

ORIGINAL

NO.

IN THE SUPREME COURT OF OHIO

14-1557

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 100068

STATE OF OHIO

Plaintiff-Appellant

-vs-

DEAN M. KLEMBUS

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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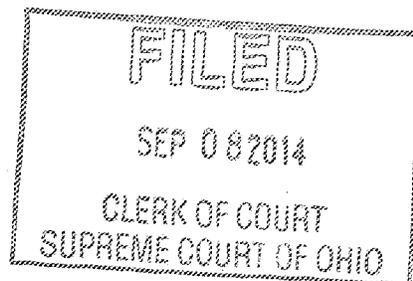


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**EXPLANATION OF WHY THIS FELONY CASE INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION AND AN ISSUE OF GENERAL OR GREAT PUBLIC
INTEREST**

A majority of the Eighth District has ruled that Ohio's repeat OVI specification, R.C. 2941.1413(A), is facially unconstitutional under the Equal Protection Clause. *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-1830 (McCormack J., dissenting) reconsidered in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227 (McCormack J., dissenting.). R.C. 2941.1413(A) requires a mandatory prison term of one, two, three, four or five years for those repeat OVI offenders who have been convicted five or more times of OVI offenses within the last twenty years. In declaring the provision unconstitutional on its face, the specification has been rendered unenforceable in the Eighth District.

Dean Klembus is a habitual drunk driver. His most recent offense was his sixth OVI violation in twenty years. Because of this, he was charged with a violation of two sections of the OVI laws found in R.C. 4511.19. The charges contained furthermore clauses which listed his prior convictions as well as repeat OVI specifications pursuant to R.C. 2941.1413(A). The specification is a penalty enhancement which requires habitual OVI violators to spend additional time in prison.

Klembus argued that the statute violated the Equal Protection Clause because the prosecution had unfettered discretion to decide when to pursue the enhancement and because a defendant can be found guilty of the specification using the same evidence required for the underlying offense. The Eighth District agreed, finding that there was no "requirement that the specification be applied with uniformity, and there is no logical rationale for the increased penalty imposed on some repeat OVI offenders and not others

without requiring proof of some additional element to justify the enhancement." *Klembus*, 2014-Ohio-3227, ¶23.

The analysis used by the lower court is severely flawed and consists of a new, hybrid standard which combines a facial constitutional challenge with a selective prosecution claim. Not only has the court created a new and unworkable standard, it also granted relief despite the fact that *Klembus* failed to present evidence to support either allegation.

R.C. 2941.1413(A) was enacted in order to protect Ohioans from repeat OVI offenders and to punish those offenders for their failure to follow the law. The statute is rationally related to that intent because it enhances the penalty for repeat offenders. By ruling that the statute is facially invalid, the Eighth District has determined that it cannot be applied to anyone. Defendants throughout the state have already begun to rely on this flawed ruling. This Court must resolve this constitutional question and, in doing so, the State requests this Court accept the following Proposition of Law:

PROPOSITION OF LAW I: The repeat OVI specification codified in R.C. 2941.1413(A) is facially constitutional under the Equal Protection Clause of both the United States and Ohio Constitutions.

PROPOSITION OF LAW II: When a defendant's conduct violates multiple criminal statutes, the government may prosecute under either, even when the two statutes prohibit the same conduct but provide for different penalties, so long as the government does not discriminate against any class of defendants based upon an unjustifiable standard.

The State claims an appeal of right as the holding that the OVI specification violates the Equal Protection Clause of the United States and Ohio Constitution involves a substantial constitutional question. This felony case further involves an issue of public or great general interest.

STATEMENT OF THE CASE AND FACTS

Dean Klembus is a repeat drunk driver. On May 6, 2012, he was indicted with his sixth OVI offense in twenty years. Specifically, Klembus was charged with one count each of violating R.C. 4511.19(A)(1)(a) and R.C. 4511.19(A)(1)(h). Because of Klembus's horrendous OVI record, the indictment also included both furthermore findings and specifications for prior OVI offenses pursuant to R.C. 2941.1413(A).

Klembus filed a motion to dismiss the specifications, arguing that they violated the Equal Protection Clause of the United States and Ohio Constitutions. The trial court conducted a hearing. Klembus argued that the specification was unconstitutional because it did not require proof of any additional elements other than what was contained in the offense and furthermore finding and because the prosecutor had discretion when deciding whether to pursue the specification. The trial court denied the motion finding that the "specification serves as an enhancement and is not cumulative punishment for the same conduct alleged in the underlying OVI offense." (Docket, 4/22/13).

Klembus entered a plea of no contest, was sentenced to two years in prison, and appealed. A majority of the Eighth District Court of Appeals reversed, finding R.C. 2941.1413(A) facially unconstitutional under the Equal Protection Clause. *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-1830. The dissenting judge noted that "a prosecutor's decision to seek an enhanced penalty for an underlying offense, without more, does not give rise to a violation of equal protection or due process." *Id.* at ¶22 (McCormack, J., dissenting).

The State filed a timely motion for reconsideration and argued that the majority of the lower court failed to consider that Klembus did not, as required, present any evidence of

arbitrary or disparate treatment. The lower court granted the State's motion and issued a new opinion in which a majority of the court still reversed Klembus's conviction. *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227(McCormack, J., dissenting). The new opinion failed to address any of the arguments raised in the motion for reconsideration and made no substantive changes to the original opinion. The State now seeks jurisdiction in this Court to resolve two substantial constitutional questions.

LAW AND ARGUMENT

PROPOSITION OF LAW I: The repeat OVI specification codified in R.C. 2941.1413(A) is facially constitutional under the Equal Protection Clause of both the United States and Ohio Constitutions.

