply to reduce a mandatory minimum term. Does this ruling change our current method of comparing the discharge date with good time to the discharge date without good time? Does this ruling imply the department should use the same method to calculate discharge dates that we use to calculate parole eligibility dates? We calculate parole eligibility dates pursuant to the following method.

Nebraska Revised Statute §83-1,110 (1) states ***"that every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term."*** If the court imposed minimum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his parole eligibility. If the court-imposed minimum is longer than the statutory minimum term, the inmate must serve the entire mandatory minimum portion plus ½ of any years above the mandatory minimum term. For example, if the court imposed a minimum term of 10 years for a 1C felony, the inmate would serve 5 years on the mandatory minimum portion and 2½ years on the remaining 5 years, for a total of 7½ years. Any credit for time previously served, would also be deducted.

The department hasn't been challenged on our current method because it benefits the inmate. If we adopt the same procedure we use for calculating parole eligibility dates, the inmates will serve additional time.

There have been several recent sentences imposed under the habitual criminal statutes. The conversations I've had with the Judge's pertain to the courts "truth in sentencing" statute that requires them to inform the inmate at the time the sentence is imposed, how much time they'll actually serve.

For your review, I have attached copies of AG opinion #96066 and Johnson v Kenney decision. I realize this issue may appear complicated, however, it would be much easier for me to explain it to you in person.

From: Microsoft Exchange on behalf of Douglass, Jeannene
Sent: Thursday, October 30, 2008 9:04 AM
To: Wilken, Kevin
Cc: Poppert, Kyle
Subject: RE:
Attachments: RE:

Sender: Jeannene.Douglass@nebraska.gov

Subject: RE:

Message-Id: <960ECE121A2CF741849DFAC189F253240B6494855E@STNEMAIL01.stone.ne.gov>

To: Kevin.Wilken@nebraska.gov

Cc: Kyle.Poppert@nebraska.gov

From: Douglass, Jeannene
Sent: Thursday, October 30, 2008 9:07 AM
To: Wilken, Kevin
Cc: Poppert, Kyle
Subject: RE: _____

Good morning, Kevin:

After reading the Opinion and Statutes (and Ron's April 23, 2007 memo) again regarding mandatory minimums and Parole Eligibility and discharge date calculations, I now understand the way we have been and should continue to calculate these dates.

Parole eligibility is calculated with the full mandatory minimum term plus $\frac{1}{2}$ of any time above and beyond that mandatory minimum sentence.

Discharge is $\frac{1}{2}$ of the maximum sentence or the flat mandatory minimum requirement

parole eligibility date will be 9-12-2018. He will discharge on 9-12-2017.

It does seem odd that he will discharge prior to becoming eligible for parole, but that's because of the way the sentence is structured (in essence, he is serving an 11-year minimum term and a 10-year maximum term).

Thanks for your input. This was a good research question and learning situation. Let me know if you have questions.

Jeannene

From: Wilken, Kevin
Sent: Wednesday, October 29, 2008 3:48 PM
To: Douglass, Jeannene; Garrison, Kelth
Subject: RE

My assumption would be that he would have to serve the 10 years plus $\frac{1}{2}$ the remaining maximum...which would make his TRD after 12 $\frac{1}{2}$ years minus JTC. I would think his TRD should be 3/12/2020. Don't quote me on that, but I would think his TRD would have to be longer than his PED.

From: Douglass, Jeannene
Sent: Wednesday, October 29, 2008 3:36 PM
To: Wilken, Kevin
Cc: Garrison, Kelth
Subject:

Hi, Kevin:

I've been researching the procedures for calculating the mandatory minimum sentences and here's what I'm thinking.

From: Douglass, Jeannene
Sent: Monday, July 13, 2009 11:07 AM
To: Baum, Mickie
Subject: Mandatory Minimum sentence calculation procedures
Attachments: 1856_001.pdf

Hi, Mickie:

Attached are some of the letters/AGO/court opinions, regarding how sentence calculations are done when mandatory minimums are involved. Give me a "holler" and we can go over it if you want/need to do that.

Let me know if I need to keep searching.

Thanks.

Jeannene

From: NE BOARD OF PAROLE [<mailto:scans@dcs.state.ne.us>]
Sent: Monday, July 13, 2009 9:47 AM
To: Douglass, Jeannene
Subject: PAROLE BOARD ATTACHMENT

Westlaw

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265 Neb. 47, 654 N.W.2d 191

(Cite as: 265 Neb. 47, 654 N.W.2d 191)

C

Supreme Court of Nebraska.
James JOHNSON, Appellee,
v.
Mike KENNEY, Appellant.
No. S-02-202.

Dec. 20, 2002.

Subsequent to Defendant pled guilty of delivery of a controlled substance and being a habitual criminal, defendant filed petition seeking habeas corpus relief. The District Court, Lancaster County, Paul D. Morritt, Jr., J., found defendant was being detained without legal authority and ordered that he be discharged. State appealed. The Supreme Court, Wright, J., held that statute requiring executive officer of correctional facility to reduce term of committed offender for good behavior did not apply to reduce mandatory minimum sentences imposed on habitual criminals.

Reversed and remanded with directions to dismiss.

West Headnotes

[1] Criminal Law ¶1134(3)

110k1134(3) Most Cited Cases

Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

[2] Prisons ¶15(3)

310k15(3) Most Cited Cases

[2] Sentencing and Punishment ¶1400

350Hk1400 Most Cited Cases

Statute requiring executive officer of correctional facility to reduce term of committed offender for good behavior did not apply to reduce mandatory minimum sentences imposed on habitual criminals, given legislative history stating that no person

sentenced to mandatory term under habitual criminal sentencing statutes would be eligible for reductions for good time, and other relevant statutes; intent of habitual criminal sentencing would be thwarted if good time credit were applied to maximum term of sentence before mandatory minimum sentence had been served. Neb.Rev.St. §§ 29-2221, 83-1,107.

[3] Statutes ¶190

361k190 Most Cited Cases

A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.

[4] Statutes ¶190

361k190 Most Cited Cases

A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.

[5] Statutes ¶184

361k184 Most Cited Cases

In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.

[6] Statutes ¶184

361k184 Most Cited Cases

In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.

[7] Statutes ¶212.7

361k212.7 Most Cited Cases

If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the

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(Cite as: 265 Neb. 47, 654 N.W.2d 191)

*49 Johnson was sentenced pursuant to Neb.Rev.Stat. § 29-2221(1) (Reissue 1995), which requires a mandatory minimum term of 10 years in prison for a habitual criminal conviction. Throughout these proceedings, Kenney has maintained that good time credit required by § 83-1,107(1) does not apply to a mandatory minimum sentence imposed under § 29-2221(1).

The trial court found that Johnson was entitled to receive good time credit of 6 months for each year of the sentence imposed. The court concluded that with a proper application of good time credit, the maximum portion of Johnson's sentence should have been reduced to 5 years. Finding that no evidence had been presented to establish that Johnson had lost any of his good time credit, the court determined that Johnson was being detained without legal authority and ordered that he be discharged. Kenney filed a timely notice of appeal, and we granted Johnson's petition to bypass.

ASSIGNMENT OF ERROR

Kenney asserts, restated, that the trial court erred in finding that good time credit applies to mandatory minimum sentences imposed on habitual criminals under § 29-2221(1).

ANALYSIS

The issue presented is one of statutory interpretation: whether the good time credit set forth in § 83-1,107(1) applies to the mandatory minimum sentence imposed upon Johnson pursuant to § 29-2221(1). We first set forth the relevant portions of each statute.

Before it was amended by 1995 Neb. Laws, L.B. 371, § 29-2221 provided that the minimum sentence imposed on a person found to be a habitual criminal was a term of not less than 10 years. See § 29-2221 (Cum.Supp.1994). As amended by L.B. 371, § 29-2221(1) provides that a habitual criminal "shall be punished by imprisonment ... for a mandatory minimum term of ten years and a maximum term of not more than sixty years." L.B. 371 became operative on September 9, 1995, and is applicable to Johnson's case.

The relevant version of § 83-1,107 provides:

(1) The chief executive officer of a facility shall reduce the term of a committed offender by six months for each *30 year of the offender's term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:

(a) From the minimum term, to determine the date of eligibility for release on parole; and
 **194 (b) From the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.

In granting Johnson habeas corpus relief, the trial court stated it was clear that § 29-2221(1) required a sentencing court in every case to impose a mandatory minimum sentence of 10 years. It noted, however, that such a requirement did not answer the question of whether Johnson, who received a straight sentence of 10 years, which represented both the mandatory minimum and the maximum sentence, was entitled to receive good time credit against his sentence.

The trial court stated that although the imposition of a mandatory minimum sentence affects a person's eligibility for probation and parole, § 83-1,107 does not address the effect imposition of a mandatory minimum sentence has on the application of good time credit to the maximum portion of the sentence. In essence, the court concluded that § 83-1,107 does not specifically exclude application of good time to the maximum portion of the sentence when a mandatory minimum sentence has been imposed. Finding no ambiguities in § 83-1,107, the court stated there was no need to resort to judicial interpretation nor any need to look to the legislative intent.

[2][3][4] We disagree with the trial court's finding that § 83-1,107 is not ambiguous. A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001).

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265 Neb. 47, 654 N.W.2d 191

(Cite as: 265 Neb. 47, 654 N.W.2d 191)

A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Premium Farms v. County of Holt*, 263 Neb. 413, 640 N.W.2d 633 (2002). It is undisputed that a "§1 habitual criminal sentenced under § 29-2221 may not be released on parole until the individual has served the mandatory minimum sentence of 10 years. The fact that § 83-1,107 does not address whether good time may be applied to the maximum term of the sentence when the mandatory minimum and the maximum term are the same number of years gives rise to the ambiguity.

When the relevant statutes are considered in pari materia, the intent of habitual criminal sentencing is thwarted if good time credit is applied to the maximum term of the sentence before the mandatory minimum sentence has been served. The minimum portion of the sentence would have no meaning.

In 1992, the Legislature passed L.B. 816, which made significant changes to the law regarding good time credit for criminal offenders under § 83-1,107. In explaining one of the purposes of the changes, the introducer, Senator Ernie Chambers, stated:

The other significant effects of this bill is [sic] that no one will become eligible for parole after their mandatory discharge date.... Under the current law, a person can reach a date when they must be discharged before they are even eligible to be considered for parole. Since they must mandatorily be discharged before the Parole Board can even consider their case, there is no way for there to be Parole Board supervision.

Floor Debata, 92d Leg., 2d Sess. 7678 (Jan. 14, 1992).

Under the trial court's interpretation, the application of good time credit to the maximum portion of the sentence would result in a mandatory discharge before Johnson was eligible for parole under the minimum portion of the sentence. Johnson's maximum sentence and mandatory "§198 minimum sentence are both 10 years. Although he could not be released on parole, Johnson would

receive a mandatory discharge from custody after only 5 years if good time reductions were applied to the maximum portion of the sentence.

Section 29-2221(1) requires that a habitual criminal "shall be punished by imprisonment ... for a mandatory minimum term of ten years." It is clear the Legislature intended that imposition of a mandatory minimum sentence would result in a person's not being eligible for parole until the mandatory minimum sentence had been served. It would not serve the legislative intent if a "§2 defendant could be mandatorily discharged before being eligible for parole.

[5][6] The language of § 83-1,107 cannot be adequately understood when considered in pari materia with related statutes. See *Premium Farms v. County of Holt*, 263 Neb. 413, 640 N.W.2d 633 (2002). In construing a statute, a court must look to the statute's purpose and give the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *State v. Portschke*, 261 Neb. 160, 622 N.W.2d 582 (2001). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

[7] Prior to its amendment, § 29-2221 provided that the sentence for a habitual criminal would be not less than 10 years. Section 29-2221 was subsequently amended to state that the sentence would be a mandatory minimum term of 10 years. If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. *State v. Portschke*, 258 Neb. 926, 606 N.W.2d 794 (2000).

Therefore, presuming that the Legislature intended a change in § 29-2221, we look to the legislative history concerning L.B. 371 in order to determine the Legislature's intent. The "Summary of L.B. 371 Referenced to the Judiciary Committee," which

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(Cite as: 265 Neb. 47, 654 N.W.2d 191)

accompanied the Introducer's Statement of Intent, provided: "Habitual Criminal Sentencing ... No person sentenced to a mandatory term under these statutes would be eligible for probation or reductions for 'good time.'" Judiciary Committee Hearing, 94th Leg., 1st Sess. (Feb. 8, 1995). The floor debate concerning L.B. 371 also supports this position.

From our review of the legislative history, we conclude the Legislature did not intend that good time credit under § 83-1,107(1) would apply to reduce mandatory minimum sentences imposed on habitual criminals under § 29-2221. Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to "§3 reach an independent conclusion irrespective of the decision made by the court below. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

CONCLUSION

The trial court erred in finding that good time credit under § 83- 1,107(1) applies to mandatory minimum sentences imposed on habitual criminals pursuant to § 29-2221(1). The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss Johnson's petition for writ of habeas corpus.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

265 Neb. 47, 654 N.W.2d 191

END OF DOCUMENT



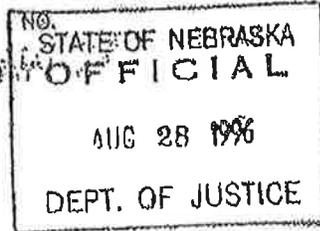
STATE OF NEBRASKA
Office of the Attorney General

2115 STATE CAPITOL BUILDING
LINCOLN, NE 68509-8920
(402) 471-2882
TDD (402) 471-2802
CAPITOL FAX (402) 471-3297
1235 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

#96066



DATE: August 28, 1996
SUBJECT: Application of Good Time to Mandatory Minimum Terms
REQUESTED BY: Senator Don Wesely
WRITTEN BY: Don Stenberg, Attorney General
Laurie Smith Camp, Deputy Attorney General

You have asked whether good time applies to mandatory minimum sentences. We conclude that good time does not apply to mandatory minimum sentences, and that an inmate may not be paroled or discharged before the completion of the mandatory minimum term.

In 1989, the Nebraska Legislature enacted LB592, which provided mandatory minimum terms for certain drug offenses. The bill specified that any person convicted of an offense carrying such a mandatory minimum term "shall not be eligible for parole prior to serving the mandatory minimum sentence." Neb. Rev. Stat. § 28-416(10) (1989).

On January 25, 1994, this office advised the Director of the Nebraska Department of Correctional Services and the Chairperson of the Nebraska Board of Parole that, whether or not the Department applied good time to mandatory minimum terms, inmates could not be paroled prior to serving their mandatory minimum sentences. Attached for your reference is a copy of my letter to Harold Clarke and Ethel Landrum.

David K. Arterburn
L. Jay Bartel
J. Kirk Brown
David T. Bydalek
Dale A. Comer
James A. Elworth
Lynne H. Fritz
Royce H. Harper

Lauren L. Hill
Jay C. Husley
Amy Holtenbeck
William L. Howland
Harilyn D. Hutchinson
Kimberly A. Klein
Joseph P. Linton

Charles E. Lowe
Lisa D. Harlin-Price
Lynn A. Nelson
Ronald D. Horavec
Friedrick F. Heid
Marc C. Powell
Kenneth W. Payne

Paul W. Potlode
Jonathan Robitaille
Lebert D. Rupp
James D. Smith
James H. Speers
Mark D. Starr
Harlan Swanson

Timothy J. Tuxel
John R. Thompson
Barry Wald
Terri H. Weeks
Alfonzo Whitaker
Melania J. Whitlure-Bantzios
Linda L. Willard

Senator Don Wesely
 August 28, 1996
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In 1995, LB371 re-classified several criminal offenses, causing them to carry mandatory minimum terms. The bill noted that a "person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation", and the bill re-wrote Nebraska's good time laws, effective July 1, 1996, so that good time is no longer applicable to minimum terms:

[E]very committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term.

Neb. Rev. Stat. § 83-1,110 (Supp. 1995).

