



OFFICE OF THE ATTORNEY GENERAL OF TEXAS
AUSTIN

January 24th, 1939

J. C. MANN
ATTORNEY GENERAL

Hon. Gordon C. Cass, County Attorney
Lampasas, Texas

Dear Mr. Cass:

Opinion No. 0-154
Re: Construction of Article
686-3(d), Penal Code of Tex.

Your request for an opinion on the
following question;

"Whether a jail sentence is man-
datory upon a second conviction and
all subsequent convictions, and also
upon plea of guilty for the second
time"

has been received by this office.

The case *Kinney v. State*, 79 S.W. 570
holds;

"Where a higher penalty is sought
to be inflicted by reason of convic-
tion of a prior similar offense, the
complaint and information or indictment
must allege that the accused has been
convicted of such previous offense of
a like character."

The case *Neece v. State*, 137 S.W. 919
holds;

"This averment is necessary in
order to give the accused notice that
a greater penalty is to be sought than
for a first offense, and to enable him
to take issue thereon, and if possible
show that there is a mistake in ident-
ity, or that there was no final former
conviction, or the like."

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Article 61 of the Penal Code of Texas provides generally the punishment in second and subsequent convictions for misdemeanors. In the case Kinney vs. State, 79 S.W. 570 holds;

"This article is to be construed as a reform provision of our Code. That is, if after the conviction for the first offense the defendant does not reform but persists in crime and commits another offense of like character, he can be tried and his former conviction used to enforce his punishment and so on as he commits such subsequent offense up to four."

In view of the foregoing authorities you are respectfully advised that it is the opinion of the writer that Article 666-3(d) is not mandatory but provides for enhanced punishment when prior conviction of offenses of like character are properly alleged and proved.

Trusting that the foregoing answers your inquiry, I remain

Yours very truly

ATTORNEY GENERAL OF TEXAS

By *Ardell Williams*
Assistant

AW:OMB

APPROVED

ATTORNEY GENERAL OF TEXAS *WJH*