I. Summary of Argument

R.C. 2941.1413(A) was enacted to protect the people of Ohio from habitual drunk drivers. It is a penalty enhancement, not a separate offense. The Eighth District found the statute facially unconstitutional as a violation of the Equal Protection Clause. However, the lower court did not apply a facial challenge test and instead created a hybrid standard which combined aspects of a facial equal protection challenge with a selective prosecution claim. This confusing and unworkable standard was used to invalidate an Ohio law and lessen the public's protection against dangerous drivers. It is imperative that this Court accept jurisdiction over this case, clarify the appropriate review, and reinstate R.C. 2941.1413(A).

II. Facial challenges under the Equal Protection Clause

Section 1 of the Fourteenth Amendment to the United States Constitution states: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio's equal-protection provisions are functionally equivalent and require the same analysis. *Eppley v. Tri-Valley Local School Dist. Bd. Of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶11. See also *State v. Thompson*, 85 Ohio St.3d 264, 2002-Ohio-2124, 767 N.E.2d 251, ¶11 citing *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio ST.3d 55, 59, 717 N.E.2d 286 (1999). Therefore, if the statute does not violate the Equal Protection Clause of the United States Constitution, it cannot violate Ohio's Equal Protection Clause. The argument, and any reasoning, that the statute violates the federal and state constitution is one in the same.

When determining whether a statute is constitutional under the Equal Protection Clause, the rational basis test is applied where the statute in question does not impinge upon a fundamental right and the defendant is not part of a suspect class. *Conley v. Shearer*, 64 Ohio St.3d 284, 595 N.E.2d 862 (1992) at 289. Klembus did not argue that he belonged to a protected class or that the statute infringed on a fundamental right, so rational basis applies to this case. *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, ¶16.

Where the rational basis test applies, a two-step analysis is involved. *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, at ¶ 9. First, the court must "identify a valid state interest." *Id.* Second, the court must "determine whether the method or means by which the state has chosen to advance that interest is rational." *Id.* Thus, under the rational basis test, a statute will be upheld against equal protection attack if it "bears a rational relationship to the state's intended goal." *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.*, 87 Ohio St.3d 55, 58 (1999). In addition, "a state has no obligation whatsoever to produce evidence to sustain the rationality of a statutory classification." *Id.* (citing *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 2643, 125 L.Ed.2d 257, 271 (1993)).

Moreover, “a statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” See *Heller v. Doe*, 509 U.S. 312 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 1006, 35 L.Ed.2d 351, 358 (1973)). Lastly, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.” See *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 491, 501–02 (1970) (quoting *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369, 377 (1911)).

In this case, the lower court improperly combined the standards for a facial equal protection challenge to those for a selective prosecution challenge and created an entirely unworkable standard that is not supported by precedent. This Court has previously recognized the difference between a selective prosecution analysis and a traditional equal protection analysis. See *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 531, 709 N.E.2d 1148 (1999) (“[b]ecause application of this analysis necessarily involves judicial review of law enforcement and prosecutorial discretion, the analysis is different from that of traditional equal-protection analysis, which is used for classifications established by statute.) The Eighth District’s newly created hybrid standard of review for equal protection claims should be reviewed by this Court and reversed so that this case does not unravel decades of precedent and cause unnecessary confusion.

III. R.C. 2941.1413(A) is facially valid because it is rationally related to the state’s intended goal of punishing habitual intoxicated drivers and protecting the public.

The first prong of the rational basis test is clearly satisfied. In ruling the specification unconstitutional, a majority of the lower court found that “[i]f the repeat OVI specification

was imposed with uniformity on all similarly situated offenders, it would be rationally related to the state's interest in protecting the public and punishing the offender." *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, ¶22. (Emphasis added). The majority acknowledged that the state has a valid interest behind the specification. *Id.* at ¶23 (“[w]e share the legislature’s desire to punish repeat OVI offenders and to protect the public from the serious threat posed by habitual drunk drivers.”)

The second prong is also satisfied. The lower court found that R.C. 2941.1413(A) was not rationally related because it does not provide a “requirement that the specification be applied with uniformity, and there is no logical rationale for the increased penalty imposed on some repeat OVI offenders and not others without requiring proof of some additional element to justify the enhancement.” *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, ¶23. It is rational to punish repeat offenders more severely than those who do not habitually violate the law. The specification does exactly that: it is a punishment enhancement for those who have repeatedly violated OVI laws.

The lower court’s analysis of this second prong is in actuality a hybrid of a selective prosecution claim which will be discussed in greater detail in the second proposition of law. It is clear that the specification is rationally related to a valid state interest. It is only when facially neutral laws are enforced in an impermissibly unconstitutional matter that a constitutional violation occurs. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).

IV. Conclusion

The repeat OVI specification is rationally related to the valid state interest in punishing habitual intoxicated drivers and protecting the public. The Eighth District failed

to properly apply a rational basis analysis to Klembus's facial challenge and has instead created a new standard that is legally unsupported. Therefore, the state respectfully requests this Honorable Court accept jurisdiction over this case and find R.C. 2942.1413(A) facially constitutional under the Equal Protection Clause.

PROPOSITION OF LAW II: When a defendant's conduct violates multiple criminal statutes, the government may prosecute under either, even when the two statutes prohibit the same conduct but provide for different penalties, so long as the government does not discriminate against any class of defendants based upon an unjustifiable standard.

I. Summary of Argument

The Eighth District found R.C. 2941.1413(A) unconstitutional on its face because there was no "requirement that the specification be applied with uniformity, and there is no logical rationale for the increased penalty imposed on some repeat OVI offenders and not others without requiring proof of some additional element to justify the enhancement." *Klembus*, 2014-Ohio-3227, ¶23. Klembus did not present any evidence that the prosecutor's discretion in bringing the specification was based on race, religion, or any type of arbitrary classification; he did not present any evidence at all. The lower court misstated and misapplied the law and in doing so invalidated a statute aimed at protecting the citizens of Ohio from chronic drunk drivers. Therefore, the State respectfully requests this Honorable Court accept jurisdiction over this substantial constitutional question in order to resolve this issue.