The legislative history of LB592 (1989) and LB371 (1995) makes clear the fact that the Nebraska Legislature expected inmates who were sentenced for offenses carrying mandatory minimum terms to serve the full mandatory minimum term before being paroled or discharged. The introducers' statements of intent, their introductions of the bills before the Judiciary Committee, and the discussion of the bills both before the Committee and during floor debate, support this conclusion. For example, when introducing LB595 in 1989, Senator Chris Abboud said that "the bill requires a mandatory prison sentence upon conviction . . .". In his Statement of Intent for LB371 in 1995, Senator John Lindsay described the mandatory minimum terms as "the minimum penalty" of "years imprisonment". He represented that: "No person sentenced to a mandatory term under these statutes would be eligible for probation or reductions for good time." During floor debate, there was discussion of (unsuccessful) amendments which would have allowed inmates to serve less than the mandatory minimums prescribed under LB371. Senator Kristensen said: "[Those amendments] will give them the opportunity for good time, so instead of 25 years in prison, they could be out in 12, and that is something we cannot let happen in Nebraska."

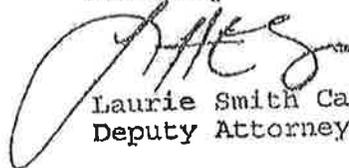
Although it is apparent from the Legislative History of LB592 and LB371 that the Nebraska Legislature expected inmates sentenced to mandatory minimum terms to be incarcerated for the full mandatory minimum term, inmates could be discharged before the expiration of a mandatory minimum term if the Department of Correctional Services were to apply good time to the inmates' maximum terms and were to use the maximum terms to determine the date of discharge, without consideration of whether or not the inmate had been sentenced to a mandatory minimum term.

Senator Don Wesely
August 28, 1996
Page -3-

Based on the Legislative History of LB592 (1989) and LB371 (1995), we conclude that an inmate who has been sentenced to a mandatory minimum term can neither be paroled nor discharged from custody of the Nebraska Department of Correctional Services prior to serving the full mandatory minimum term.

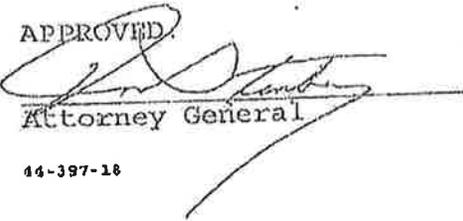
Sincerely,

DON STENBERG
Attorney General



Laurie Smith Camp
Deputy Attorney General

APPROVED


Attorney General

44-397-18

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES
 Robert P. Houston
 Director



Dave Heineman
 Governor

MEMORANDUM

DATE: April 8, 2005
 TO: Douglas County District Court Judges
 FROM: Ron Riethmuller, Records Administrator 
 RE: Procedure for Calculating Mandatory Minimum Terms

The department uses the following method to calculate parole eligibility and mandatory discharge dates on sentences with mandatory minimum terms.

There are currently three felony statutes that have mandatory minimum terms:

1C felony	Mandatory minimum term of 5 years
1D felony	Mandatory minimum term of 3 years
Habitual Criminal	Mandatory minimum term of either 10 or 25 years

Nebraska Revised Statute §83-1,110 (1) states ***“that every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term.”*** If the court imposed minimum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his parole eligibility. If the court-imposed minimum is longer than the statutory minimum term, the inmate must serve the entire mandatory minimum portion plus $\frac{1}{2}$ of any years above the mandatory minimum term. For example, if the court imposed a minimum term of 10 years for a 1C felony, the inmate would serve 5 years on the mandatory minimum portion and $2\frac{1}{2}$ years on the remaining 5 years, for a total of $7\frac{1}{2}$ years. Any credit for time previously served, would also be deducted.

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES

Robert P. Houston

Director



Dave Heineman
Governor

MEMORANDUM

DATE: April 23, 2007

TO: George Green, General Counsel

FROM: Ron Riethmuller, Records Administrator 

RE: Clarification on Procedure for Calculating Discharge Dates on Mandatory Minimum Terms

I have had recent discussions with several District Judges concerning the method the department uses for calculating discharge dates on inmates serving mandatory minimum terms. There is consensus among the Judges and the department on the method used to calculate the parole eligibility date on inmates serving mandatory minimum terms. However, I have been questioned concerning the method the department uses in calculating the discharge date. The purpose of this memo is to seek clarification to determine if the current departmental method is correct or whether the procedure should be changed.

There are currently three felony statutes that have mandatory minimum terms:

1C felony	Mandatory minimum term of 5 years
1D felony	Mandatory minimum term of 3 years
Habitual Criminal	Mandatory minimum term of either 10 or 25 years

The issue is whether or not good time applies to the inmate's maximum term when computing their discharge date.

Currently the department relies on Nebraska Attorney General's Opinion #96066 which concluded that an inmate could not be discharged prior to serving their mandatory minimum term. Based on that opinion, the following procedure was adopted. If the court-imposed maximum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his mandatory discharge. If the court imposed maximum term is longer than the mandatory minimum term, the mandatory discharge date with good time is compared to mandatory minimum without good time. The mandatory discharge date will be the longer of the two dates.

To calculate the mandatory discharge date, the department relies on the Nebraska Supreme Court ruling in Johnson v. Kenney 265 Neb. 47 (2002) which concluded that good time credit under Nebraska Revised Statute §83-1,107 (1) would not apply to reduce a mandatory minimum term. If the court-imposed maximum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his mandatory discharge. If the court imposed maximum term is longer than the mandatory minimum term, the mandatory discharge date with good time is compared to mandatory minimum without good time. The mandatory discharge date will be the longer of the two dates. For example, if the court imposed a maximum term of 15 years for a habitual criminal conviction, the discharge date would be changed to 10 years. If the court imposed maximum term was 20 years or longer, then the discharge date would be calculated in the normal manner. This method insures that no inmate will be discharged prior to serving the mandatory minimum portion of the sentence.

The method listed above in calculating the mandatory discharge date is departmental policy. To date, there have not been any court decisions that have specifically addressed calculating discharge dates on maximum terms that are longer than the mandatory minimum.

For example, if the court imposed a maximum term of 15 years for a habitual criminal conviction, the discharge date would be changed to 10 years. If the court imposed maximum term was 20 years or longer, then the discharge date would be calculated in the normal manner. This method insures that no inmate will be discharged prior to serving the mandatory minimum portion of the sentence.

The Nebraska Supreme Court ruling in Johnson v. Kenney, 265 Neb.47 (2002) concluded that good time credit under Nebraska Revised Statute §83-1,107 (1) would not apply to reduce a mandatory minimum term. Does this ruling change our current method of comparing the discharge date with good time to the discharge date without good time? Does this ruling imply the department should use the same method to calculate discharge dates that we use to calculate parole eligibility dates? We calculate parole eligibility dates pursuant to the following method.

Nebraska Revised Statute §83-1,110 (1) states *"that every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term."* If the court imposed minimum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his parole eligibility. If the court-imposed minimum is longer than the statutory minimum term, the inmate must serve the entire mandatory minimum portion plus $\frac{1}{2}$ of any years above the mandatory minimum term. For example, if the court imposed a minimum term of 10 years for a 1C felony, the inmate would serve 5 years on the mandatory minimum portion and $2\frac{1}{2}$ years on the remaining 5 years, for a total of $7\frac{1}{2}$ years. Any credit for time previously served, would also be deducted.

The department hasn't been challenged on our current method because it benefits the inmate. If we adopt the same procedure we use for calculating parole eligibility dates, the inmates will serve additional time.

There have been several recent sentences imposed under the habitual criminal statutes. The conversations I've had with the Judge's pertain to the courts "truth in sentencing" statute that requires them to inform the inmate at the time the sentence is imposed, how much time they'll actually serve.

For your review, I have attached copies of AG opinion #96066 and Johnson v. Kenney decision. I realize this issue may appear complicated, however, it would be much easier for me to explain it to you in person.

From: Microsoft Exchange on behalf of Douglass, Jeannene
Sent: Thursday, July 15, 2010 3:40 PM
To: Folts-Oberle, Angela
Subject: RE:
Attachments: RE:

Sender: Jeannene.Douglass@nebraska.gov

Subject: RE:

Message-Id: <960ECE121A2CF741849DFAC189F253241999D00437F@STNEMAIL01.stone.ne.gov>

To: Angela.Folts-Oberle@nebraska.gov

From: Douglass, Jeannene
Sent: Thursday, July 15, 2010 3:40 PM
To: Folts-Oberle, Angela
Subject: RE:

Sorry to be so slow in responding to your question. I think it looks fine. I, too, get really confused with these mandatory minimum sentence calculations. It really causes me to step back, take a really deep breath, and then start to think it out. Good Grief (as Charlie Brown would say).

It was nice to see you yesterday at the meeting. Sorry we didn't have more time to chat a bit.

Have a good rest of the week.

Jeannene

From: Folts-Oberle, Angela
Sent: Thursday, July 08, 2010 2:21 PM
To: Douglass, Jeannene
Subject: RE:

Question? So do I have the amount of good time (10y 6m) right on the max sentence or should it be 12 yrs? I've confused myself. Darn these mandatory minimums...wish I did more of them.

Angela Folts-Oberle
 Records Manager
 NCCW
 402-362-3317 Ext. 218
angela.folts-oberle@nebraska.gov

From: Folts-Oberle, Angela
Sent: Thursday, July 08, 2010 2:18 PM
To: Douglass, Jeannene
Subject: RE:

I screw up the easier of the two calculations...geez la weez! I'm guessing I figured the mandatory minimum in on that somehow cuz its 1yr 1/2 off. I made the change. Thanks for catching that one.

Angela Folts-Oberle
 Records Manager
 NCCW
 402-362-3317 Ext. 218
angela.folts-oberle@nebraska.gov

From: Douglass, Jeannene
Sent: Thursday, July 08, 2010 12:56 PM
To: Folts-Oberle, Angela
Subject:

Hi, Angela:

34

Would you take a look at the TRD calculation for 1-13-2022; CTS has 7-13-2023. The PED is fine. Thanks.

please? I figured a TRD of

Jeannene

Douglass, Jeannene

From: Douglass, Jeannene
Sent: Tuesday, December 14, 2010 11:15 AM
To: Miltenberger, Cody J. (DC Atty Law Clerk)
Cc: Shurter, Ginger; Poppert, Kyle
Subject: Mandatory Minimum sentence time calculations
Attachments: Mandatory Minimum documents

Good Morning, Mr. Miltenberger:

Kyle Poppert forwarded your recent e-mail to me for response regarding mandatory minimum sentence time calculations.

I am attaching a copy of a memorandum dated April 8, 2005 from Ron Riethmuller (then Records Administrator) regarding the Procedure for calculating Mandatory Minimum Terms. Also attached is a copy of the Lancaster County District Court decision (Alvin Long vs. John Martin) which affirmed the Department's procedures regarding how we (the Department) handles mandatory minimum terms. Please let me know if you have any problems opening this attachment.

Basically, the entire mandatory minimum must be applied/calculated before any good time can be applied to the calculations. Once that has been calculated, Good Time is then applied to any balance of time above and beyond the mandatory minimum term. For example, if the mandatory minimum term is 10 years and the court-imposed minimum term is 25 years, we would subtract the mandatory minimum of 10 years from the "court-imposed minimum term" of 25 years and good time would only apply to the remaining 15 years. In other words, the entire 10-year mandatory minimum term would be calculated to insure that requirement is met; in addition, the remaining balance of 15 years would be added to that date and the good time applicable to the 15 years would be subtracted to determine a parole eligibility date. Any Court-awarded jail credit would also be subtracted from that final date.

Now, if the minimum term is 10 years (in the above scenario), no good time would be applied because of the 10-year mandatory minimum (flat 10 years). Jail credit is always included in the calculations (subtracted) regardless of the type of sentence.

I understand this is somewhat confusing and involved; if you have any questions, please let me know. I'll be glad to assist you in any way I can with this. I will be out of the office this afternoon and through next Monday, December 20th. I will be back on December 21st.

**Jeannene Douglass
 Records Manager II
 Central Records Office
 Nebraska Department of Corrections
 PH: 402-479-5773**

From: Poppert, Kyle

12/14/2010

Sent: Monday, December 06, 2010 9:12 AM
To: Miltenberger, Cody J. (DC Atty Law Clerk)
Cc: Douglass, Jeannene
Subject: RE:

Cody,
I forwarded your email to Jeannene Douglass records manager at our central office.

She is the expert in the field and will be happy to assist you.
Kyle

Kyle J. Poppert
Classification and Inmate Records Administrator
Programs & Community Services
Phone: (402) 479-5750
Cellular:
Fax: (402) 479-5623
Kyle.Poppert@nebraska.gov

From: Miltenberger, Cody J. (DC Atty Law Clerk) [<mailto:Cody.Miltenberger@douglascounty-ne.gov>]
Sent: Monday, December 06, 2010 9:08 AM
To: Poppert, Kyle
Subject:

Kyle,

I work with the Douglas County Attorney's Office and was recently asked by one of our attorney's, Jim Masteller, to contact NDCS regarding jail credit, habitual criminal sentencing, and mandatory minimums. Particularly, we are interested in how the NDCS applies good time in cases involving a habitual criminal; when does good time begin to accrue for an inmate convicted as a habitual criminal? Furthermore, how does the NDCS apply good time with regards to mandatory minimums. We would like to get a hold of any materials you use as reference in applying the above mentioned principles, and any other available resources. I was given your contact information from Dawn-Renee Smith. If you could point me in the right direction on gaining information on these issues I would greatly appreciate it. Thank you very much for your time.

Sincerely,

Cody J Miltenberger
Douglas County Attorney's Office
Criminal Division - Law Clerk
(402) 444-4030

12/14/2010

~~COPY~~
COPY

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

ALVIN LONG,)	Docket 562	Page 260
)		
Plaintiff,)		
)		
vs.)	ORDER	
)		DEPT. OF JUSTICE
JOHN MARTIN,)		JUL 29 1999
)		
Defendant.)		STATE OF NEBRASKA

This matter came before the Court on April 26, 1999, via telephone conference for trial on the merits of a petition for a writ of mandamus. The plaintiff, Alvin Long, was pro se and the defendant, John Martin, was represented by Assistant Attorney General Linda Willard. Exhibits 1, 2, 3, 6, and 7 were received into evidence and the case was submitted on briefs. The Court, now being fully advised, finds and orders as follows:

FACTS

Pursuant to an arrest on the charge of theft, Long failed to appear in court on April 22, 1996, as ordered, and was consequently convicted for failure to appear and was sentenced as an habitual criminal. On April 15, 1997, Long was sentenced under Neb. Rev. Stat § 29-2221, which covers habitual criminals, to "not less than 10 years nor more than 20 years." In 1995, the Nebraska Unicameral passed Legislative Bill 371 and amended § 29-2221. LB 371 § 13 changed the term of incarceration for a habitual criminal from "a term of not less than ten nor more than sixty years" to "a mandatory minimum term of ten years and a maximum term of not more than sixty years." LB 371 § 32 states that "[s]ections 3 to 5 and 34 of this act become operative on January 1, 1996. Sections 19 to 21, 25, 26, 29, and 35 of this act become operative on July 1,

1996. The other sections of this act become operative on their effective date." The amendment to § 29-2221 that requires a mandatory minimum term of ten years came into effect on September 9, 1995, as seen in the footnote following the text of the statute.

Long is currently serving his sentence in the Lincoln Correctional Center. Long filed this petition against John Martin in Martin's official capacity as records manager for the Lincoln Correctional Center because, according to the statutory revision, Long's good time does not count toward a mandatory minimum sentence. Long asserts that since Neb. Rev. Stat. § 29-2221 (Reissue 1995) does not specifically state that good time will not apply to his mandatory minimum term, he should be entitled to good time on his mandatory minimum term. Long seeks remedy through a writ of mandamus to compel Martin to credit him with good time.

STANDARD OF REVIEW

Under Neb. Rev. Stat. § 25-2156 (Reissue 1995), "the writ of mandamus may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station." The Nebraska Supreme Court has held that a writ of mandamus can be

issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.

State ex rel. Wal-Mart Stores, Inc. v. Kortum, 251 Neb. 805, 809, 559 N.W.2d 496, 500 (1997); see *State ex rel. City of Elkhorn v. Haney*, 252 Neb. 788, 792, 566 N.W.2d 771, 774 (1997). In a mandamus action, the petitioner has the burden of proof and must show clearly and conclusively that it is entitled to the particular thing asked for and that the respondent is under a legal

obligation to act. *Haney*, 252 Neb. at 792, 566 N.W.2d at 773-74. Mandamus is defined as an extraordinary remedy. *Kortum*, 251 Neb. at 809, 559 N.W.2d at 500.