II. Prosecutorial discretion does not violate equal protection unless the decision to prosecute is based on race, religion, or another arbitrary classification.

The lower court created a new standard of review for facial challenges to the Equal Protection Clause. As previously discussed, R.C. 2941.1413(A) satisfies a rational basis

review. The lower court considered the issue using a hybrid of rational basis and selective prosecution. But Klembus also fails a selective prosecution claim because he failed to present any evidence to substantiate his allegation.

Prosecutorial discretion does not, without more, violate the Equal Protection Clause. The United States Supreme Court has long held that “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *U.S. v. Armstrong*, 517 U.S. 456, 464, 116 S.Ct. 1480 (1996) quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). “In order to dispel the presumption that a prosecutor has not violated equal protection, a criminal defendant must present ‘clear evidence to the contrary.’” *U.S. v. Armstrong*, 517 U.S. 456, 465, 116 S.Ct. 1480 (1996) citing *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926).

Klembus’s selective prosecution claim should have been analyzed under *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501 (1962) and its progeny. *Oyler* is nearly identical to Klembus’s claim, except that the defendants in *Oyler* presented some evidence to support their allegation. In *Oyler*, the Supreme Court was asked to review an equal protection challenge raised by inmates who received harsher sentences because they were prosecuted as habitual criminals. The defendants claimed that the relevant laws were only being applied to a small portion of the defendants who would have qualified. The Court rejected the inmates claim, finding that “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an

unjustifiable standard such as race, religion, or other arbitrary classification.” *Oyler*, 368 U.S. at 456.

In *State v. Flynt*, 63 Ohio St.2d 132, 134, 407 N.E.2d 15, this Court defined a two-part test to be used for selective prosecution claims. “To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at *prima facie*, (1) that, while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution, and (2) that the government’s discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights.” See also *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 531, 709 N.E.2d 1148 (1999).

Klembus clearly fails this standard. Klembus not only failed to present clear and convincing evidence, he did not present any evidence at all to substantiate this claim. Klembus met the statutory requirements for R.C. 2941.1413(A) penalty enhancement. The Eighth District found an Equal Protection Clause violation because the statute did not require that it be applied with uniformity. The state is unaware of any statute that contains such language. The Eighth District then went on to say that there was no logical rationale for the increased penalty on some but not all repeat offenders. This holding was made despite the fact that Klembus failed to present any evidence that it was not routinely applied to other offenders. His failure to meet his evidentiary burden should have doomed his claim.

The prosecutor’s decision to pursue the specification against Klembus was not based on race, religion, or any arbitrary classification. It is because Klembus is a repeat offender and a danger to society. Klembus, and criminals like him, are the reason that the legislature

enacted R.C. 2941.1413(A) in the first place. And Klembus failed to present any evidence to the contrary to support a selective prosecution argument.

III. The Eighth District incorrectly relied on a small portion of *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979) which has been called into doubt by subsequent precedent from the United States Supreme Court.

The lower court relied on *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979) to support its holding. Ronald Wilson was indicted on two counts of aggravated burglary. He entered a guilty plea but argued that he should only be sentenced to burglary because of the duplication of the elements. In reviewing Wilson's equal protection claim, this Court stated that "[t]he Equal Protection Clause is not violated when, based upon prosecutorial discretion, a person may be charged under more than one statute and thereby receive different penalties. The use of prosecutorial discretion, in and of itself, does not violate equal protection." *Id.* at 55. The *Wilson* court went on to say that "if the statutes prohibit identical activity, require identical proof, and yet impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause." It is this line that the Eighth District depended on.

The Eighth District's reliance on *Wilson* is misplaced. First, *Wilson* dealt with a review of two different offenses. The statute at issue here is merely a penalty enhancement. Second, the portion of *Wilson* that the lower court relied on is likely no longer good law. Several months after *Wilson*, the United States Supreme Court released its decision in *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979) which held that, "when a defendant's conduct violates more than one criminal statute, the government may prosecute under either, even when the two statutes prohibit the same conduct but provide for different penalties, so long as the Government does not discriminate against any class of defendants

based upon some unjustifiable standard. The Equal Protection Clause is not violated simply because the defendant is convicted and sentenced under the statute carrying the greater penalty.” *State v. Dixon*, 2nd Dist. Montgomery No. 18582, 2002-Ohio-541, *3. *Batchelder* rejected the same argument that Klembus makes, “that prosecutors should not have ‘unfettered discretion’ in deciding whether to charge a defendant under the statute providing the greater penalty.” *Dixon* at *4.

The Eighth District’s reliance on *Wilson* highlights the need for this Court’s jurisdiction in order to clarify the appropriate standard of review. Prosecutors are allowed to have discretion in charging and may bring a penalty enhancement without violating the Equal Protection Clause. The burden is on the defendant to present evidence that he was discriminatorily selected for prosecution. Klembus did not and the Eighth District improperly found the R.C. 2941.1413(A) unconstitutional on this basis.

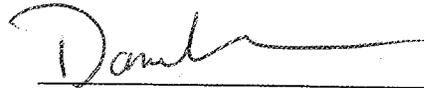
As the Vermont Supreme Court in *State v. Rooney*, 189 Vt. 306, 19 A.3d 92 (Vt. 2011) recognized the same, in so far as the federal equal protection clause is involved. In *Rooney*, a defendant had argued a statutory scheme which, “leaves a prosecutor without a principled basis on which to choose between the two identical element crimes [...] is inherently arbitrary and violates the equal protection guarantees of the United States [Constitution...] because there is no legitimate purpose behind the different penalty provisions attached to crimes with identical elements,” finding no violation under the Equal Protection Clause of the United States Constitution, the Vermont court reasoned that the case was no different from *Batchelder*. *Rooney*, at ¶19, 26.

CONCLUSION

The State asks that this Court accept jurisdiction of this matter. R.C. 2941.1413(A) is an important penalty enhancement which protects the public from habitual drunk drivers. For these reasons, the State asks that this Court accept jurisdiction of this case, adopt its Propositions of Law, and reverse the decision of the appellate court which created a new, unworkable standard of review for an equal protection claim.

Respectfully submitted,

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Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 100068

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DEAN M. KLEMBUS

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-12-562381-A

BEFORE: E.T. Gallagher, J., E.A. Gallagher, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: July 24, 2014

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ON RECONSIDERATION¹

¹ The original announcement of decision, *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-1830, released May 1, 2014, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. See App.R. 22(C); see also S.Ct.Prac.R. 7.01.

EILEEN T. GALLAGHER, J.:

{¶1} Pursuant to App.R. 26(A)(1)(a), appellee, state of Ohio, filed an application for reconsideration of this court's decision in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-1830. Klembus has not opposed the state's application.

{¶2} In determining whether to grant a motion for reconsideration filed pursuant to App.R. 26(A)(1)(a), the test “is whether the motion * * * calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by [the court] when it should have been.” *State v. Dunbar*, 8th Dist. Cuyahoga No. 87317, 2007-Ohio-3261, ¶ 182, quoting *Matthews v. Matthews*, 5 Ohio App.3d 140, 143, 450 N.E.2d 278 (10th Dist.1982).

{¶3} The state's motion for reconsideration identified a need for clarification. We therefore grant the state's motion for reconsideration but our decision remains unchanged. For clarification purposes, we have made some modifications to our earlier opinion. Therefore, we vacate the earlier opinion, and issue this opinion in its place.

{¶4} Defendant-appellant, Dean M. Klembus (“Klembus”), appeals the denial of his motion to dismiss a specification from the indictment charging him with driving under the influence of alcohol (“OVI”), a fourth-degree felony. We find merit to the appeal, reverse the trial court's judgment in part, and remand this case to the trial court with instructions to dismiss the specification.

{¶5} Klembus was charged with two counts of operating a vehicle under the influence of alcohol (“OVI”). Count 1 alleged driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1)(a). Count 2 alleged driving with an excessive blood alcohol content, in violation of R.C. 4511.19(A)(1)(h). Both counts contained the following “FURTHERMORE” clause pursuant to R.C. 4511.19(G)(1)(d):

FURTHERMORE, and he within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature to wit: (1) on or about January 2, 2008, 6C06389, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (2) and on or about July 12, 2004, 4C02588, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (3) and on or about October 4, 2000, 0C04081, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (4) and on or about March 17, 1997, 7C00548, in the Bedford Municipal Court, in violation of 4511.19(A)(1); (5) and on or about December 29, 1992, 2C08595, in the Bedford Municipal Court, in violation of 4511.19(A)(1).

Each count also included a repeat OVI offender specification “concerning prior felony offenses” pursuant to R.C. 2941.1413(A), which states:

The offender, within twenty years of committing the offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses.

{¶6} Klembus filed a motion to dismiss the specification clause, arguing it violated the Equal Protection Clauses of the United States and Ohio Constitutions. After a hearing on the merits, the trial court denied Klembus’s motion to dismiss and Klembus subsequently pleaded no contest to both charges. The two charges merged for sentencing, and the trial court sentenced Klembus to one year on the underlying OVI charge and one year on the specification, to be served consecutively for an aggregate two-year prison term. The court also imposed a lifetime suspension of driving

privileges, and his vehicle was forfeited. Klembus now appeals the denial of his motion to dismiss.

{¶7} In his sole assignment of error, Klembus argues the repeat OVI offender specification, on its face, violates the constitutional guarantees of equal protection and due process because the specification is based upon the same information or proof required to establish a fourth-degree felony. He contends R.C. 4511.19(G)(1)(d) and 2941.1413 allows the prosecutor to arbitrarily obtain a greater prison sentence for the underlying offense without proof of any additional element, fact, or circumstance. Thus, Klembus is challenging the repeat OVI offender specification on its face, not as it was personally applied to him. “A facial challenge to the constitutionality of a statute is decided by considering the statute without regard to extrinsic facts.” *State v. Mole*, 8th Dist. Cuyahoga No. 98900, 2013-Ohio-3131, ¶ 14, citing *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988).

{¶8} Both the Ohio and United States Constitutions provide that no person shall be deprived of life, liberty, or property without due process of law or be denied the equal protection of the law. Ohio Constitution, Article I, Section 2; Fourteenth Amendment to the U.S. Constitution. “Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees.” *Bell v. Wolfish*, 441 U.S. 520, 535, 536, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

{¶9} However, once a defendant has been convicted, the court may impose upon the defendant whatever punishment is authorized by statute for the offense, so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clauses of the Ohio and United States Constitutions. *Chapman v. U.S.*, 500 U.S. 453, 465, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991). An argument based on equal protection in this context duplicates an argument based on due process. *Id.* The standard for determining whether a statute violates equal protection is “essentially the same under state and federal law.” *State v. Thompkins*, 75 Ohio St.3d 558, 561, 664 N.E.2d 926 (1996), quoting *Fabrey v. McDonald Village Police Dept.*, 70 Ohio St.3d 351, 354, 639 N.E.2d 31 (1994).

{¶10} The dissent cites several cases for the proposition that cumulative punishments are constitutional if they are specifically authorized by the legislature.² However, not one of the cases cited in the dissent addresses the issue presented in this case, which is whether the repeat violent offender specification violated equal protection.