DISCUSSION

The plaintiff, Alvin Long, argues that his sentence should be controlled by Neb. Rev. Stat. § 29-2221 before LB 371 went into effect. He claims that, before the 1995 amendments to § 29-2221 became operative, his good time would have been applicable to his sentence of "not less than 10 years." *Weaver v. Graham*, 450 U.S. 24, 32, 101 S. Ct. 960, 966 (1981) states the law regarding the *ex post facto* doctrine as applied to prison sentences:

For prisoners who committed crimes before its enactment, [the statute in question] substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment.' Therefore, it is a retrospective law which can be constitutionally applied to a prisoner only if it is not to his detriment.

Thus, if the statute was not enacted at the time Long committed the crime, a detrimental alteration to his term length cannot constitutionally stand. Long alleges that since his crime occurred on April 22, 1996, the amendments to § 29-2221 under LB 371 § 13 are to his detriment because they restrict the application of his good time to his sentence and because he claims they did not go into effect until July 1, 1996.

Martin, the defendant, alleges that LB 371 § 13 went into effect on September 9, 1995, seven months before Long committed his crime for which he was sentenced under § 29-2221.

The amendment states that a habitual criminal "shall be punished by imprisonment in a Department of Correctional Services adult correctional facility for a mandatory minimum term of ten years" Martin argues that when interpreting a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the

statute considered in its plain, ordinary, and popular sense. *Southern Nebraska Rural Public Power Dist. v. Nebraska Electric Generation and Transmission Cooperative, Inc.*, 249 Neb. 913, 919, 546 N.W.2d 315, 320 (1996), *George Rose & Sons Sodding & Grading Co. v. Nebraska Dep't of Revenue*, 248 Neb. 92, 98, 532 N.W.2d 18, 23 (1995). Martin, having consulted a dictionary on the words "mandatory" and "minimum" to gauge their plain, ordinary, and popular sense, claims that the plain meaning of the term "mandatory minimum" requires that no reduction can occur in the minimum number of years a habitual criminal serves. Additionally, Martin points out that in the Committee Statement from the Judiciary Committee's hearing on LB 371, under the heading "Summary of purpose and/or changes," the Committee stated that "[n]o person sentenced to a mandatory term under these statutes would be eligible for probation or reduction of good time." The Second Committee Statement stated the same purpose.

The mandatory minimum sentence under Neb. Rev. Stat. §29-2221 came into effect on September 9, 1995, as clearly seen in the footnote of the statute. Long committed the crime of failing to appear on April 22, 1996, some seven months later. Considering that Long received his sentence under this statute and was found to be a habitual criminal, the amendments of LB 371 § 13 to § 29-2221 apply to his term. Since the statute regarding habitual criminals makes no mention of good time applicability to a mandatory minimum term, the Court must interpret the statute, "[determining] and [giving] effect to the *purpose and intent of the Legislature* as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense." *George Rose & Sons Sodding and Grading Co., supra* (emphasis added). As cited by the defendant, the February 8, 1995 Committee Statement by the Judiciary Committee (Exhibit 7) reveals the purpose of the LB 371 amendments to the habitual criminal statute:

Habitual Criminal Sentencing - Those sentenced under the habitual criminal law (i.e. convicted of a felony after having already served one year in prison for a prior offense), would receive a mandatory ten-year term No person sentenced to a mandatory term under these statutes would be eligible for probation or reductions for good time.

The Second Committee Statement made the same determination. Good time does not apply, therefore, to Alvin Long's mandatory minimum sentence.

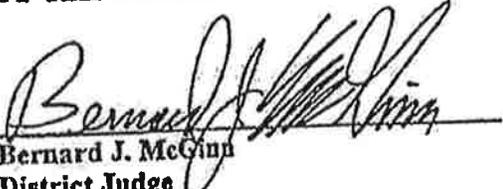
CONCLUSION

The Court finds that, for the reasons stated above, the plaintiff Alvin Long has failed to established a clear legal right to the relief sought, application of good time to his mandatory minimum sentence, as required by petitioners for a writ of mandamus.

IT IS ORDERED that judgment be entered in favor of the defendant. Costs are to be paid by Lancaster County.

DATED AND SIGNED this 29th day of July, 1999.

BY THE COURT:


Bernard J. McGinn
District Judge

cc *Alvin Long, Plaintiff*
Linda Willard, Assistant Attorney General, Attorney for Respondent

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES

Robert P. Houston

Director

etc 9-9-95



Dave Heineman
Governor

MEMORANDUM

DATE: April 8, 2005

TO: Douglas County District Court Judges

FROM: Ron Riethmuller, Records Administrator 

RE: Procedure for Calculating Mandatory Minimum Terms

The department uses the following method to calculate parole eligibility and mandatory discharge dates on sentences with mandatory minimum terms.

There are currently three felony statutes that have mandatory minimum terms:

1C felony	Mandatory minimum term of 5 years
1D felony	Mandatory minimum term of 3 years
Habitual Criminal	Mandatory minimum term of either 10 or 25 years

Nebraska Revised Statute §83-1,110 (1) states ***“that every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term.”*** If the court imposed minimum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his parole eligibility. If the court-imposed minimum is longer than the statutory minimum term, the inmate must serve the entire mandatory minimum portion plus ½ of any years above the mandatory minimum term. For example, if the court imposed a minimum term of 10 years for a 1C felony, the inmate would serve 5 years on the mandatory minimum portion and 2½ years on the remaining 5 years, for a total of 7½ years. Any credit for time previously served, would also be deducted.

To calculate the mandatory discharge date, the department relies on the Nebraska Supreme Court ruling in Johnson v. Kenney 265 Neb. 47 (2002) which concluded that good time credit under Nebraska Revised Statute §83-1,107 (1) would not apply to reduce a mandatory minimum term. If the court-imposed maximum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his mandatory discharge. If the court imposed maximum term is longer than the mandatory minimum term, the mandatory discharge date with good time is compared to mandatory minimum without good time. The mandatory discharge date will be the longer of the two dates. For example, if the court imposed a maximum term of 15 years for a habitual criminal conviction, the discharge date would be changed to 10 years. If the court imposed maximum term was 20 years or longer, then the discharge date would be calculated in the normal manner. This method insures that no inmate will be discharged prior to serving the mandatory minimum portion of the sentence.

The method listed above in calculating the mandatory discharge date is departmental policy. To date, there have not been any court decisions that have specifically addressed calculating discharge dates on maximum terms that are longer than the mandatory minimum.

From: Microsoft Exchange on behalf of Miltenberger, Cody J. (DC Atty Law Clerk)
<Cody.Miltenberger@douglascounty-ne.gov>
Sent: Wednesday, December 15, 2010 9:04 AM
To: Douglass, Jeannene
Subject: RE: Mandatory Minimum sentence time calculations
Attachments: RE: Mandatory Minimum sentence time calculations

Sender: Cody.Miltenberger@douglascounty-ne.gov

Subject: RE: Mandatory Minimum sentence time calculations

Message-Id: <CBEF4A4F30A2DC4E9AF763A00E4B58F406ADC5CB@doucntyexc01.DC.dotcomm.org>

Recipient: Jeannene.Douglass@nebraska.gov

From: Miltenberger, Cody J. (DC Atty Law Clerk) <Cody.Miltenberger@douglascounty-ne.gov>
Sent: Wednesday, December 15, 2010 9:04 AM
To: Douglass, Jeannene
Subject: RE: Mandatory Minimum sentence time calculations

Jeannene,

Thank you very much for the memorandum for Mandatory Minimums. The memo was spot on with what we were looking for. I truly appreciate you taking the time to help me out.

Thanks again,

Cody

From: Douglass, Jeannene [mailto:Jeannene.Douglass@nebraska.gov]
Sent: Tuesday, December 14, 2010 11:15 AM
To: Miltenberger, Cody J. (DC Atty Law Clerk)
Cc: Shurter, Ginger; Poppert, Kyle
Subject: Mandatory Minimum sentence time calculations

Good Morning, Mr. Miltenberger:

Kyle Poppert forwarded your recent e-mail to me for response regarding mandatory minimum sentence time calculations.

I am attaching a copy of a memorandum dated April 8, 2005 from Ron Riethmuller (then Records Administrator) regarding the Procedure for calculating Mandatory Minimum Terms. Also attached is a copy of the Lancaster County District Court decision (Alvin Long vs. John Martin) which affirmed the Department's procedures regarding how we (the Department) handles mandatory minimum terms. Please let me know if you have any problems opening this attachment.

Basically, the entire mandatory minimum must be applied/calculated before any good time can be applied to the calculations. Once that has been calculated, Good Time is then applied to any balance of time above and beyond the mandatory minimum term. For example, if the mandatory minimum term is 10 years and the court-imposed minimum term is 25 years, we would subtract the mandatory minimum of 10 years from the "court-imposed minimum term" of 25 years and good time would only apply to the remaining 15 years. In other words, the entire 10-year mandatory minimum term would be calculated to insure that requirement is met; in addition, the remaining balance of 15 years would be added to that date and the good time applicable to the 15 years would be subtracted to determine a parole eligibility date. Any Court-awarded jail credit would also be subtracted from that final date.

Now, if the minimum term is 10 years (in the above scenario), no good time would be applied because of the 10-year mandatory minimum (flat 10 years). Jail credit is always included in the calculations (subtracted) regardless of the type of sentence.

I understand this is somewhat confusing and involved; if you have any questions, please let me know. I'll be glad to assist you in any way I can with this. I will be out of the office this afternoon and through next Monday, December 20th. I will be back on December 21st.

Jeannene Douglass
Records Manager II
Central Records Office
Nebraska Department of Corrections
PH: 402-479-5773

From: Poppert, Kyle
Sent: Monday, December 06, 2010 9:12 AM
To: Miltenberger, Cody J. (DC Atty Law Clerk)
Cc: Douglass, Jeannene
Subject: RE:

Cody,
I forwarded your email to Jeannene Douglass records manager at our central office.

She is the expert in the field and will be happy to assist you.
Kyle

Kyle J. Poppert
Classification and Inmate Records Administrator
Programs & Community Services
Phone: (402) 479-5750

Fax: (402) 479-5623
Kyle.Poppert@nebraska.gov

From: Miltenberger, Cody J. (DC Atty Law Clerk) [<mailto:Cody.Miltenberger@douglascounty-ne.gov>]
Sent: Monday, December 06, 2010 9:08 AM
To: Poppert, Kyle
Subject:

Kyle,

I work with the Douglas County Attorney's Office and was recently asked by one of our attorney's, Jim Masteller, to contact NDCS regarding jail credit, habitual criminal sentencing, and mandatory minimums. Particularly, we are interested in how the NDCS applies good time in cases involving a habitual criminal; when does good time begin to accrue for an inmate convicted as a habitual criminal? Furthermore, how does the NDCS apply good time with regards to mandatory minimums. We would like to get a hold of any materials you use as reference in applying the above mentioned principles, and any other available resources. I was given your contact information from Dawn-Renee Smith. If you could point me in the right direction on gaining information on these issues I would greatly appreciate it. Thank you very much for your time.

Sincerely,

Cody J Miltenberger
Douglas County Attorney's Office
Criminal Division - Law Clerk
(402) 444-4030

From: Microsoft Exchange on behalf of Douglass, Jeannene
Sent: Tuesday, May 24, 2011 3:42 PM
To: Kube, James
Cc: Poppert, Kyle
Subject: Mandatory Minimum sentences
Attachments: Mandatory Minimum sentences

Sender: Jeannene.Douglass@nebraska.gov

Subject: Mandatory Minimum sentences

Message-Id: <960ECE121A2CF741849DFAC189F253242131ECE377@STNEMAIL01.stone.ne.gov>

To: james.kube@nebraska.gov

Cc: kyle.poppert@nebraska.gov

From: Douglass, Jeannene
Sent: Tuesday, May 24, 2011 3:42 PM
To: Kube, James
Cc: Poppert, Kyle
Subject: Mandatory Minimum sentences
Attachments: 0300_001.pdf

Good Afternoon, Judge Kube:

As we discussed this afternoon on the phone, I am sending you a copy of the Attorney General Opinion #96066, dated August 28, 1996 relevant to the application of good time to Mandatory Minimum Terms.

I have also attached a Memorandum dated April 8, 2005 from Ron Riethmuller (Records Administrator at that time for the Nebraska Department of Corrections) regarding the procedure for calculating Mandatory Minimum terms as well as a Memorandum dated September 18, 1996 to Records Staff from Mr. Riethmuller, regarding computing Parole Eligibility and Discharge Dates with sentences involving mandatory minimums.

I hope this information is helpful to you in understanding this process. It was a pleasure talking with you this afternoon. If you have any questions regarding this material, or if you have problems opening this attachment, please don't hesitate to contact me.

Thank You.

*Jeannene Douglass
Records Manager II
Central Records Office
Nebraska Department of Corrections
PH: 402-479-5773
E-mail: jeannene.douglass@nebraska.gov*

From: BOARD OF PAROLE [<mailto:dcs.copiers@nebraska.gov>]
Sent: Tuesday, May 24, 2011 2:31 PM
To: Douglass, Jeannene
Subject: Parole Board Attached Image

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES

Harold W. Clarke

Director

MEMORANDUM

DATE: September 18, 1996

TO: Records Staff

FROM: Ron Riethmuller, Records Administrator *RR*

RE: Computing Parole Eligibility and Discharge Dates on Inmates Serving Mandatory Minimums



E. Benjamin Nelson
Governor

To comply with the recent Attorney General's Opinion concerning mandatory minimum sentences, the following procedures shall be used to insure that mandatory minimum terms are served.

We will proceed with the procedure as was discussed at the July 12, 1996 records meeting regarding parole eligibility computation. The parole eligibility date is computed based on the inmate serving the entire mandatory minimum term provided by statute plus one-half (½) of the balance of any court imposed minimum term beyond the mandatory minimum. For example, a total sentence of 8 to 14 years for a 1DF (mandatory minimum of 3 years) is computed as follows:

Parole Eligibility: Inmate must serve the entire three (3) years PLUS one-half (½) of the remaining five (5) years, a total of 5 ½ years for parole eligibility. This procedure, which complies with the language in LB 371, prohibits awarding of good time on mandatory minimums.

The following procedure will insure that no inmate is discharged prior to serving the mandatory minimum.

1. The discharge date on the maximum term will be compared with the mandatory minimum provided by statute.
2. If the discharge date is prior to the inmate serving the entire statutory mandatory minimum, the discharge date shall be changed to reflect the later date.

Example: If an inmate is sentenced to a term of 3 to 5 years for a 1DF under LB 816, both the parole eligibility and discharge dates would be 3 years.

3. If the discharge date on the maximum term is longer than the mandatory minimum, no changes will be made on the discharge date.

I have reviewed the mandatory minimums on all active inmates; this procedure will extend the discharge dates of nine inmates. A list of the affected inmates is attached.

xc: Harold W. Clarke
Larry A. Tewes
George D. Green
Laurie Smith Camp
Manuel S. Gallardo

P.O. Box 94661 • Lincoln, Nebraska 68509-4661 • Phone (402) 471-2654

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Office of the Attorney General

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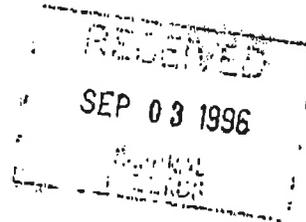
COPY

DON STENBERG
ATTORNEY GENERAL

STEVE GRASZ
LAURIE SMITH CAMP
DEPUTY ATTORNEYS GENERAL

August 30, 1996

Harold Clarke, Director
Nebraska Department of
Correctional Services
P.O. Box 94661
Lincoln, NE 68509



RE: Mandatory Minimum Terms

Dear Harold:

Enclosed is a copy of an Attorney General's Opinion issued in response to a letter from Senator Don Wesely. As you can see, the Opinion concludes that inmates who are sentenced to mandatory minimum terms may not be paroled or discharged prior to serving the mandatory minimum term.