² For example, the dissent cites *State v. Gonzales*, 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903 (1st Dist.) in which the court found the additional penalty on a major drug offender (“MDO”) specification did not violate double jeopardy because the cumulative punishment was specifically authorized by the legislature. It is interesting to note that the legislature eliminated the additional penalty for major drug offenders when it enacted H.B. 86 in September 2011.

Prior to H.B. 86, R.C. 2925.03(C)(4)(g) provided that if the state proved the defendant was a MDO, the court could “impose as a mandatory prison term the maximum prison term prescribed for a felony of the first degree and may impose an additional” one-to-ten-year mandatory prison term. To impose the additional prison term over the mandatory ten-year prison term, the court was required to make required finding under R.C. 2929.14(D)(2)(b)(i) and (ii). As amended by H.B. 86, R.C. 2925.03(C)(4)(g) now provides that if the state proves the defendant is a MDO, the court must impose the mandatory maximum prison term prescribed for first-degree felony.

With the exception of *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979), all cases cited in the dissent involve challenges based on the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, which states: “No person shall * * * be subject for the same offense to be twice put in jeopardy of life or limb.”³ We do not dispute the dissent’s analyses of these cases.⁴

{¶11} Nevertheless, we disagree with the dissent’s suggestion that cumulative punishments are constitutional simply because some courts have found that certain statutes authorizing cumulative punishments do not violate double jeopardy. Criminal defendants have successfully challenged enhanced penalties pursuant to other constitutional protections such as the right to due process, the protection against ex post facto laws, and equal protection. For example, in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that a penalty enhancement provision violated the defendant’s right to a jury determination of guilt for every element of the crime beyond a reasonable doubt. In *U.S. v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), the court struck a penalty enhancing provision because it violated the defendant’s right to due process. In *Peugh v. U.S.*, 569

³ The Ohio Constitution mirrors the Fifth Amendment and states “No person shall be twice put in jeopardy for the same offense.”

⁴ We have no reason to dispute the dissent’s analyses of these cases, except to state that perhaps modern courts have forgotten or ignored the original intent of the Bill of Rights, which was established to protect individual liberties from oppressive government regulation and control. See Charles William Hendricks, *100 Years of Double Jeopardy Erosion; Criminal Collateral Estoppel Made Extinct*, 48 Drake L.Rev. 379 (2000).

U.S. 2 __, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013), the court recently held that increased sentences in the United States Sentencing Guidelines Manual violated the ex post facto clause contained in Article I, Section 9 of the United States Constitution.⁵

{¶12} Furthermore, just as courts have found that some cumulative penalties comport with double jeopardy, the United States Supreme Court has also held that some penalty enhancing provisions offend that constitutional protection. In determining whether a cumulative punishments violate double jeopardy, the United States Supreme Court set forth a “same elements” test in *Blockburger v. United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 180 (1932). Under this test, known as the *Blockburger* test, the inquiry is “whether each offense contains an element not contained in the other.” *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). If an individual is charged with violating two criminal statutes, each violation must contain an element that is not contained in the other, or else both offenses are treated as the same offense. *Id.* In these circumstances, double jeopardy prohibits any form of additional, cumulative punishment. *Id.*⁶ Therefore, just because some courts have held that the

⁵ In *Wisconsin v. Mitchell*, 508 U.S. 476, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993), a defendant unsuccessfully challenged enhanced penalty provision for hate crimes as violating First Amendment.

⁶ See also *Rutledge v. United States*, 517 U.S. 292, 297, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) (holding that when two statutes define the “same offense,” the *Blockburger* test presumes that the imposition of dual punishments for simultaneous violation of both statutes violates double jeopardy; *Brown v. Ohio*, 432 U.S. 161, 168-169, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (holding that each statute must require proof of an additional fact that the other does not because the Double Jeopardy Clause prohibits successive prosecutions as well as cumulative punishments for a greater or lesser included offense).

penalty-enhancing provisions at issue in their cases did not violate double jeopardy does not mean that all cumulative punishments are per se constitutional.

{¶13} In this case, Klembus never asserted a Fifth Amendment double jeopardy challenge to the repeat OVI offender specification. His challenge was based solely on the Equal Protection Clause of the Fourteenth Amendment, which presents an entirely different analysis from a double jeopardy challenge. The Equal Protection Clause of the Fourteenth Amendment states that “[n]o state shall * * * deny to any person within its jurisdiction the equal protection of the laws.”

{¶14} In an equal protection claim, government actions that affect suspect classifications or fundamental interests are subject to strict scrutiny by the courts. *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 59, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 14. In the absence of a suspect classification or fundamental interest, the state action is subject to a rational basis test. *Id.* Under the rational basis test, a statute must be upheld if it bears a rational relationship to a legitimate governmental interest. *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, 362, 653 N.E.2d 212 (1995). However, a statute is presumed constitutional and will be declared invalid only if the challenging party demonstrates beyond a reasonable doubt that the statute violates a constitutional provision. *Desenco, Inc. v. Akron*, 84 Ohio St.3d 535, 538, 706 N.E.2d 323 (1999).

{¶15} “Equal protection of the law means the protection of equal laws.” *Conley v. Shearer*, 64 Ohio St.3d 284, 289, 595 N.E.2d 862 (1992). There is no equal protection

issue if all offenders in a class are treated equally. *Id.* at 290. In *Conley*, the Ohio Supreme Court explained:

The prohibition against the denial of equal protection of the laws requires that the law shall have an equality of operation on persons according to their relation. So long as the laws are applicable to all persons under like circumstances *and do not subject individuals to an arbitrary exercise of power* and operate alike upon all persons similarly situated, it suffices the constitutional prohibition against the denial of equal protection of the laws.

(Emphasis added.) *Id.* at 288-289.

{¶16} Klembus does not claim to belong to a “suspect class” or that the repeat OVI offender specification infringes upon a fundamental right. He argues the repeat OVI offender specification violates equal protection because it gives the state unfettered discretion to choose between two significantly different punishments when charging similarly situated OVI offenders. He contends that by giving the state sole discretion to include or omit the repeat OVI offender specification permits an arbitrary and unequal operation of the OVI sentencing provisions.

{¶17} Klembus was charged with violating R.C. 4511.19(G)(1), which provides in pertinent part:

(d) Except as otherwise provided in division (G)(1)(e) of this section, an offender who, within six years of the offense, previously has been convicted of or pleaded guilty to three or four violations of division (A) or (B) of this section or other equivalent offenses or an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature is guilty of a felony of the fourth degree. The court shall sentence the offender to all of the following:

(i) If the sentence is being imposed for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section, *a mandatory prison term of one, two, three, four, or five years as required by and in accordance with division*

(G)(2) of section 2929.13 of the Revised Code if the offender also is convicted of or also pleads guilty to a specification of the type described in section 2941.1413 of the Revised Code or, in the discretion of the court, either a mandatory term of local incarceration of sixty consecutive days in accordance with division (G)(1) of section 2929.13 of the Revised Code or a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of that section if the offender is not convicted of and does not plead guilty to a specification of that type. If the court imposes a mandatory term of local incarceration, it may impose a jail term in addition to the sixty-day mandatory term, the cumulative total of the mandatory term and the jail term for the offense shall not exceed one year, and, except as provided in division (A)(1) of section 2929.13 of the Revised Code, no prison term is authorized for the offense. If the court imposes a mandatory prison term, notwithstanding division (A)(4) of section 2929.14 of the Revised Code, it also may sentence the offender to a definite prison term that shall be not less than six months and not more than thirty months and the prison terms shall be imposed as described in division (G)(2) of section 2929.13 of the Revised Code. If the court imposes a mandatory prison term or mandatory prison term and additional prison term, in addition to the term or terms so imposed, the court also may sentence the offender to a community control sanction for the offense, but the offender shall serve all of the prison terms so imposed prior to serving the community control sanction.

(Emphasis added.) If the offender is convicted of or pleads guilty to the repeat OVI specification, R.C. 4511.19(G)(1)(d) imposes a *mandatory one, two, three, four, or five-year prison term*. If the offender is not convicted of the specification, the court has *discretion to impose either a mandatory 60-day term of local incarceration pursuant to R.C. 2929.13(G)(1) or a mandatory 60-day prison term in accordance with R.C. 2929.13(G)(2)*. In addition, R.C. 4511.19(G)(1)(d) gives the trial court discretion to impose up to 30 months in prison and community control sanctions if the offender has not been convicted of or pleaded guilty to the repeat OVI offender specification. Thus, the presence of the repeat OVI offender specification triggers the enhanced punishment.

{¶18} R.C. 2941.1413, which provides the specification concerning an additional prison term for repeat OVI offenders, states:

(A) Imposition of a mandatory additional prison term of one, two, three, four, or five years upon an offender under division (G)(2) of section 2929.13 of the Revised Code *is precluded unless the indictment, count in the indictment, or information charging a felony violation of division (A) of section 4511.19 of the Revised Code specifies that the offender, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more equivalent offenses.* The specification shall be stated at the end of the body of the indictment, count, or information and shall be stated in substantially the following form:

“SPECIFICATION (or, SPECIFICATION TO THE FIRST COUNT). The Grand Jurors (or insert the person’s or the prosecuting attorney’s name when appropriate) further find and specify that (set forth that the offender, within twenty years of committing the offense, previously had been convicted of or pleaded guilty to five or more equivalent offenses).”

(B) As used in division (A) of this section, “equivalent offense” has the same meaning as in section 4511.181 of the Revised Code.

{¶19} Under R.C. 4511.19(G)(1)(d) and 2941.1413, a repeat OVI offender may be subject to between one and five years of mandatory prison time instead of a mandatory 60 days of incarceration and a discretionary prison term up to 30 months without the state calling any additional witnesses or adducing any additional testimony or evidence. The increased penalty does not depend upon the jury finding any additional elements, facts, or circumstances beyond a reasonable doubt. Rather, the additional punishment depends solely on the prosecutor’s decision whether or not to present to the grand jury the repeat OVI offender specification provided by R.C. 2941.1413.

{¶20} In *Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979), the Ohio Supreme Court held that prosecutorial discretion, in and of itself, does not violate equal protection.

Id. at 55. However, the court in *Wilson* further held that if two statutes “prohibit identical activity, require identical proof, and yet impose different penalties, then sentencing a person under the statute with the higher penalty violates the Equal Protection Clause.” *Id.* at 55-56. *See also Cleveland v. Huff*, 14 Ohio App.3d 207, 209, 470 N.E.2d 934 (8th Dist.1984) (holding that a Cleveland ordinance prohibiting soliciting and another ordinance prohibiting prostitution prohibited identical activity and required identical proof, while imposing different penalties violated equal protection).

{¶21} The court in *Wilson* ultimately determined there was no equal protection violation in that case because, although the defendant was charged under two different burglary statutes, one of the statutes required proof of an additional element not required in the other. *Id.* at 58. Here, the elements of the repeat OVI offender specification are identical to those set forth in R.C. 4511.19(G)(1)(d) for the underlying fourth-degree felony. The specification does not require proof of any additional element to increase the penalty for the same conduct. Thus, the repeat OVI offender specification allows the prosecutor to arbitrarily subject some individual defendants, such as Klembus, to increased penalties that others are not subject to. In this way, a repeat OVI offender charged with the specification may be treated differently from other members of his class, who are not subject to the repeat OVI offender specification.

{¶22} “The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender.” R.C. 2929.11(A). If the repeat OVI specification was imposed with uniformity on all similarly situated

offenders, it would be rationally related to the state's interest in protecting the public and punishing the offender. Indeed, courts have held that the General Assembly may prescribe cumulative punishments for the same offense, in certain circumstances, without violating constitutional protections against double jeopardy. *State v. Zampini*, 11th Dist. Lake No. 2007-L-109, 2008-Ohio-531, ¶ 11.