Thank you for adjusting your procedures accordingly. It is recognized that some inmates who have maximum terms which, less good time, give them discharge dates prior to the expiration of their mandatory minimum terms are likely to test this Opinion's conclusion through litigation. I have told Linda Willard that she may refer those cases to me, if she wishes.

Sincerely,

DON STENBERG
Attorney General

[Signature]
Laurie Smith Camp
Deputy Attorney General

Enclosure

cc: Linda Willard
George Green
Ron Riethmuller

David R. Anderson
L. Jay Bartel
J. Kirk Brown
David T. Byrdick
Dale A. Comer
James A. Elwarth
Lynne A. Fries
Rayce H. Harper

Lauren L. Hill
Jay C. Hinsley
Amy Hollenbeck
William L. Howland
Marilyn B. Hutchinson
Kimberly A. Klein
Joseph P. Loudon

Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Nelson
Ronald D. Novacek
Frederick F. Held
Marie C. Paval
Kathleen W. Payne

Paul N. Petadle
Jonathan Roubaille
Hobert B. Rupe
James D. Saiten
James H. Seears
Mark D. Starr
Martin Swanson

Timothy J. Tesel
John R. Thompson
Barry Wald
Terri M. Weeks
Alfonzo Wilczak
Melanie J. Whitmore-Mantellos
Linda L. Willard



STATE OF NEBRASKA Office of the Attorney General

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1215 K ST. FAX (402) 471-4725

DON STENBERG
ATTORNEY GENERAL

#96066

STEVE GRASZ
Laurie Smith Camp
DEPUTY ATTORNEYS GENERAL

No. STATE OF NEBRASKA
OFFICIAL
AUG 28 1996
DEPT. OF JUSTICE

RECEIVED
SEP 03 1996
GENERAL RECORDS

DATE: August 28, 1996
SUBJECT: Application of Good Time to Mandatory Minimum Terms
REQUESTED BY: Senator Don Wesely
WRITTEN BY: Don Stenberg, Attorney General
Laurie Smith Camp, Deputy Attorney General

You have asked whether good time applies to mandatory minimum sentences. We conclude that good time does not apply to mandatory minimum sentences, and that an inmate may not be paroled or discharged before the completion of the mandatory minimum term.

In 1989, the Nebraska Legislature enacted LB592, which provided mandatory minimum terms for certain drug offenses. The bill specified that any person convicted of an offense carrying such a mandatory minimum term "shall not be eligible for parole prior to serving the mandatory minimum sentence." Neb. Rev. Stat. § 28-416(10) (1989).

On January 25, 1994, this office advised the Director of the Nebraska Department of Correctional Services and the Chairperson of the Nebraska Board of Parole that, whether or not the Department applied good time to mandatory minimum terms, inmates could not be paroled prior to serving their mandatory minimum sentences. Attached for your reference is a copy of my letter to Harold Clarke and Ethel Landrum.

David K. Arterburn
L. Jay Barcel
J. Kirk Brown
David T. Bydalek
Dale A. Camer
James A. Elsdorff
Lynne R. Feltner
Royce N. Hildebrand

Lauren L. Hill
Jay C. Hingley
Amy Holzenbeck
William L. Howland
Harilyn S. Hutchinson
Katherine A. Klein
Jolissa R. Ligon

Charles E. Lowe
Lisa D. Martin-Price
Lynn A. Nelson
Ronald D. Popavec
Fredrick F. Reid
Marie C. Powell
Kenneth V. Payne

Paul M. Pochle
Jonchmi Radtelle
Robert S. Rupp
James D. Smith
James H. Spears
Harris Starr
Kurtis Swanson

Timothy J. Tenel
John A. Thompson
Barry Wald
Terry H. Wehls
Alfonzo Whitaker
Melanie J. Whitlock
Linda L. Willard

Senator Don Wesely
August 28, 1996
Page -2-

In 1995, LB371 re-classified several criminal offenses, causing them to carry mandatory minimum terms. The bill noted that a "person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation", and the bill re-wrote Nebraska's good time laws, effective July 1, 1996, so that good time is no longer applicable to minimum terms:

[E]very committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term.

Neb. Rev. Stat. § 63-1,110 (Supp. 1995).

The legislative history of LB592 (1989) and LB371 (1995) makes clear the fact that the Nebraska Legislature expected inmates who were sentenced for offenses carrying mandatory minimum terms to serve the full mandatory minimum term before being paroled or discharged. The introducers' statements of intent, their introductions of the bills before the Judiciary Committee, and the discussion of the bills both before the Committee and during floor debate, support this conclusion. For example, when introducing LB595 in 1989, Senator Chris Abboud said that "the bill requires a mandatory prison sentence upon conviction . . .". In his Statement of Intent for LB371 in 1995, Senator John Lindsay described the mandatory minimum terms as "the minimum penalty" of "years imprisonment". He represented that: "No person sentenced to a mandatory term under these statutes would be eligible for probation or reductions for good time." During floor debate, there was discussion of (unsuccessful) amendments which would have allowed inmates to serve less than the mandatory minimums prescribed under LB371. Senator Kristensen said: "[Those amendments] will give them the opportunity for good time, so instead of 25 years in prison, they could be out in 12, and that is something we cannot let happen in Nebraska."

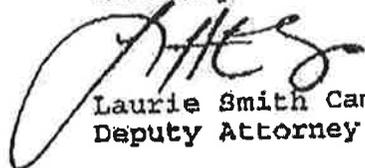
Although it is apparent from the Legislative History of LB592 and LB371 that the Nebraska Legislature expected inmates sentenced to mandatory minimum terms to be incarcerated for the full mandatory minimum term, inmates could be discharged before the expiration of a mandatory minimum term if the Department of Correctional Services were to apply good time to the inmates' maximum terms and were to use the maximum terms to determine the date of discharge, without consideration of whether or not the inmate had been sentenced to a mandatory minimum term.

Senator Don Wesely
August 28, 1996
Page -3-

Based on the Legislative History of LB592 (1989) and LB371 (1995), we conclude that an inmate who has been sentenced to a mandatory minimum term can neither be paroled nor discharged from custody of the Nebraska Department of Correctional Services prior to serving the full mandatory minimum term.

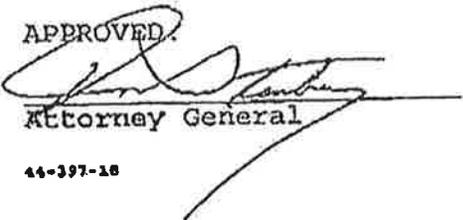
Sincerely,

DON STENBERG
Attorney General



Laurie Smith Camp
Deputy Attorney General

APPROVED



Attorney General

44-397-18

STATE OF NEBRASKA

DEPARTMENT OF CORRECTIONAL SERVICES

Robert P. Houston

Director

efb 9-9-95



Dave Heineman
Governor

MEMORANDUM

DATE: April 8, 2005

TO: Douglas County District Court Judges

FROM: Ron Riethmuller, Records Administrator 

RE: Procedure for Calculating Mandatory Minimum Terms

The department uses the following method to calculate parole eligibility and mandatory discharge dates on sentences with mandatory minimum terms.

There are currently three felony statutes that have mandatory minimum terms:

1C felony	Mandatory minimum term of 5 years
1D felony	Mandatory minimum term of 3 years
Habitual Criminal	Mandatory minimum term of either 10 or 25 years

Nebraska Revised Statute §83-1,110 (1) states ***"that every committed offender shall be eligible for parole when the offender has served one-half the minimum term of his or her sentence. No such reduction of sentence shall be applied to any sentence imposing a mandatory minimum term."*** If the court imposed minimum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his parole eligibility. If the court-imposed minimum is longer than the statutory minimum term, the inmate must serve the entire mandatory minimum portion plus ½ of any years above the mandatory minimum term. For example, if the court imposed a minimum term of 10 years for a 1C felony, the inmate would serve 5 years on the mandatory minimum portion and 2½ years on the remaining 5 years, for a total of 7½ years. Any credit for time previously served, would also be deducted.

To calculate the mandatory discharge date, the department relies on the Nebraska Supreme Court ruling in Johnson v. Kenney 265 Neb. 47 (2002) which concluded that good time credit under Nebraska Revised Statute §83-1,107 (1) would not apply to reduce a mandatory minimum term. If the court-imposed maximum term is the same as the statutory mandatory minimum term, the inmate must serve the entire mandatory minimum term, minus any credit for time served towards his mandatory discharge. If the court imposed maximum term is longer than the mandatory minimum term, the mandatory discharge date with good time is compared to mandatory minimum without good time. The mandatory discharge date will be the longer of the two dates. For example, if the court imposed a maximum term of 15 years for a habitual criminal conviction, the discharge date would be changed to 10 years. If the court imposed maximum term was 20 years or longer, then the discharge date would be calculated in the normal manner. This method insures that no inmate will be discharged prior to serving the mandatory minimum portion of the sentence.

The method listed above in calculating the mandatory discharge date is departmental policy. To date, there have not been any court decisions that have specifically addressed calculating discharge dates on maximum terms that are longer than the mandatory minimum.

From: Microsoft Outlook on behalf of Poppert, Kyle
Sent: Tuesday, August 02, 2011 9:49 AM
To: Scott, Tamara; Morello, Pamela
Subject: RE:
Attachments: RE:

Sender: Kyle.Poppert@nebraska.gov

Subject: RE:

Message-Id: <960ECE121A2CF741849DFAC189F253242F10E8EFOC@STNEMAIL01.stone.ne.gov>

To: Tamara.Scott@nebraska.gov

To: Pamela.Morello@nebraska.gov

From: Poppert, Kyle
Sent: Tuesday, August 02, 2011 9:49 AM
To: Scott, Tamara; Morello, Pamela
Subject: RE: _____

Yes it is correct. He has a 5 year mandatory minimum term.
 Kyle

Kyle J. Poppert
 Classification and Inmate Records Administrator
 Nebraska Department of Correctional Services
 Programs & Community Services Division
 Phone: (402) 479-5750
 Cellular
 Fax: (402) 742-2349
Kyle.Poppert@nebraska.gov

Change is inevitable, growth is optional.

From: Scott, Tamara
Sent: Tuesday, August 02, 2011 9:27 AM
To: Morello, Pamela
Cc: Poppert, Kyle
Subject: RE: _____

This is what it says in CTS. PED – 9/21/16 and TRD – 9/21/14. I have seen this a few times in the past and it is correct. It has to do with him serving a "Mandatory Minimum" sentence.

**Kyle,
 Is this correct?**

"Most of the shadows of this life are caused by standing in our own sunshine."
 Ralph Waldo Emerson

Tamara J. Scott-Records
 NDCS - Work Ethic Camp
 2309 North Highway 83 - McCook, NE 69001
 (308) 345-8405 ext. 222 - Fax (308) 345-8407

From: Morello, Pamela
Sent: Tuesday, August 02, 2011 8:52 AM
To: Scott, Tamara
Subject: _____

Good Morning Tamara
 I think we have PED and TRD dates reversed.

"...now it begins, not later, not tomorrow, next week, month or year, not with the next guy, but rather right now, in this moment, with you and me..."

Pam Morello

58

Warden
Work Ethic Camp
2309 North Hwy 83
McCook, NE 69001
1.308.345.8405 Ext 205
(cell)

From: Microsoft Outlook on behalf of Baum, Mickie
Sent: Monday, October 03, 2011 7:53 AM
To: Richter, Melody
Subject: RE:
Attachments: RE:

Sender: Mickie.Baum@nebraska.gov

Subject: RE:

Message-Id: <6F298A4AC6A1CC43B6F46F120DCE4BF2292CA05100@STNEMAIL01.stone.ne.gov>

To: Melody.Richter@nebraska.gov

From: Baum, Mickie
Sent: Monday, October 03, 2011 7:52 AM
To: Richter, Melody
Subject: RE:

Mandatory Minimum terms often have the PED after the TRD. His sentence is correct. Thanks Mickie

Mickie Baum - Corrections Records Manager II
 Nebraska State Penitentiary
 402-479-8854 Fax 402-479-8021
Mickie.Baum@nebraska.gov

From: Richter, Melody
Sent: Sunday, October 02, 2011 4:25 PM
To: Baum, Mickie
Subject:

Hello!

Hey I was just looking at Inmate Kenneth Wells 70537 information and saw that his PED is after his TRD. How could that be?

QUICK CHECK INFORMATION 10/2/2011

ID: _____ CURR LOCATION NSP RECEIVED DATE 11/16/2009
 BIRTH CITY/STATE/COUNTRY: CEDAR RAPIDS / IA / USA; Previous ID _____
 RACE WHITE SEX M CURR AGE 56 DOB _____
 MRTL SINGLE CNSLR NBR _____
 SSN _____ FBI SID _____
 DRUG DP 28-416 Y DNA _____ SEX OFFENDER N
 CURR CUSTDY DT 12/21/2009 CURR CUSTODY _____ CURR JOB ASSGN _____ JOB _____
 DESC UNASSIGNED
 SENT BEGIN DATE: 11/6/2009 MIN SENT: 12 0 MAX SENT: 12 0
 TENTATIVE RELEASE DATE: 9/25/2016 PAROLE ELIG DATE: 9/25/2017

LAST PB MEETING: 5/6/2010 NEXT REVIEW: 10/1/2016 HEARING DATE: _____ PB STATUS: DEFERRED
 M. Richter
 Unit Case Manager
 Nebraska State Penitentiary
 Phone: 402-471-3161 Ext. 3477

melody.richter@nebraska.gov



Please consider the environment before printing this email

From: Microsoft Outlook on behalf of Boal, Beth
Sent: Tuesday, January 24, 2012 12:08 PM
To: Robinson, Hank
Subject: RE: PED > TRD
Attachments: RE: PED > TRD

Sender: Beth.Boal@nebraska.gov

Subject: RE: PED > TRD

Message-Id: <FF2228F74E95E146992441BAE0B91AF0370633E085@STNEMAIL01.stone.ne.gov>

To: hank.robison@nebraska.gov

From: Boal, Beth
Sent: Tuesday, January 24, 2012 12:08 PM
To: Robinson, Hank
Subject: RE: PED > TRD

OK, then for the purposes of your report, I need to assume min days of 0 when PED > TRD, correct?

Thank you,

Beth Boal
Office of the CIO
State of Nebraska
501 South 14th Street
P.O. Box 95045
Lincoln, Nebraska 68509-5045
email: beth.boal@nebraska.gov
phone: 402.471.0703 (OCIO)
402.479.5770 (DCS)
(Cell)

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From: Poppert, Kyle
Sent: Tuesday, January 24, 2012 11:47 AM
To: Boal, Beth
Cc: Robinson, Hank
Subject: RE: PED > TRD

Correct, he will discharge before he is eligible for parole.

Kyle J. Poppert
Classification and Inmate Records Administrator
Nebraska Department of Correctional Services
Programs & Community Services Division
Phone: (402) 479-5750
Cellular:
Fax: (402) 142-2349
Kyle.Poppert@nebraska.gov

Change is inevitable, growth is optional.

From: Boal, Beth
Sent: Tuesday, January 24, 2012 11:39 AM
To: Poppert, Kyle
Cc: Robinson, Hank
Subject: RE: PED > TRD

So, for this guy, when 8/18/2039 rolls around, is he released?

2/18/2047

8/18/2039

Thank you,

Beth Boal
 Office of the CIO
 State of Nebraska
 501 South 14th Street
 P.O. Box 95045
 Lincoln, Nebraska 68509-5045
 email: beth.boal@nebraska.gov
 phone: 402.471.0703 (OCIO)
 402.479.5770 (DCS)

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From: Poppert, Kyle
Sent: Tuesday, January 24, 2012 11:37 AM
To: Boal, Beth
Cc: Robinson, Hank
Subject: RE: PED > TRD

Because they have mandatory minimum terms that must be served first, their PED is calculated on $\frac{1}{2}$ of the remaining minimum term.

Kyle J. Poppert
 Classification and Inmate Records Administrator
 Nebraska Department of Correctional Services
 Programs & Community Services Division
 Phone: (402) 479-5750
 Cellular
 Fax: (402) 742-2349
Kyle.Poppert@nebraska.gov

Change is inevitable, growth is optional.

From: Boal, Beth
Sent: Tuesday, January 24, 2012 11:34 AM
To: Poppert, Kyle
Cc: Robinson, Hank
Subject: PED > TRD

Kyle – why would inmates have a PED > their TRD? I could see small variations, but of the 61 currently active inmates with PED > TRD, some vary by 5 – 8 years!

ID
 Number : Inmate Name

Parole Eligibility
 Date

Tentative Release Date

8/20/2021	6/20/2016
12/24/2012	2/24/2012
2/18/2047	8/18/2039
6/24/2017	6/24/2013
11/19/2032	12/19/2027
1/16/2016	1/15/2016
12/20/2016	4/5/2016
9/21/2012	3/21/2012
8/24/2014	2/24/2013
7/26/2014	1/26/2012
6/8/2035	12/8/2032
6/22/2077	7/7/2067
9/12/2018	10/12/2017
12/2/2013	12/2/2017
2/21/2030	8/21/2027
12/29/2012	6/29/2012
11/24/2020	5/24/2018
12/21/2014	7/21/2016
6/15/2012	8/14/2012
8/5/2043	1/20/2030
9/25/2017	9/25/2016
3/1/2013	9/1/2012
5/7/2027	9/7/2024
8/24/2015	3/24/2015
9/21/2016	9/21/2014
11/5/2012	5/5/2012
7/3/2050	1/3/2050
11/19/2021	9/28/2019
8/27/2013	11/27/2012
6/5/2014	1/5/2014
10/25/2013	4/25/2013
12/21/2014	12/21/2013
4/2/2019	4/17/2018
3/26/2020	9/26/2017
10/29/2022	7/29/2020
7/27/2028	1/27/2028
11/25/2016	5/25/2015
8/22/2014	2/22/2014
2/18/2015	2/18/2014
4/19/2017	11/16/2016
9/20/2045	10/20/2040
2/26/2020	2/26/2018
9/4/2016	9/4/2015
9/16/2016	3/15/2016
1/7/2027	3/7/2026
6/21/2046	12/21/2030
5/7/2017	1/7/2015
5/19/2015	11/19/2014
8/10/2025	3/10/2024
2/14/2013	1/14/2013
4/6/2016	6/6/2015
9/25/2037	3/25/2035
11/26/2023	5/26/2021
6/2/2033	5/2/2031

8/23/2034	4/23/2031
5/1/2018	1/1/2016
4/19/2016	10/18/2014
3/18/2020	9/18/2018
5/8/2030	11/23/2029
7/24/2013	1/24/2013
2/3/2024	10/3/2021

Thank you,

Beth Boal
 Office of the CIO
 State of Nebraska
 501 South 14th Street
 P.O. Box 95045
 Lincoln, Nebraska 68509-5045
 email: beth.boal@nebraska.gov
 phone: 402.471.0703 (OCIO)
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From: Robinson, Hank
Sent: Monday, January 23, 2012 12:30 PM
To: Boal, Beth; Spring, B J
Subject: No rush

What do you guys make of this?

ID Number	Min Inmate Days	MinOutDate	Max Inmate Days	MaxOutDate	Spread
	0.00	23-Jan-12	-6590.00	07-Jan-94	-6590
	23866.00	#####	20259.00	12-Jul-67	-3607
	12815.00	#####	10074.00	#####	-2741
	8686.00	#####	5947.00	#####	-2739
	12573.00	26-Jun-46	10199.00	#####	-2374
	3441.00	25-Jun-21	1615.00	25-Jun-16	-1826
	7611.00	#####	5814.00	#####	-1797
	12299.00	#####	10503.00	25-Oct-40	-1796
	11522.00	#####	9864.00	25-Jan-39	-1658
	1984.00	29-Jun-17	523.00	29-Jun-13	-1461
	8253.00	#####	7035.00	#####	-1218
	3233.00	#####	2318.00	#####	-915

9382.00	#####	8467.00	#####	-915
6609.00	#####	5694.00	#####	-915
4330.00	#####	3416.00	#####	-914
8542.00	13-Jun-35	7630.00	#####	-912
2990.00	#####	2078.00	01-Oct-17	-912
6035.00	#####	5123.00	#####	-912
920.00	31-Jul-14	8.00	31-Jan-12	-912
5527.00	#####	4616.00	#####	-911
4399.00	#####	3546.00	08-Oct-21	-853
3937.00	#####	3115.00	#####	-822
3593.00	#####	2810.00	03-Oct-19	-783
7775.00	#####	7044.00	#####	-731
1708.00	#####	977.00	#####	-731
2961.00	#####	2231.00	#####	-730
3074.00	23-Jun-20	2435.00	#####	-639
1773.00	#####	1223.00	#####	-550
1553.00	#####	1005.00	24-Oct-14	-548
1936.00	#####	1389.00	#####	-547
949.00	#####	403.00	#####	-546
1068.00	#####	550.00	26-Jul-13	-518
4953.00	#####	4435.00	#####	-518
1691.00	#####	1325.00	#####	-366
1458.00	20-Jan-16	1093.00	20-Jan-15	-365
2510.00	#####	2145.00	#####	-365
1068.00	#####	703.00	#####	-365
2077.00	#####	1712.00	#####	-365
2631.00	#####	2281.00	#####	-350
1127.00	#####	790.00	#####	-337
2429.00	#####	2094.00	17-Oct-17	-335
5468.00	12-Jan-27	5162.00	#####	-306
1540.00	#####	1235.00	11-Jun-15	-305
341.00	#####	37.00	#####	-304
587.00	#####	314.00	#####	-273
1798.00	#####	1539.00	#####	-259
1345.00	#####	1161.00	#####	-184
292.00	#####	108.00	#####	-184
247.00	#####	63.00	#####	-184
1702.00	#####	1518.00	#####	-184
346.00	03-Jan-13	163.00	04-Jul-12	-183
646.00	30-Oct-13	463.00	#####	-183
408.00	#####	227.00	#####	-181
553.00	29-Jul-13	372.00	29-Jan-13	-181
14046.00	08-Jul-50	13865.00	08-Jan-50	-181
1217.00	#####	1036.00	#####	-181

947.00	#####	766.00	#####	-181
6685.00	#####	6519.00	#####	-166
869.00	10-Jun-14	718.00	10-Jan-14	-151
1915.00	#####	1764.00	#####	-151
1565.00	#####	1444.00	06-Jan-16	-121
393.00	#####	362.00	19-Jan-13	-31
0.00	23-Jan-12	-24.00	#####	-24
0.00	23-Jan-12	-2.00	21-Jan-12	-2
0.00	23-Jan-12	-2.00	21-Jan-12	-2
149.00	20-Jun-12	148.00	19-Jun-12	-1

T. Hank Robinson, Ph.D
 Director
 Research Division
 Nebraska Dept. of Correctional Services
 PO Box 94661
 Lincoln, NE 68509
 Phone:

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 [West Reporter Image \(PDF\)](#)

283 Neb. 560, 811 N.W.2d 227

[Judges and Attorneys](#)

Supreme Court of Nebraska.
STATE of Nebraska, appellee,
v.
William D. KINSER, Jr., appellant.

No. S-11-558.
March 23, 2012.

Background: Defendant was convicted by jury in the District Court, Scotts Bluff County, Randall L. Lippstreu, J., of flight to avoid arrest and driving under revocation and found to be a habitual offender, resulting in a sentence of six months' imprisonment on the former charge, with a one-year license revocation, and to a minimum term of 18 years' imprisonment on the latter conviction. Defendant appealed.

Holdings: The Supreme Court, Stephan, J., held that:

(1) defendant convicted of flight to avoid arrest as a felony based on his willful reckless operation of a motor vehicle was subject to enhancement of his sentence under habitual criminal statute, and (2) in a matter of first impression, any discrepancy between minimum sentence imposed on conviction for flight to avoid arrest and statements of sentencing court regarding his parole eligibility was controlled by the former.

Affirmed.

West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

 [110 Criminal Law](#)

 [110XXIV Review](#)

 [110XXIV\(L\) Scope of Review in General](#)

 [110XXIV\(L\)4 Scope of Inquiry](#)

 [110k1134.28 k. Statutory Issues In general. Most Cited Cases](#)

Statutory Interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.

[2]  [KeyCite Citing References for this Headnote](#)

 [110 Criminal Law](#)

 [110XXIV Review](#)

 [110XXIV\(N\) Discretion of Lower Court](#)

 [110k1156.1 Sentencing](#)

 [110k1156.2 k. In general. Most Cited Cases](#)

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

[3]  [KeyCite Citing References for this Headnote](#)

- ◀ 350H Sentencing and Punishment
 - ◀ 350HVI Habitual and Career Offenders
 - ◀ 350HVI(C) Offenses Usable for Enhancement
 - ◀ 350HVI(C)1 In General
 - ◀ 350Hk1255 Particular Offenses
 - ◀ 350Hk1260 k. Other particular offenses. Most Cited Cases

Defendant convicted of flight to avoid arrest as a felony based on his willful reckless operation of a motor vehicle was subject to enhancement of his sentence under habitual criminal statute, though misdemeanor and felony flight to avoid arrest were defined in the same statute, as the statute was not a specific subsequent offense statute, in that the offense of flight to avoid arrest was a misdemeanor if it involved fleeing in a motor vehicle in an effort to avoid arrest, whereas the offense became a felony if the state alleged and proved the additional element of willful reckless operation of a motor vehicle, and this additional fact pertained to the manner in which the offense was committed, not to prior criminal conduct. West's Neb.Rev.St. §§ 8-905(3)(a)(iii), 29-2221.

[4]  KeyCite Citing References for this Headnote

- ◀ 350H Sentencing and Punishment
 - ◀ 350HVI Habitual and Career Offenders
 - ◀ 350HVI(K) Proceedings
 - ◀ 350Hk1375 Evidence
 - ◀ 350Hk1380 Degree of Proof
 - ◀ 350Hk1380(1) k. In general. Most Cited Cases

In a habitual criminal proceeding, the state's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he was sentenced and committed to prison for not less than one year, (2) the trial court rendered a judgment of conviction for each crime, and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings. West's Neb.Rev.St. § 29-2221(1).

[5]  KeyCite Citing References for this Headnote

- ◀ 284 Pardon and Parole
 - ◀ 284II Parole
 - ◀ 284k48 Eligibility for Parole or Parole Consideration
 - ◀ 284k50 k. Minimum sentence, and computation of term in general. Most Cited Cases

- ◀ 350H Sentencing and Punishment  KeyCite Citing References for this Headnote
 - ◀ 350HV Sufficiency and Construction of Sentence Imposed
 - ◀ 350HV(C) Construction
 - ◀ 350HV(C)2 Punishment
 - ◀ 350Hk1137 Conflict in Record
 - ◀ 350Hk1139 k. Oral and written pronouncements. Most Cited Cases

Any discrepancy between the minimum sentence of 18 years imposed on defendant on his flight to avoid arrest conviction and the statements of the sentencing court regarding his parole eligibility was controlled by the former, as statute specifically provided that if any discrepancy existed between the statement of the minimum limit of the sentence and the statement of parole eligibility, the statement of the minimum limit controlled the calculation of defendant's term. West's Neb.Rev.St. § 29-2204(1).

***560 1. Statutes: Appeal and Error.** Statutory Interpretation presents a question of law, for which an appellate court has an obligation to reach an Independent conclusion Irrespective of the determination made by the court below.

2. Sentences: Appeal and Error. A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court.

3. Sentences: Prior Convictions: Habitual Criminals: Proof. In a habitual criminal proceeding, the State's evidence must establish with requisite trustworthiness, based upon a preponderance of the evidence, that (1) the defendant has been twice convicted of a crime, for which he or she was sentenced and committed to prison for not less than one year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.

Brian J. Lockwood and Richard L. DeForge, Deputy Scotts Bluff County Public Defenders, for appellant.

Jon Bruning, Attorney General, and Kimberly A. Klein, Lincoln, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

***561 NATURE OF CASE**

A jury found William D. Kinser, Jr., guilty of felony flight to avoid arrest. After finding that Kinser had five previous felony convictions, the district court for Scotts Bluff County found Kinser to be a habitual criminal and sentenced him to a term of not less than 18 nor more than 30 years' imprisonment with the Nebraska Department of Correctional Services (DCS) for that crime. Kinser contends that the habitual criminal determination was erroneous because the flight to avoid arrest conviction was enhanced from a misdemeanor to a felony based upon Kinser's ****229** willful reckless operation of a motor vehicle and that any further enhancement under the habitual criminal statute would result in an improper double enhancement. Kinser also argues that the sentencing order must be reversed because the district court intended for him to be eligible for parole after 10 years, whereas, under the sentence imposed for his flight to avoid arrest conviction, he will not be eligible for parole for 14 years. We find no merit to either contention and therefore affirm.

BACKGROUND

On the evening of December 23, 2010, Deputy Lanny Hanks was observing traffic on Lake Minatare Road in Scotts Bluff County, Nebraska. He saw a vehicle exceeding the speed limit and undertook pursuit. Hanks initially activated only his patrol car's overhead lights, but when he realized the vehicle was not stopping, he activated his car's siren. After a chase of approximately 10 miles, Hanks was able to immobilize the vehicle. Kinser was identified as the operator of the vehicle.

The State charged Kinser with felony operation of a motor vehicle to avoid arrest; driving under revocation, first offense; and driving while under the influence of alcohol (DUI), second offense. The State alleged that Kinser's flight to avoid arrest involved willful reckless operation of a motor vehicle, which made the offense a Class IV felony under ***562** Neb.Rev.Stat. § 28-905(3)(a)(III) (Reissue 2008). The State also alleged that Kinser was a habitual criminal under Neb.Rev.Stat. § 29-2221 (Reissue 2008). A jury trial was held on the flight to avoid arrest and driving under revocation charges. The jury found Kinser guilty of both offenses.

Prior to sentencing, the State notified Kinser and the court that it would present evidence that Kinser was a habitual criminal. At the hearing, the State introduced five prior convictions: (1) a 1983 conviction for burglary, (2) a 1993 conviction for failure to appear, (3) a 1993 conviction for theft, (4) a 1995 conviction for second degree assault, and (5) a 1995 conviction for assault on a police officer in the third degree. Certified records showed that Kinser received a sentence of at least 1 year's

based upon a preponderance of the evidence, that (1) the defendant has been twice *564 convicted of a crime, for which he or she was sentenced and committed to prison for not less than 1 year; (2) the trial court rendered a judgment of conviction for each crime; and (3) at the time of the prior conviction and sentencing, the defendant was represented by counsel or had knowingly and voluntarily waived representation for those proceedings.^{FN4} The district court concluded that there were five valid and usable convictions for purposes of the habitual criminal enhancement. Kinser does not challenge this conclusion, which is fully supported by the record. Instead, Kinser argues that using his felony flight to avoid arrest conviction to trigger a habitual criminal enhancement would result in an improper double enhancement.

FN4. State v. Epp, 278 Neb. 683, 773 N.W.2d 356 (2009).

Felony flight to avoid arrest is criminalized under § 28-905, which in relevant part provides:

(1) Any person who operates any motor vehicle to flee in such vehicle in an effort to avoid arrest or citation commits the offense of operation of a motor vehicle to avoid arrest.

(2)(a) Except as otherwise provided in subsection (3) of this section, any person who violates subsection (1) of this section shall be guilty of a Class I misdemeanor.

....

****231** (3)(a) Any person who violates subsection (1) of this section shall be guilty of a Class IV felony if, in addition to the violation of subsection (1) of this section, one or more of the following also applies:

(I) The person committing the offense has previously been convicted under this section;

(II) The flight to avoid arrest results directly and proximately in the death of or injury to any person if such death or injury is caused directly and proximately by the vehicle being driven by the person fleeing to avoid arrest; or

(III) The flight to avoid arrest includes the willful reckless operation of the motor vehicle.

Kinser was convicted of a Class IV felony under § 28-905(3)(a)(III), based on his willful reckless operation of *565 the vehicle during the flight to avoid arrest. Kinser argues he was improperly sentenced as a habitual criminal because the "enhancement" from a misdemeanor to a felony under § 28-905(3)(a)(III) plus the habitual criminal enhancement results in an impermissible double enhancement under this court's holding in State v. Chapman.^{FN5} Evaluating this argument requires a discussion of Chapman and its progeny.