{¶23} However, R.C. 2941.1413(A) provides no requirement that the specification be applied with uniformity, and there is no logical rationale for the increased penalty imposed on some repeat OVI offenders and not others without requiring proof of some additional element to justify the enhancement, especially since the class is composed of offenders with similar histories of OVI convictions. Under these circumstances, we cannot say the repeat OVI offender specification is rationally related to a legitimate state interest. We therefore find that the repeat OVI offender specification violates equal protection.

{¶24} We share the legislature's desire to punish repeat OVI offenders and to protect the public from the serious threat posed by habitual drunk drivers. And we sympathize with the legislature's intent to provide the public with a greater sense of justice by distinguishing the first or second time offenders from the more serious habitual offenders by enhancing the punishment of those who repeatedly commit OVI offenses. Our decision merely holds that legislation enacted to achieve that purpose must comport with equal protection.

{¶25} Justice can be carried out with the same level of satisfaction for the victims without the repeat OVI specification. Indeed, the trial court could have imposed the same two-year sentence on Klembus without the repeat OVI specification because the court had discretion to impose up to 30 months in prison on the underlying fourth-degree felony. Furthermore, the legislature may increase the penalty for repeat OVI offenders in the statute governing the underlying offense to achieve its objectives. In this way, all repeat OVI offenders would be subject to the same law in an impartial and uniform manner.

{¶26} The sole assignment of error is sustained.

{¶27} Judgment is reversed in part and remanded to the trial court with instructions to vacate the repeat OVI offender specification from the indictment.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, JUDGE

EILEEN A. GALLAGHER, P.J., CONCURS;
TIM McCORMACK, J., DISSENTS WITH SEPARATE OPINION

TIM McCORMACK, J., DISSENTING:

{¶28} I respectfully dissent. I would affirm the trial court's decision in its entirety as I find no constitutional violations in this case.

{¶29} I begin with the clear, well-established premise that all statutes are afforded a presumption of constitutionality. *Burnett v. Motorists Mut. Ins. Co.*, 118 Ohio St.3d 493, 2008-Ohio-2751, 890 N.E.2d 307, ¶ 28. Before a court declares a statute unconstitutional, the court must be convinced “beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 25, quoting *State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955), paragraph one of the syllabus.

{¶30} Here, Klembus was charged with one count of driving while under the influence, in violation of R.C. 4511.19(A)(1)(a), which provides that “[n]o person shall operate any vehicle * * * if at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them.” Klembus was also charged with one count of driving while under the influence, in violation of R.C. 4511.19(A)(1)(h), which prohibits operating a motor vehicle with a “concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person’s breath.”

{¶31} Pursuant to R.C. 4511.19(G)(1)(d), he was charged with a fourth-degree felony, on both counts, based upon the allegation that he had been previously convicted of or pleaded guilty to five or more similar OVI offenses within the previous 20 years.

R.C. 4511.19(G)(1)(d) employs a 20-year look-back to previous convictions and enhances an OVI charge to a felony of the fourth degree if “an offender who, within twenty years of the offense, previously has been convicted of or pleaded guilty to five or more violations of that nature * * *.”

{¶32} The indictment also included a specification to R.C. 4511.19, on each count, which provides an additional mandatory prison term of one, two, three, four, or five years for repeat OVI offenders who have, within twenty years of the offense, previously been convicted of or pleaded guilty to five or more equivalent offenses. R.C. 2941.1413(A).

{¶33} Klembus argues that this specification to R.C. 4511.19 violates equal protection because the specification permits the prosecution to obtain greater punishment for the underlying offense without proof of any additional elements or facts. In support of his argument, he cites to *Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745, for the proposition that if two different statutes prohibit identical activity and require identical proof, yet impose different penalties, sentencing a person under the statute with the higher penalty violates equal protection. I find *Wilson* is distinguishable from this case.

{¶34} In *Wilson*, the defendant was charged with burglary, in violation of R.C. 2911.12, and aggravated burglary, in violation of R.C. 2911.11(A)(3). He pleaded guilty to both counts and requested that he be sentenced under the burglary statute because the charges were duplicative, yet the penalties imposed were different. The defendant argued that the trial court was constitutionally required to sentence him in accordance with the lesser of the two penalties. The trial court rejected the defendant's

request and sentenced him under the aggravated burglary statute, which the court of appeals affirmed.

{¶35} Upon further appeal, the Ohio Supreme Court determined that the issue was whether both statutes required the state to prove identical elements while prescribing different penalties. Restating the test the appellate court applied, the Supreme Court concluded that “if the defendant is charged with the elevated crime, the state has the burden of proving an additional element beyond that required by the lesser offense.” *Id.* at 55-56. In affirming the court of appeals, the Supreme Court found no equal protection violation in *Wilson* because the state was required to prove the elements of burglary in addition to one of three aggravating circumstances in order to convict the defendant of aggravated burglary. *Id.* at 57-58.

{¶36} In *Wilson*, the court analyzed two different statutes and determined that if two different statutes prohibited identical activity and required identical proof, yet imposed different penalties, sentencing the defendant under the statute with the higher penalty could violate equal protection. Here, however, Klembus was charged under R.C. 4511.19, which proscribed one activity. The statute also contained a penalty enhancement outlined in R.C. 2941.1413. The R.C. 2941.1413 penalty enhancement does not prohibit an activity or require proof of an additional element of a crime. Rather, it is a statutorily authorized specification that increases the severity of a penalty imposed for certain repeat OVI offenders.