FN5. State v. Chapman, 205 Neb. 368, 287 N.W.2d 697 (1980).

The defendant in Chapman was convicted of third-offense DUI. He was sentenced as a habitual criminal under § 29-2221 then in effect based upon his prior felony convictions for malicious destruction of property and third-offense DUI. This court concluded the district court erred in sentencing him as a habitual criminal. We reasoned that his prior conviction for third-offense DUI was not a prior felony for purposes of a habitual criminal enhancement because the offense became a felony solely due to his prior DUI convictions. The statute prohibiting third-offense DUI in relevant part provided, "[I]f such conviction is for a third offense, or subsequent offense thereafter, such person shall be imprisoned ... for not less than one year nor more than three years...." ^{FN6} After noting a reluctance "to apply an expansive reading to the Habitual Criminal Act," this court held in Chapman that "offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute 'felonies' within the meaning of prior felonies that enhance penalties

under the habitual criminal statute." ^{FN7} We noted the language of the statute evidenced a legislative intent that "convictions for third offense and all subsequent offenses ... should be treated similarly" ^{FN8} and that the "weight of authority [was] against double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute." ^{FN9}

^{FN6}. Neb.Rev.Stat. § 39-669.07(3) (Relssue 1974). See State v. Chapman, supra note 5.

^{FN7}. State v. Chapman, supra note 5, 205 Neb. at 370, 287 N.W.2d at 698.

^{FN8}. Id. at 371, 287 N.W.2d at 699.

^{FN9}. Id. at 370, 287 N.W.2d at 699.

566** This court later extended the Chapman holding in State v. Hittle.^{FN10} The defendant in that case was convicted of felony flight to avoid arrest and felony driving under a 15-year license suspension. Based on a prior conviction for operating a motor vehicle with a suspended or revoked license and convictions from a single proceeding for possessing a stolen firearm and a controlled substance, he was sentenced as a habitual criminal. The statute *232** criminalizing driving under a revoked license at the time of his offenses, Neb.Rev.Stat. § 60-6,196(6) (Relssue 1993), provided, "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section [after two previous DUI convictions] shall be guilty of a Class IV felony." On appeal, this court acknowledged that Chapman was distinguishable because a conviction under § 60-6,196(6) was a felony whether or not the defendant was previously convicted of the same offense. But we stated that Chapman rested upon two general principles:

^{FN10}. State v. Hittle, 257 Neb. 344, 598 N.W.2d 20 (1999).

(1) A defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute and (2) the specific enhancement mechanism contained in Nebraska's DUI statutes precludes application of the general enhancement provisions set forth in the habitual criminal statute.^{FN11}

^{FN11}. Id. at 355, 598 N.W.2d at 29.

We reasoned that driving under a revoked license was criminalized under the same statutory scheme as DUI and that a person could become a felon for driving under a suspended license only by first committing multiple DUI offenses. Thus, we observed that the penalty for driving under a revoked license was "enhanced by virtue of the defendant's prior violations of other provisions within the same statute." ^{FN12} Based on this reasoning, we held that a conviction under § 60-6,196(6) could not be used as either the offense triggering a habitual ***567** criminal enhancement or a prior felony for purposes of the enhancement.

^{FN12}. Id. at 356, 598 N.W.2d at 29.

This court next considered the holdings of Chapman and Hittle in State v. Taylor.^{FN13} The

defendant in that case was convicted of third degree assault on an officer under Neb.Rev.Stat. § 28-931 (Reissue 1995), which at the time of the offense, provided:

FN13. State v. Taylor, 262 Neb. 639, 634 N.W.2d 744 (2001).

- (1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer or employee of [DCS] while such officer or employee is engaged in the performance of his or her official duties.
- (2) Assault on an officer in the third degree shall be a Class IV felony.

That felony conviction served as the trigger for a habitual criminal enhancement. On appeal, the defendant argued he should not have been convicted under § 28-931 and sentenced as a habitual criminal under § 29-2221 because that resulted in an improper double enhancement. He contended that third degree assault under Neb.Rev.Stat. § 28-310 (Reissue 2008) was a misdemeanor and that his conviction was enhanced to a felony based on the status of his victim, a DCS employee.

After noting that the defendant's argument presented "a question of statutory interpretation as to whether the Legislature enacted § 28-931 as a 'specific subsequent offense statute' for general third degree assault, or as a separate crime," FN14 this court rejected the defendant's argument "because § 28-931[was] not a specific subsequent offense statute." FN15 We explained:

FN14. Id. at 647, 634 N.W.2d at 750.

FN15. Id. at 647, 634 N.W.2d at 751.

****233** Nothing contained in the plain language of § 28-931 enhances the penalties for third degree assault upon a DCS employee based on subsequent offenses. A comparison of the plain language of §§ 28-310 and 28-931 indicates that the Legislature enacted these statutes to ***568** punish two separate and distinct crimes with separate and distinct elements. Under § 28-931, the status of the victim is an element of the crime and is not a subsequent offense penalty enhancement. FN16

FN16. Id.

The same reasoning applies to this case, despite the fact that misdemeanor and felony flight to avoid arrest are defined in the same statute. Section 28-905(3)(a)(III) is not a specific subsequent offense statute. Reading § 28-905 as a whole, the offense of flight to avoid arrest is a misdemeanor if it involves fleeing in a motor vehicle in an effort to avoid arrest, whereas the offense becomes a felony under § 28-905(3)(a)(III) if the State alleges and proves the additional element of willful reckless operation of a motor vehicle. This additional fact pertains to the manner in which the offense was committed, and not to prior criminal conduct. Thus, Kinser was not subjected to an impermissible double enhancement and the district court did not err in sentencing him as a habitual criminal. We express no opinion as to whether the result would be the same if Kinser had been convicted of felony flight to avoid arrest under § 28-905(3)(a)(I), as that issue is not presented in this case.

DISTRICT COURT DID NOT IMPOSE ERRONEOUS SENTENCE

Kinser argues that the sentencing order must be reversed as erroneous because of a discrepancy between the sentence imposed for his flight to avoid arrest conviction and the court's statements at the sentencing hearing regarding his eligibility for parole. Relying upon the following statement, Kinser asserts the trial court intended for him to be parole eligible after 10 years:

So the defendant will be sentenced to serve an indeterminate or terms—let me rephrase that because we have a mandatory minimum. He'll be sentenced to serve sentences in an institution

under the jurisdiction of [DCS] as follows: On Count II [driving under revocation], which is the misdemeanor, six months, and there's a one year revocation of his license. On Count I [fleeing to avoid arrest], *569 which is the felony, not less than 18 years and not more than 30 years. The minimum will include the mandatory minimum of 10 years with a two-year revocation of his license. Those sentences will be served concurrent. I give him credit for 190 days that he has served. Costs will be taxed to the defendant. He will not be parole eligible until he has served the mandatory minimum of 10 and [DCS] can indicate the time period but he will be eligible for parole. I'll revoke his bond and remand him then back to custody.

The State argues this language falls to show "an intention that Kinser be parole eligible in 10 years." FN17 It contends that the district court expressly left the issue of parole eligibility to DCS, but informed Kinser that he would serve the mandatory minimum of 10 years.

FN17. Brief for appellee at 13.

Subject to an exception not applicable here, in imposing an indeterminate sentence upon an offender, a court is required by Neb.Rev.Stat. § 29-2204 (Reissue 2008) to "[f]ix the minimum and maximum limits **234 of the sentence," FN18 to "[a]dvise the offender on the record the time the offender will serve on his or her minimum term before attaining parole eligibility assuming that no good time for which the offender will be eligible is lost," FN19 and to "[a]dvise the offender on the record the time the offender will serve on his or her maximum term before attaining mandatory release assuming that no good time for which the offender will be eligible is lost." FN20 We agree with the State that the sentencing court did not clearly state that Kinser would be eligible for parole after serving 10 years. But even if it had, the question would be resolved by § 29-2204(1), which provides, "If any discrepancy exists between the statement of the minimum limit of the sentence and the statement of parole eligibility ... the statement[] of the minimum limit ... shall control the calculation of the offender's term."

FN18. § 29-2204(1)(a)(ii)(A).

FN19. § 29-2204(1)(b).

FN20. § 29-2204(1)(c).

*570 Although this court has not had occasion to apply this provision, the opinion of the Nebraska Court of Appeals in State v. Glover FN21 is instructive. The defendant in that case argued for a reduction in her sentence or, alternatively, for a resentencing, based on an incorrect statement made by the district court at sentencing. The trial judge sentenced her to a term of 21 to 30 months' imprisonment, but stated that on the low end, she would serve about 9 months. The Court of Appeals acknowledged the trial court's misstatement, explaining that assuming no loss of good time, the defendant would serve 10 1/2 months before becoming eligible for parole. However, the court rejected her argument, reasoning that under the plain language of § 29-2204(1), the minimum sentence of 21 months controlled the calculation of her term, which determined her parole eligibility.

FN21. State v. Glover, 3 Neb.App. 932, 535 N.W.2d 724 (1995).

[5]  We agree with the Court of Appeals' interpretation and application of § 29-2204(1) in Glover. In this case, any discrepancy between the minimum sentence of 18 years for Kinser's flight to avoid arrest conviction and the statements of the sentencing court regarding parole eligibility would be controlled by the former. Under our holding in Johnson v. Kenney, FN22 good time credit would not

reduce the 10-year mandatory minimum portion of Kinser's sentence for that crime. Thus, assuming no loss of good time credit, Kinser would serve the 10-year mandatory minimum plus 4 of the remaining 8 years of the minimum sentence, less credit for time served, before becoming eligible for parole.^{FN23}

FN22. *Johnson v. Kenney*, 265 Neb. 47, 654 N.W.2d 191 (2002).

FN23. See Neb.Rev.Stat. §§ 83-1,107 (Supp.2011) and 83-1,110 (Reissue 2008).

CONCLUSION

For the reasons discussed, Kinser was properly sentenced as a habitual criminal and the sentence imposed for his flight to avoid arrest conviction was not erroneous. The judgment is affirmed.

AFFIRMED.

WRIGHT, J., not participating in the decision.

Neb., 2012.
State v. Kinser
283 Neb. 560, 811 N.W.2d 227

[Judges and Attorneys \(Back to top\)](#)

[Judges](#) | [Attorneys](#)

Judges

- **Connolly, Hon. William M.**

State of Nebraska Supreme Court
Lincoln, Nebraska 68509

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- **Heavican, Hon. Michael G.**

State of Nebraska Supreme Court
Lincoln, Nebraska 68509

[Litigation History Report](#) | [Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **Lippstreu, Hon. Randall L.**

State of Nebraska District Court, 12th District
Gering, Nebraska 69341

[Judicial Reversal Report](#) | [Judicial Expert Challenge Report](#) | [Profiler](#)

- **McCormack, Hon. Michael**

State of Nebraska Supreme Court
Lincoln, Nebraska 68509

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- **Stephan, Hon. Kenneth C.**

State of Nebraska Supreme Court
Lincoln, Nebraska 68509

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- **Wright, Hon. John F.**

State of Nebraska Supreme Court
Lincoln, Nebraska 68509

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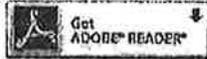
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Adobe Reader is required to view PDF images.



From: Douglās, Jeannene
Sent: Tuesday, March 27, 2012 4:38 PM
To: Liss, Nathan
Subject: RE: calculating mandatory minimum sentences

Glad I could help. Have a great rest of the week. Hope you will be able to enjoy some of the wonderful Spring weather.

*Jeannene Douglass
Records Manager II
Central Records Office
Nebraska Department of Corrections
PH: 402-479-5773
E-mail: jeannene.douglass@nebraska.gov*

From: Liss, Nathan
Sent: Tuesday, March 27, 2012 4:34 PM
To: Douglass, Jeannene
Subject: RE: calculating mandatory minimum sentences

Thank you very much, Jeannene. The information you provided is very helpful. I will certainly be in touch if I have any further questions.

Take care, and thanks again for your help.

- Nate

Nathan A. Liss
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From: Douglass, Jeannene
Sent: Tuesday, March 27, 2012 3:18 PM
To: Liss, Nathan
Subject: calculating mandatory minimum sentences

80

Good Afternoon, Nate:

I have attached the memorandums and e-mails I have stating how the Department of Corrections calculates mandatory minimum sentences (parole eligibility is based on minimum terms) and the Tentative Discharge Date (which is either the flat mandatory minimum term or one-half of the maximum term, whichever is longer.

If you have any questions, please let me know. I'll do what I can to answer them.

Jeannene Douglass
Records Manager II
Central Records Office
Nebraska Department of Corrections
PH: 402-479-5773
E-mail: jeannene.douglass@nebraska.gov

From: Microsoft Outlook on behalf of Poppert, Kyle
Sent: Sunday, June 03, 2012 2:27 PM
To: Hookstra, Inga
Subject: RE: Question on f
Attachments: RE: Question on f

Sender: Kyle.Poppert@nebraska.gov

Subject: RE:

Message-Id: <960ECE121A2CF741849DFAC189F2532446A1871C24@STNEMAIL01.stone.ne.gov>

To: Inga.Hookstra@nebraska.gov

From: Poppert, Kyle
Sent: Sunday, June 03, 2012 2:28 PM
To: Hookstra, Inga
Subject: RE: Question on [redacted]

She is serving a 10 year mandatory minimum for habitual criminal so her PED will actually be after she discharges. She must serve the 10 years plus half the balance of her minimum term before she is eligible for parole, which is longer than her 20 year maximum term.
Kyle

Kyle J. Poppert
Classification and Inmate Records Administrator
Nebraska Department of Correctional Services
Programs & Community Services Division
Phone: (402) 479-5750
Cellular
Fax: (402) 742-2349
Kyle.Poppert@nebraska.gov

Change is Inevitable, growth is optional.

From: Hookstra, Inga
Sent: Saturday, June 02, 2012 1:53 PM
To: Poppert, Kyle
Subject: Question on [redacted]

I take it that this inmate has a mandatory sentence, but how can her PED be greater than her TRD? Essentially she is never eligible for parole, which I know that happens. I am just thinking how an inmate with these type of dates will be handled in CIT with Release Savings and some other issues. I may need to make some modifications to policy and the system.

QUICK CHECK INFORMATION 6/2/2012

ID: _____ CURR LOCATION NCW RECEIVED
DATE 12/14/2011

BIRTH CITY/STATE/COUNTRY: KANSAS CITY / MO / USA; Previous ID:

RACE BLACK SEX E CURR AGE 41 DOB* _____
MRTL MARRIED CNSLR NBR _____
SSN _____ FBI _____ SID _____
DRUG DP 28-416 N DNA No Sample Required SEX OFFENDER N

CURR CUSTDY DT 12/14/2011 CURR CUSTODY 1X CURR JOB ASSGN All Day JOB
DESC SEW FACTRY
SENT BEGIN DATE: 12/14/2011 MIN SENT: 14.8 MAX SENT: 20.0

TENTATIVE RELEASE DATE: 10/3/2021 PAROLE ELIG DATE: 2/3/2024

LAST PB MEETING: _____ NEXT REVIEW: 6/1/2012 HEARING DATE: _____ PB STATUS: DEFERRED

Docket Count: _____ Docket Number: _____ County: _____ Off Ct: _____ Attempt Code: _____ Offense: _____

1	11-769	LANCASTER	1	Mandatory Minimum	THEFT BY DECEPTION
			2		THEFT BY DECEPTION
			3		THEFT BY DECEPTION

Inga Hookstra
Controller
Nebraska Department of Correctional Services
P. O. Box 94661
Lincoln, Nebraska 68509
inga.hookstra@nebraska.gov
Phone: 402-479-5756
Fax: 402-479-5821

From: Microsoft Outlook on behalf of Poppert, Kyle
Sent: Monday, January 07, 2013 1:35 PM
To: Bulling-June, April

Sender: Kyle.Poppert@nebraska.gov

Subject:

Message-Id: <84061BD94EFEF64BBCE765BD7E9EBD1F147AAF69@STNEEX10MB01.stone.ne.gov>

To: April.Bulling@nebraska.gov

From: Poppert, Kyle
Sent: Monday, January 07, 2013 1:34 PM
To: Bulling-June, April
Attachments: IMPORTANT.doc; LB 191 response to inmates.doc; Effects of Appeals.doc; COMB CONSEC SENTENCES_20100810104212.pdf; 30 DAY MONTH_20100810104247.pdf; CS-v-CCsentences.pdf; GOOD TIME LAWS.docx; GOOD TIME ON PAROLE_20100810104512.pdf; MANDATORY MIN_20100810103815.pdf; mandatory minimums.doc; mandatory minimums1.doc; mandatory minimums2.doc; MandatoryMinimum.pdf; OMBUDSMAN'S ACCESS_20100810103537.pdf

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Change is Inevitable, growth is optional.

IMPORTANT RECORDS INFORMATION

Restoration of good time A DCS memo dated September 16, 1980, directed Records Officers to restore all good time forfeited between September 10, 1976, and January 8, 1978. This action was a result of DCS failing to properly promulgate DCS rules and regulations.

Restoration of good time Per AR 117.01 DCS policy allows for restorations of good time in increments of more than 1 month for good time forfeited prior to September 1, 1985. This good time can only be restored by the Director. If the inmate has had more good time restored than was forfeited prior to September 1, 1985, the inmate would not be eligible for restoration of more than 1 month good time.

Nelson v. Wolff, 190 Neb. 141, 206 N.W. 2d 330 (1973). This ruling states: "if a sentence is pronounced upon one already serving sentence from another court, second sentence does not begin to run until sentence which prisoner is serving has expired unless court pronouncing second sentence specifically states otherwise". **This ruling was reaffirmed by the Nebraska Supreme Court in Harpster v. Benson, 216 Neb. 776, 345 N.W.2d 335, 336 (1984) and State v. McNerny, 239 Neb. 887, 479 N.W. 2d 454 (1992).**

Culpen v. Hahn, 158 Neb. 390, 63 N.W. 2d 157 (1954). This ruling states that "where two sentences are imposed in the same court at the same time for two offenses, the sentences will run concurrently if the trial judge does not otherwise order.

Gochenour v. Bolin, 208 Neb. 444, 303 N.W. 2d 775 (1981). This decision states that consecutive terms must be consolidated under the provisions of the good time law in effect at the time of the original sentence. Also refer to Boston v. Black, 340 N.W. 2d 401 (1983).

Malone v. Benson, Ruled that forfeiture of all good time was not mandatory when an inmate violates parole. As a result of this decision the Parole Administration implemented a schedule for offenses relating to parole violations that was in line with DCS Rule 5.

Richardson/Sterling v. Clarke, 2 Neb. App. 575 (1994). Court of Appeals ruling that applied to inmates sentenced prior to July 15, 1992. The court ruled that inmates who filed direct appeals of their convictions and received an opinion from the appellate court after July 14, 1992, or are still awaiting a final decision on the direct appeal are entitled to the provisions of the new good time law (LB 816).

Jones v. DCS, 253 Neb. 161, 568 N.W. 2d 897 (1997) Supreme Court ruling that inmates granted reinstated direct appeals were entitled to the provisions of the new good time law (LB 816)

Heckman v. Clarke, Docket 134, No. 369, Douglas County District Court (1994). Affirmed DCS policy relating to computing dead time and jail time on consecutive sentences that result from parole revocations.

State v. Bennett, 2 Neb. App. 188 (1993). Court of Appeals ruling that eliminated mandated dates of solitary confinement. The sentence wasn't affirmed until after the legislature removed the statutory language authorizing solitary confinement (eff. 9-9-93) and, therefore, the solitary confinement portion of the sentence was reversed.

Awarding of Jail Time Credit (83-1,106) LB 1307, passed by the Legislature in 1969 authorized the Director of Corrections to grant credit for time served prior to sentencing. LB 1499, passed by the Legislature in 1972 (effective July 6, 1972) amended this section, it removed the Director of Corrections from the section and specified that any credit for time served must be awarded by the sentencing court. State v. Esquivel, 244 Neb. 308, 505 N.W. 2d 736 (1993) states that in a criminal case the sentencing judge is required to determine, state and grant the amount of credit to be given to the defendant.

Mandatory Minimum Sentences A letter from Attorney General Don Stenberg dated January 25, 1994 advised the Department of Correctional Services and Board of Parole that inmates serving mandatory minimum terms for drug offenses convicted as either Class IC or ID felons must serve the entire mandatory minimum term before they are eligible for parole. This letter resulted in a DCS policy change that ensured that all inmates sentenced under these statutes would serve the entire mandatory minimum term. However, it should be noted that jail time credit was deducted.

Mandatory Minimum Terms Under §29-2221 (1) Effective 9-9-95, the habitual criminal minimum terms became mandatory. Parole eligibility will be computed based on the inmate serving the entire mandatory minimum term plus 1/2 of the total of any additional minimum term(s). For example, the total sentence was 14 to 30 years for an offense enhanced by habitual criminal, parole eligibility would be the flat 10 years plus 2 years (1/2 of the balance of 4 years).

Below are two court cases that have affirmed not applying good time to mandatory minimum terms.

Johnson v. Kenney, 265 Neb. 47 (2002) Nebraska Supreme Court ruling stating an inmate must serve the full mandatory minimum term before being eligible for parole or discharge.

Hurbenca v. DCS, A-06-945 (2007) Court of Appeals ruling affirmed DCS policy that added 10 years to both the inmate's parole eligibility and discharge dates on a consolidated sentence. Hurbenca's sentences are consolidated under good time law LB 567, however, mandatory minimum terms received on consecutive terms apply.

Certificate of Discharge - Restoration of Civil Rights A memo from Director Clarke dated July 19, 1993, directed the department to add specific language to discharge papers stating that the restoration of civil rights does not automatically restore the right to carry firearms. This memo was the result of a letter and court brief filed by the AG's office. Refer to Records Meeting Minutes of August 23, 1993. REFER to related Attorney General's Opinion dated March 18, 1996. The opinion states that no rights can be restored without obtaining a pardon.

Jasper Falkner v. NE Board of Parole and NE Department of Correctional Services, 330 N.W. 2d 141 Nebraska Supreme Court ruling held that an inmate returned to NE to serve another state's sentence under the interstate compact, could not serve the remaining portion of his NE sentence concurrently with the other state's sentence.

Wound Shield v. Gunter filed May 1, 1987. No. 86-747 Nebraska Supreme Court ruling that affirmed DCS policies concerning sentence computations on LB 1307/1499 cases involving mandatory parole revocations.

State v. Jones, 532 N.W. 2d 293, 248 Neb. 117 N Nebraska Supreme Court ruling held that the District Court cannot reduce a previously imposed term. Commutation of sentence is a power entrusted to the executive branch of government (Pardon Board).

Indeterminate "flat" sentences This situation only affects inmates that committed their crimes on or after September 9, 1993 and are sentenced through June 30, 1998. During this time period, the provision in statute that allowed DCS to automatically insert the statutory minimum on "flat" sentences was removed from state statute. Effective July 1, 1998 the language allowing DCS to automatically insert the statutory minimum on "flat" sentences was reinstated per LB 364.

Nebraska Criminal Code The Nebraska criminal code was re-written and the new code became effective January 1, 1979. Offenses committed prior to this date were under the old criminal code and the offenses were listed under a different statute number. The new criminal code assigned new statutes to all existing offenses.

GOOD TIME LAWS

Pre-1969	sentenced prior to 8-25-1969
1307/1499	Sentenced 8-25-1969/7-6-1972
LB 567	8-24-1975
LB 816	7-15-1992
LB 364	7-1-1998
LB 191	3-16-2011

THINGS TO CONSIDER WHEN CALCULATING TIME

1. Sentence begin date – the date the sentence was imposed by the court (NOT the date the judge signed the court commitment order, but the date the sentence was actually imposed. These are sometimes the same date; sometimes, they are not because the judge might sign the order several days after the sentence was imposed.)
2. Sentence/term(s) – how long the inmate is to be incarcerated
3. Jail Credit granted – jail credit is granted by the Court. The Department does not determine the amount of jail credit to be applied to the sentence; at times, the Court commitment may state that jail credit is to be determined by NDCS (Nebraska Department of Corrections); when that happens, jail credit is considered to be zero. On occasion, the commitment order may state that the jail credit begins at a certain time on one day through a specific time on another day. Jail credit is calculated in full days only.
4. All time calculations are based on a 30-day month and a 360 day year. IF the commitment order states the inmate was sentenced to a 365 day sentence, the Department considers that to be one year. Leap Year calculations are included in the 360-day year. However, a 366-day sentence would be considered to be one year and one day. Jail credit calculations are also based on a 30-day month.
5. Need to know which good time law is applicable to the case on which the time is being calculated. (Most cases now are under terms of LB 191.)
6. Sentences may be received at different times during the course of an inmate's incarceration. These sentences may be concurrent or consecutive to the sentences already being served. Depending on the status of those sentences, good time is applied accordingly.

GOOD TIME LAWS DESCRIBED

Pre-1969, LB 1307 and LB 1499 – good time applies to parole only. Inmates under this good time law are either discretionarily paroled (parole by the Parole Board) or mandatorily paroled (released mandatorily on parole by law). This good time was awarded AS IT WAS EARNED! Hence, the release date was calculated practically on a day-to-day basis. If, for whatever reason, the inmate had violated a mandatory parole and was not eligible for another mandatory parole, s/he would then serve out the remainder of the sentence in custody and be released by Expiration of Sentence (sometimes referred to as “full time” – flat maximum term less jail credit plus dead time, if applicable). It depended on whether or not the inmate was working. (a little history – this is the reason LB 567 came into existence. The inmates wanted to know where they stood when they were admitted to the Department to start serving their sentence; legislation was presented and passed – LB 567 -- so that the good time would be applied at the time the sentence started.)

LB 567 has two types of good time. It also has two types of release: (1) Discretionary Parole – parole granted by the Board of Parole; (2) Mandatory Discharge (the date the inmate **MUST** be released from the Department's custody, having served the requirements of the sentence imposed).

Good Behavior Good Time (GBGT) is applied to both the minimum and maximum sentences (minimum term to determine parole eligibility date) and maximum term (to determine the date inmate is to discharge). GBGT is earned as follows:

- 2 months (5 days a month) on the first year of the sentence
- 2 months (5 days a month) on the second year of the sentence
- 3 months (7½ days) on the third year of the sentence (any time the calculation comes out to include a half day, round the number up to the higher number)
- 4 months (10 days a month) on the fourth year and any portion thereafter

Meritorious Good Time (MGT) is applied **ONLY** to the maximum sentence (term) to determine the discharge date. MGT is strictly **two (2) months a year (5 days a month)**.

So, both the GBGT and MGT must be calculated and deducted from the **MAXIMUM TERM** to determine the **discharge date**. This is the earliest date the inmate can be discharged from this sentence. If the inmate should lose good time for any reason (misconduct or parole violation), the good time lost must be added on to the TRD

LB 816, made the time calculations simpler in that the *minimum term* was reduced by six months for each year of the sentence to determine the inmate's parole eligibility date; the maximum sentence was also reduced by six months for each year of the *maximum term* to determine the date the inmate was to be discharged from the custody of the state. Jail credit is also deducted from each of these calculations. There is no distinction between types of good time under this good time law; all good time is strictly one-half of the *minimum and maximum sentence* and was credit at the beginning of the sentence being served. An Attorney General's Opinion was issued June 11, 1992 addressing questions the Department has pertaining to the loss of good time and its application to the minimum and/or the maximum term. (copy attached)

LB 364 is similar to LB 816. It is strictly half time – half of the minimum sentence to determine date inmate becomes eligible for parole; half of the maximum sentence to determine the date inmate must be discharged from custody having completed the requirements of the court-imposed sentence. The good time is applied to the sentence when the inmate starts serving that sentence. it can be taken away from the maximum sentence ONLY (if appropriate, because of parole violation and/or any other misconduct/disciplinary reasons).

LB 191 is also similar to LB 816 and LB 364 in that the time-sentence calculations are half-time: half of the minimum term to determine the parole eligibility date; half of the maximum term to determine the mandatory discharge date (TRD).

The difference with LB 191 is the fact that an inmate can earn an additional 3 days a month good time under the following conditions.

1. Has not been found guilty of a CLASS I OR CLASS II offense , or MORE THAN three (3) Class III offenses under the Department's disciplinary code, s/he will receive 3 days credit on the first day of the month "following a twelve-month period of incarceration within the Department." This will continue to occur each month as long as the inmate continues to have no Class I, Class II or three Class III offenses. LB 191 credits apply only to the Tentative Release Date; it has no bearing on the parole eligibility date and is credited only while the inmate is incarcerated. IF the inmate is released on parole, the parole good time credit of 10 days a month is applied to the TRD to determine the date the inmate will discharge from parole.

Terms used in inmate sentencing and time-sentence calculations

Concurrent sentence – more than one sentence running at the same time. Each sentence is calculated independently to determine which sentence is precedent. It is possible that one sentence would determine parole eligibility and the other determine the date of discharge.

Concurrent vs consecutive sentence – IF the court commitment does not specify the status of the sentence (to run concurrent or consecutive to an existing sentence), and IF the sentence was received on the same date in the same court, the sentences are considered to be concurrent. However, IF the sentences are from different courts, same date or not, they are considered to be consecutive.

Consecutive sentence – sentence “follows” a sentence that has already been imposed. According to Sec. 83-1,110 (2) every committed offender sentenced to consecutive terms, whether received at the same time or at any time during the original sentence, shall be eligible for parole when one-half the minimum sentence has been served; discharge when $\frac{1}{2}$ the maximum sentence has been served.

Dead Time – time inmate is not available to the State of Nebraska to serve the court-imposed sentence (i.e., on bond, on escape, absconded parole supervision, possibly serving a sentence in another jurisdiction, etc.)

Determinate sentence – “flat” sentence. For example, the court might sentence someone to a 2-year sentence. This is considered to be “flat” sentence.

Indeterminate sentence -- includes a “maximum” term to be used to compute the defendant’s discharge date and a “minimum” term to be used to compute the defendant’s parole eligibility date. An example of an indeterminate sentence is 2 to 4 years.

Jail Credit -- time served in custody prior to being sentenced to the Nebraska Department of Corrections

Mandatory Minimum sentence – the inmate must serve the entire “mandatory minimum” required by law before being released either on parole or discharge. No good time applies to the mandatory minimum term—only jail credit would apply, as would dead time, if applicable to the case.

Precedent sentence – sentence controlling discharge and/or parole eligibility.

Statutory Minimum term – is applied to “flat” sentences and is the minimum sentence provided by the law. This is where the class of felony or misdemeanor applies. For example, if the offense is a Class 3 Felony, and the court sentences the inmate to a 5 year sentence,

**OFFENSES INVOLVING
MANDATORY MINIMUM TERMS**

Class ID Felony – 3 year Mandatory Minimum

Class IC Felony – 5 year Mandatory Minimum

Habitual criminal --

Freudenberg, John

From: Doug Warner <DWarner@scottsbluffcounty.org>
Sent: Saturday, January 19, 2013 5:59 PM
To: Freudenberg, John
Cc: Brian Wasson
Subject:

John:

I represented the state when I worked in the AG's office in a post conviction action in Cheyenne County involving _____ I saw his name in a police report this week and could not believe he was out of prison.

I did some research and it appears to me that he was released 10 years early by the Department of Corrections. I obtained a copy of the sentencing journal, the bill of exceptions of the sentencing hearing and the Dept of Corrections website sentencing information.

He was sentenced to (2) mandatory 10-20 year sentences to be served consecutively. He is not entitled to good time on a mandatory minimum sentence and should not have been eligible for parole for 20 years. He was sentenced on April 9, 2003 and given 215 days credit.

Can the Attorney General's office support my effort to get him back in prison? I can fax the materials I have to support my position and ask you to look at Anderson v. Houston, 274 Neb 916 (2008).

I believe the parole board should send him back to prison. He was arrested on Friday, January 18 for a new assault charge and a Parole hold was placed on him. We did notify a parole supervisor about this situation. Captain Brian Wasson of the Scottsbluff Police Department has been working with me on this issue.