{¶37} Courts have consistently concluded that an enhanced penalty specification, standing alone, does not violate constitutional protections. In *State v. Gonzales*, the First District Court of Appeals found no double jeopardy violation where the legislature specifically authorized cumulative punishment. 151 Ohio App.3d 160, 2002-Ohio-4937, 783 N.E.2d 903 (1st Dist.). *Gonzales* involved the application of a major drug offense (“MDO”) specification to the indictment. The MDO specification provided that whomever violates the drug trafficking provisions, where the amount of an identified drug exceeds a certain amount, that individual is a major drug offender and the court must impose the maximum ten-year prison sentence. The defendant argued that Ohio’s statutory drug scheme violated double jeopardy because the statutes prohibiting drug possession and drug trafficking required proof of identical elements contained in the MDO specification.

{¶38} In finding no double jeopardy violation, the court determined that the sentencing provisions clearly reflected the legislature’s intent to create a penalty for an individual who sells or possesses a certain amount of drugs over and above the penalty imposed for the drug trafficking or possession itself. *Gonzales* at ¶ 42. The court therefore concluded that “where ‘the legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those statutes proscribe the “same” conduct * * *, a court’s task of statutory construction is at an end and the prosecution may seek and the trial court may impose cumulative punishment under the statutes in a single trial.’” *Id.* at ¶ 40, quoting *Missouri v. Hunter*, 459 U.S. 359, 369, 103 S.Ct. 673, 74

L.Ed.2d 535 (1983). A reviewing court is therefore “limited to ensuring that the trial court did not exceed the sentencing authority which the General Assembly has permitted the judiciary.” *Id.*, quoting *State v. Moss*, 69 Ohio St.2d 515, 518, 433 N.E.2d 181 (1982).

{¶39} More specifically, Ohio courts have repeatedly upheld the R.C. 2941.1413 enhanced penalty specification contained within R.C. 4511.19, relying on legislative intent as authorization of such cumulative punishment. The Ninth District Court of Appeals, concluding that R.C. 2941.1413 was not a double jeopardy violation and did not violate a defendant’s due process rights, determined that the sentencing provisions “clearly reflect the legislature’s intent to create a penalty for a person who has been convicted of or pleaded guilty to five or more equivalent offenses within twenty years of the [OVI] offense over and above the penalty imposed for the [OVI] conviction itself.” *State v. Midcap*, 9th Dist. Summit No. C.A. 22908, 2006-Ohio-2854, ¶ 12; *see also State v. Grosse*, 9th Dist. Summit No. 2009-Ohio-5942 (because the plain language of R.C. 2929.13(G)(2) and 4511.19(G)(1)(d)(ii) specifically allows a court to sentence a defendant on both the specification and the underlying offense, those sections are not unconstitutionally vague).

{¶40} The Eleventh District Court of Appeals determined that a “careful reading” of the R.C. 2941.1413 specification demonstrates that the mandatory prison term must be imposed in addition to the sentence for the underlying offense:

The language and interplay of R.C. 4511.19(G)(1)(d)(ii) and R.C. 2941.1413 demonstrate that the legislature specifically authorized a separate

penalty for a person who has been convicted of or pleaded guilty to five or more OVI offenses within twenty years which shall be imposed in addition to the penalty for the underlying OVI conviction. See *State v. Midcap*, 9th Dist. No. 22908, 2006-Ohio-2854. Therefore, R.C. 4511.19(G)(1)(d)(ii) and R.C. 2941.1413 “clearly reflect the legislature’s intent to create a penalty for a person who has been convicted of or pleaded guilty to five or more equivalent offenses within twenty years of the OMVI offense over and above the penalty imposed for the OMVI conviction itself * * *.”

State v. Stillwell, 11th Dist. Lake No. 2006-L-010, 2007-Ohio-3190, ¶ 26; see also *State v. Zampini*, 11th Dist. Lake No. 2007-L-109, 2008-Ohio-531 (finding the Double Jeopardy Clause does no more than prevent a sentencing court from prescribing greater punishment than the legislature intended); *State v. McAdams*, 11th Dist. Lake No. 2010-L-012, 2011-Ohio-157 (finding that the R.C. 2941.1413 specification could not exist without the underlying offense and merely attaches to that offense). I find the above analyses instructive.

{¶41} In the not too distant past, drinking and driving was tolerated to a much greater extent than it is today. It took a terrible toll of loss of life and a powerful grass roots movement to push through legislative change that dealt with serial drinking and driving with a much stricter statutory approach.

{¶42} It is entirely understandable and proper that any provision in the criminal code that mandates a cumulative and extensive prison sentence would be carefully reviewed for procedural and constitutional flaws. That is our role in this appeal.

{¶43} Through more recent years, the Ohio General Assembly adopted a much stricter scheme to be applied to those who have demonstrated that after five prior OVI convictions, that person is either so diseased, or so unwilling to abide by Ohio law, that

their criminal actions must be addressed definitively. The application of the mandatory prison sentence certainly reflects the waste of human potential: incarceration replaces positive productivity. The legislation, however, was imposed by the Ohio General Assembly with a purpose. The statute embraces the concept that if there is to be suffering, it will be the multiple OVI offender who is punished and not the next innocent victim.

{¶44} For the mindless individual who aimlessly fires a weapon in a populated area and strikes a victim, for the sober driver who recklessly speeds and takes the life of an innocent victim, for the individual who puts at risk an infant or child through endangerment, the General Assembly has identified enhanced punishments for these egregious, inherently dangerous behaviors. This undertaking is their province.

{¶45} The sentencing provisions outlined in R.C. 4511.19 and 2941.1413 clearly reflect the legislature's intent to create a penalty for an individual who has been convicted of or pleaded guilty to five or more OVI offenses within twenty years over and above the penalty imposed for the underlying OVI conviction itself. Recognizing the sound judgment of the General Assembly, and in deference to its justifiable intent in authorizing this type of punishment, I would not find the penalty enhancement set forth in R.C. 2941.1413 to be unconstitutional.