Thanks for your assistance in this matter.

Doug Warner

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Freudenberg, John

From: Freudenberg, John
Sent: Wednesday, January 23, 2013 8:46 AM
To: Blum, Kathy; Poppert, Kyle
Subject: FW: Attached Image
Attachments: 1201_001.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Kathy and Kyle

Please find attached the Sentencing Order for which provides a transcript of the relevant portion of that proceeding if you wish to have it in the future. ■ I also have a copy of the bill of exceptions

Thanks.

John

IN THE DISTRICT COURT OF CHEYENNE COUNTY, NEBRASKA

THE STATE OF NEBRASKA,)
)
 vs. Plaintiff,)
)
)
 Defendant.)

Case No. CR
JOURNAL ENTRY
ON SENTENCING

HEARING DATE: April 9, 2003.
APPEARANCES: For plaintiff: Paul Schaub
For defendant: Bell Island

CHARGES SENTENCED ON: Burglary § 28-507 Class III Felony
Conspiracy to Commit Burglary § 28-202 Class III Felony
Burglary § 28-507 Class III Felony
Burglary § 28-507 Class III Felony
Theft by Receiving Stolen Property § 28-517 Class IV Felony

PROCEEDINGS:

Presentence Report: Presentence report was considered by the court and made available to counsel for both parties.

Evidence: plaintiff has no evidence adduces additional evidence on sentencing
defense has no evidence adduces additional evidence on sentencing

Enhancement: Counts I, II, III, IV, and V are each found to have at least two valid and useable prior convictions, and the defendant shall be punished as an habitual offender on each count.

Arguments: argument of plaintiff's counsel is heard waived
argument of defense counsel is heard waived

Allocation: upon inquiry by Court, defendant: makes no statement exercises right of allocation

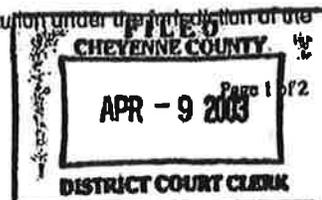
SENTENCE: IT IS THE JUDGMENT AND SENTENCE OF THE COURT that the defendant is sentenced:

On Count No.: I to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years, with 215 days credit for time served before sentencing,

On Count No.: II to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years, with 215 days credit for time served before sentencing,
 sentence is consecutive/concurrent to Count(s) # I

On Count No.: III to imprisonment and committed to an institution under the jurisdiction of the

Sentencing Journal



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On Count No.: IV

Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 215 days credit for time served before sentencing.

☐ sentence is ~~consecutive~~/concurrent to Count(s) # I, II
☐ to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 215 days credit for time served before sentencing.

On Count No.: V

☐ sentence is ~~consecutive~~/concurrent to Count(s) # I, II, III

☐ to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 0 days credit for time served before sentencing.

☐ sentence is consecutive/~~concurrent~~ to Count(s) # I, II, III, IV

Commitment:

☐ to pay court costs of \$ _____ to the clerk of the court.
It is therefore ordered that the defendant be remanded to the custody of the Sheriff, and taken to the appropriate location for execution of sentence:
Execution of this sentence is suspended until _____

Good Time:

As required by law, the court advised the defendant on the record of the time required to be served on the sentence, assuming no good time for which the defendant is eligible is lost, upon minimum term before attaining parole eligibility and upon maximum term before attaining mandatory release

Other:

Sentence on Counts I, II, III and IV to be served concurrently. The sentence on Count V to be served consecutively to the other sentences.

SIGNED ON: April 9, 2003.

BY THE COURT:
Orville L. Loppsten
District Judge

cc: County Attorney
Defense Counsel
County Sheriff
Probation

From: Wayne, Larry
Sent: Wednesday, January 23, 2013 10:53 AM
To: Houston, Bob
Subject: FW:

Bob: FYI; _____ was paroled April 26, 2012. We had incomplete information at the time from The Cheyenne County District Court. They have since sent a journal entry from the 2003 sentencing indicating they intended he receive separate habitual criminal time in addition to the original sentence imposed. He is currently in custody for a misdemeanor assault committed while on this parole. This came to our attention from The Attorney General's Office. _____ will be picked up and returned to DEC. Kathy Blum is contacting the AG's office to explain what occurred and what is being done to correct it.

Larry Wayne
Deputy Director
Programs and Community Services
Nebraska Department of Correctional Services
P.O. Box 94661
Lincoln, NE 68532-4661
Office: 402-479-5721
Cell:

From: Blum, Kathy
Sent: Wednesday, January 23, 2013 10:39 AM
To: Poppert, Kyle; Douglass, Jeannene; Robinson, Hank; Gibson-Beltz, Cathy; Smith, Dawn Renee; Wayne, Larry; Hopkins, Frank; Green, George
Cc: Phelps, Jason
Subject: RE:

I have talked with Jason Phelps and he is going to place a hold on _____ and have him returned to DEC.

Kathleen A. Blum
Associate Legal Counsel
Nebraska Department of Correctional Services
Phone: 402-479-5901
Fax: 402-479-5623
E-mail: kathy.blum@nebraska.gov

From: Poppert, Kyle
Sent: Wednesday, January 23, 2013 10:27 AM
To: Douglass, Jeannene; Blum, Kathy; Robinson, Hank; Gibson-Beltz, Cathy; Smith, Dawn Renee; Wayne, Larry; Hopkins, Frank; Green, George
Subject: RE:

Based upon the additional information we received today, I believe we should take him at DEC pending a classification action.

Into custody and house

Kyle

Kyle J. Poppert
 Classification and Inmate Records Administrator
 Nebraska Department of Correctional Services
 Programs & Community Services Division
 Phone: (402) 479-5750
 Cellula.
 Fax: (402) 742-2349
Kyle.Poppert@nebraska.gov

Change is Inevitable, growth is optional.

From: Douglass, Jeannene
Sent: Wednesday, January 23, 2013 10:23 AM
To: Blum, Kathy; Poppert, Kyle; Robinson, Hank
Subject: RE

For clarification, in my previous e-mail, I used the term "commitment order" but, I should have used the term "Journal Entry on Sentencing" instead. The original court document we received in 2003 was a Commitment." Now, today from the Court, I received a "Journal Entry on Sentencing" which provides the statement "shall be punished as an habitual offender on each count."

*Jeannene Douglass
 Records Manager II
 Central Records Office
 Nebraska Department of Corrections
 PH: 402-479-5773
 E-mail: jeannene.douglass@nebraska.gov*

From: Douglass, Jeannene
Sent: Wednesday, January 23, 2013 10:15 AM
To: Blum, Kathy; Poppert, Kyle; Robinson, Hank
Subject:

<< File: lohman.pdf >>

I called the Cheyenne County District Court this morning regarding _____ to clarify his sentence and offenses. I talked with Deb Hume, Clerk of the District Court in Cheyenne County; she said that this was a case that back "in the day" (April 2003) they thought the Habitual Criminal charge could/should be a separate offense. That information was not included on the commitment order they brought with _____ when he was admitted into NDCS in 2003. They have now made it a part of the commitment order and have faxed that document to me. I have made it a part of the permanent record (both the institution and CRO inmate file as well as the computer has been updated) and the time has been recalculated with the total combined minimum term of 20 years, mandatory minimum.

_____ is not eligible for parole until 9-3-2022 which is the same date as he will discharge from NDCCS (unless he receives additional sentences and/or loses good time). We were not aware of this information when he was heard and paroled on October 26, 2012.

If you need more information from me, please let me know. I'll do what I can to assist in any way.

Thanks.

Jeannene Douglass
Records Manager II
Central Records Office
Nebraska Department of Corrections
PH: 402-479-5773
E-mail: jeannene.douglass@nebraska.gov

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From: Microsoft Outlook on behalf of Douglass, Jeannene
Sent: Wednesday, January 23, 2013 10:15 AM
To: Blum, Kathy; Poppert, Kyle; Robinson, Hank
Subject:
Attachments:

Sender: Jeannene.Douglass@nebraska.gov

Subject:

Message-Id: <39951F55C62721429CED7747FC35B86C13569692@STNEEX10MB02.stone.ne.gov>

To: Kathy.Blum@nebraska.gov

To: Kyle.Poppert@nebraska.gov

To: hank.robinson@nebraska.gov

From: Douglass, Jeannene
Sent: Wednesday, January 23, 2013 10:15 AM
To: Blum, Kathy; Poppert, Kyle; Robinson, Hank
Subject:



I called the Cheyenne County District Court this morning regarding _____ clarify his sentence and offenses. I talked with Deb Hume, Clerk of the District Court in Cheyenne County; she said that this was a case that back "in the day" (April 2003) they thought the Habitual Criminal charge could/should be a separate offense. That information was not included on the commitment order they brought with _____ when he was admitted into NDCS in 2003. They have now made it a part of the commitment order and have faxed that document to me. I have made it a part of the permanent record (both the institution and CRO inmate file as well as the computer has been updated) and the time has been recalculated with the total combined minimum term of 20 years, mandatory minimum.

_____ is not eligible for parole until 9-3-2022 which is the same date as he will discharge from NDCS (unless he receives additional sentences and/or loses good time). We were not aware of this information when he was heard and paroled on October 26, 2012.

If you need more information from me, please let me know. I'll do what I can to assist in any way.

Thanks.

*Jeannene Douglass
Records Manager II
Central Records Office
Nebraska Department of Corrections
PH: 402-479-5773
E-mail: jeannene.douglass@nebraska.gov*

IN THE DISTRICT COURT OF CHEYBNE COUNTY, NEBRASKA

The State of Nebraska
Plaintiff

Defendant

COMMITMENT
Case No.

Charges	Burglary 28-507 Class III Felony
Sentenced	Conspiracy to Commit Burglary 28-202 Class III Felony
	Burglary 28-507 Class III Felony
	Burglary 28-507 Class III Felony
	Theft by Receiving Stolen Property 28-517 Class IV Felony

On April 9th Christopher K. Lohman was sentenced to the above counts by the Honorable Randall L. Lippstreu , District Judge of Scotts Bluff County.

On Count I. To imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years, with 215 days credit for time served before sentencing.

On Count II. To imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years Mandatory. Nor more than 20 years. Sentence is concurrent to Count I. Credit for 215 days.

On Ct III To imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years, with 215 days credit for time served before sentencing. Sentence concurrent to Counts I. II.

Count IV. To imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, Nor more than 20 years, with 215 days credit for time served before sentencing. Concurrent to Counts I. II. III.

On Ct. V. To imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years Nor more than 20 years. With 0 days credit for time served before sentencing. Sentence is consecutive to Counts I, II, III, IV. To pay costs of \$ to the clerk of the court.

It is therefore ordered that the defendant be remanded to the custody of the Sheriff, and taken to the appropriate location for execution of sentence.

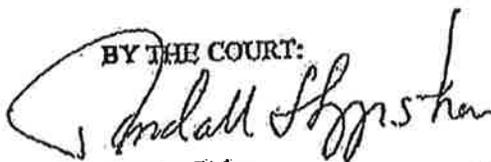
COPY

As required by law, the court advised the defendant on the record of the time required to be served on the sentence, assuming no good time for which the defendant is eligible is lost, upon minimum term before attaining parole eligibility and upon maximum term fore attaining mandatory release.

Sentenced on Counts I, II, III, and IV to be served concurrently. The sentence on count V to be served consecutively to the other sentences.

SIGNED ON April 9th, 2003.

BY THE COURT:



District Judge



COPIES

IN THE DISTRICT COURT OF CHEYENNE COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff,

vs.

Defendant.

Case No.

JOURNAL ENTRY
ON SENTENCING

HEARING DATE: April 9, 2003.

APPEARANCES: For plaintiff: Paul Schaub
For defendant: Bell Island

CHARGES SENTENCED ON: Burglary § 28-507 Class III Felony
Conspiracy to Commit Burglary § 28-202 Class III Felony
Burglary § 28-607 Class III Felony
Burglary § 28-807 Class III Felony
Theft by Receiving Stolen Property § 28-517 Class IV Felony

PROCEEDINGS:

Presentence Report: Presentence report was considered by the court and made available to counsel for both parties.

Evidence: plaintiff has no evidence adduces additional evidence on sentencing
defense has no evidence adduces additional evidence on sentencing

Enhancement: Counts I, II, III, IV, and V are each found to have at least two valid and useable prior convictions, and the defendant shall be punished as a habitual offender on each count.

Arguments: argument of plaintiff's counsel is heard waived
argument of defense counsel is heard waived

Allocution: upon inquiry by Court, defendant: makes no statement exercises right of allocution

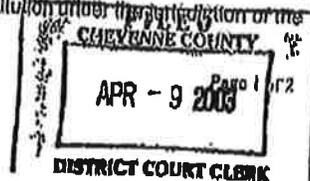
SENTENCE: IT IS THE JUDGMENT AND SENTENCE OF THE COURT that the defendant is sentenced:

On Count No.: I to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 215 days credit for time served before sentencing.

On Count No.: II to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 215 days credit for time served before sentencing.
 sentence is ~~separate~~/concurrent to Count(s) # I

On Count No.: III to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 215 days credit for time served before sentencing.

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On Count No.: IV Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 215 days credit for time served before sentencing, sentence is ~~consecutive~~ concurrent to Count(s) # I, II

to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 215 days credit for time served before sentencing, sentence is ~~consecutive~~ concurrent to Count(s) # I, II, III

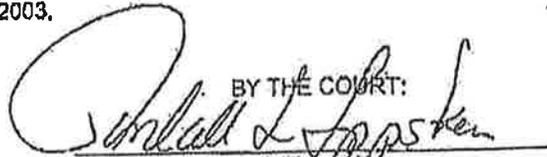
On Count No.: V to imprisonment and committed to an institution under the jurisdiction of the Nebraska Department of Correctional Services for a period of not less than 10 years mandatory, nor more than 20 years with 0 days credit for time served before sentencing, sentence is consecutive ~~concurrent~~ to Count(s) # I, II, III, IV

Commitment: to pay court costs of \$ _____ to the clerk of the court. It is therefore ordered that the defendant be remanded to the custody of the Sheriff, and taken to the appropriate location for execution of sentence:
 Execution of this sentence is suspended until _____

Good Time: As required by law, the court advised the defendant on the record of the time required to be served on the sentence, assuming no good time for which the defendant is eligible is lost, upon minimum term before attaining parole eligibility and upon maximum term before attaining mandatory release

Other: Sentence on Counts I, II, III and IV to be served concurrently, the sentence on Count V to be served consecutively to the other sentences

SIGNED ON: April 9, 2003.

BY THE COURT:

 District Judge

cc: County Attorney
 Defense Counsel
 County Sheriff
 Probation

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From: Microsoft Outlook on behalf of Poppert, Kyle
Sent: Wednesday, January 23, 2013 7:03 AM
To: Douglass, Jeannene
Subject:
Attachments:

Sender: Kyle.Poppert@nebraska.gov

Subject

Message-Id: <84061BD94EF64BBCE765BD7E9EBD1F15B2E052@STNEEX10MB02.stone.ne.gov>

To: jeannene.douglass@nebraska.gov

From: Poppert, Kyle
Sent: Wednesday, January 23, 2013 7:03 AM
To: Douglass, Jeannene
Subject:

Good morning Jeannene,
With _____ commit order reading 10 years (mandatory) to 20 years, does that change anything?
Could the Mandatory language be construed to be a mandatory minimum term?
Kyle

Kyle J. Poppert
Classification and Inmate Records Administrator
Nebraska Department of Correctional Services
Programs & Community Services Division
Phone: (402) 479-5750
Cellular
Fax: (402) 742-2349
Kyle.Poppert@nebraska.gov

Change is inevitable, growth is optional.

From: Microsoft Outlook on behalf of Hohnstein, Kathy
Sent: Thursday, January 24, 2013 9:56 AM
To: Gibson-Beltz, Cathy
Subject: RE:
Attachments: RE:

Sender: Kathy.Hohnstein@nebraska.gov

Subject: RE:

Message-Id: <3352B97A33F8374C9AAEB8E3099602B215AD8959@STNEEX1OMB02.stone.ne.gov>

To: Cathy.Gibson-Beltz@nebraska.gov