Supreme Court of Ohio Clerk of Court - Filed May 06, 2015 - Case No. 2014-1557

IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

DEAN KLEMBUS,

Defendant-Appellee.

Case No. 2014-1557

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth Appellate District

Court of Appeals
Case No. 100068

BRIEF OF AMICI CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION AND FRANKLIN COUNTY PROSECUTOR RON O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLANT STATE OF OHIO

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STATEMENT OF *AMICUS* INTEREST

The Ohio Prosecuting Attorneys Association ("OPAA") is a private non-profit membership organization that was founded in 1937 for the benefit of the 88 elected county prosecutors. Its mission is to increase the efficiency of its members in the pursuit of their profession; to broaden their interest in government; to provide cooperation and concerted action on policies that affect the office of the Prosecuting Attorney; and to aid in the furtherance of justice.

OPAA members and the Office of the Franklin County Prosecutor prosecute many cases involving vehicular crimes. The OPAA and current Franklin County Prosecutor Ron O'Brien therefore have a strong interest in the correct resolution of issues related to vehicular crimes, including OVI, which can rise to the level of a felony when committed by a recidivist offender. The repeat OVI specification, prescribed by R.C. 2941.1413, provides an important tool to protect the public from offenders who have committed six or more OVI offenses within 20 years. Accordingly, in the interest of aiding this Court's review of the constitutionality of the repeat OVI specification, the OPAA and Franklin County Prosecutor Ron O'Brien offer the following amicus brief in support of the constitutionality of that specification.

STATEMENT OF THE CASE AND FACTS

Amici curiae accept the statement of the case and facts set forth in the brief of plaintiff-appellant State of Ohio.

ARGUMENT

The OPAA and Franklin County Prosecutor Ron O'Brien support both of the State's propositions of law, and respectfully urge this Court to reverse the Eighth District's decision on the basis of both. However, the primary focus of this brief will be the undersigned's support of the State's second proposition of law, which involves prosecutorial discretion.

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

A. R.C. 2941.1413(A) is facially constitutional

"The standard for determining if 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). "Under a traditional equal protection analysis, class distinctions in legislation are permissible if they bear some rational relationship to a legitimate governmental objective. Departures from traditional equal protection principles are permitted only when burdens upon suspect classifications or abridgments of fundamental rights are involved." *State ex rel. Vana v. Maple Hts. City Council*, 54 Ohio St.3d 91, 92, 561 N.E.2d 909 (1990), citing *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982). Under rational-basis scrutiny, legislative distinctions are invalid only if they bear no relation to the state's goals and no ground can be conceived to justify them. *Fabrey*, 75 Ohio St.3d at 353.

The Supreme Court of the United States has held that the punishment of a recidivist in a manner more severe than a first offender is a justifiable state action. *Solem v. Helm*, 463 U.S. 277, 296, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). Legislatures are allowed to conclude that

"individuals who have repeatedly engaged in serious or violent criminal behavior and whose conduct has not been deterred by more conventional approaches to punishment, must be isolated from society in order to protect the public safety." *Ewing v. California*, 538 U.S. 11, 24, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003) (controlling plurality). The States "have a valid interest in deterring and segregating habitual criminals." *Id*. at 25 (quoting another case). "Recidivism has long been recognized as a legitimate basis for increased punishment." *Id*.

Within this framework, Ohio courts have long accepted recidivist statutes. *Blackburn v. State*, 50 Ohio St. 428, 36 N.E. 18 (1893); *State v. Gordon*, 28 Ohio St.2d 45, 276 N.E.2d 243 (1971); *Village of Groveport v. Lovsey*, 10th Dist. No. 95AP-83, 1995 WL 527769 (Sept. 5, 1995).

"Acts of the General Assembly are entitled to a strong presumption of constitutionality." *State v. Cowan*, 103 Ohio St.3d 144, 2004-Ohio-4777, 814 N.E.2d 846. As a result, "challenged legislation will not be invalidated unless the challenger establishes the unconstitutional nature of the statute beyond a reasonable doubt." *Id.* at 146.

"A party may challenge a statute as either unconstitutional on its face or as applied to a particular set of facts." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶37 (citation omitted). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) (capitalization sic).

"[W]here its intent is manifest, the General Assembly may prescribe the imposition of cumulative punishments for crimes which constitute the same offense without violating the

constitutional protections against double jeopardy." *State v. Zampini*, 11th Dist. No.2007-L-109, 2008-Ohio-531, at ¶ 11.

Moreover, "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. McAdams*, 11th Dist. No. 2010-L-012, 2011-Ohio-157, ¶34 (citations and internal quotation marks omitted). As a result, the repeat-offender specification codified in R.C. 2941.1413(A) is facially constitutional, as it is rationally related to the State's interest in punishing habitual drunk drivers more severely in order to protect the public. Therefore, the Eighth District's conclusion to the contrary should be reversed.

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

A. Prosecutors have broad discretion in selecting what charges to bring against an individual

In this case, defendant's argument necessarily resolved to one of selective prosecution. That is, that he was singled-out for prosecution and punishment by the State relative to the repeat OVI specification based only upon some alleged improper classification; a classification which he never articulated. Defendant asserted this conclusion, much like the Eighth District did in *State v. Klembus*, 8th Dist. No. 100068, 2014-Ohio-3227, without any recognition whatsoever of prosecutorial discretion. This was a significant omission by both defendant and the Eighth

District because "judicial review of law enforcement and prosecutorial discretion * * * *is different from that of traditional equal-protection analysis*, which is used for classifications established by statute." *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, fn 2, 1999-Ohio-285, 709 N.E.2d 1148 (emphasis added; citations omitted).

As recognized in *United States v. Armstrong*, 517 U.S. 456, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), "[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *Id*. at 463. The standard for sustaining such a claim is "demanding" and "rigorous." *Id*. at 463, 468.

To prove an equal protection violation, the defendant must show that the decision to prosecute was based on "an unjustifiable standard such as race, religion, or other arbitrary classification," *Armstrong*, 517 U.S. at 464, quoting *Oyler v. Boles*, 368 U.S. 448, 456, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962). The defendant must establish a discriminatory effect and a discriminatory purpose based on the unjustifiable standard. *Armstrong*, 517 U.S. at 465. For example, "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted." *Id*. at 465.

A discriminatory purpose can only be established if it is shown that the prosecutor selected or reaffirmed the particular course of action at least in part based on and because of its adverse effect on an identifiable group. *Wayte v. United States*, 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985).

As this Court stated in *State v. Flynt*, 63 Ohio St.2d 132, 134, 407 N.E.2d 15, 17 (1980), quoting *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974):

> To support a defense of selective or discriminatory prosecution, a defendant bears the heavy burden of establishing, at least 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.

"[T]he conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler*, 368 U.S. at 456. "A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *United States v. Goodwin*, 457 U.S. 368, 382, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982). "Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Bordenkircher*, 434 U.S. at 364 (internal quotation marks and brackets omitted).

A prosecutor's broad discretion includes the ability to draw from a wide range of information in making charging decisions. Prosecutors can rightly give "full consideration" to a "wide range of factors" in deciding whether to prosecute, beyond just the strength of the prosecution's case. *United States v. Lovasco*, 431 U.S. 783, 794, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). "The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest." *Id*.

This far-ranging inquiry includes the decision to prosecute some offenders and not to prosecute others. "Prosecutors often need more information than proof of a suspect's guilt, * * * before deciding whether to seek an indictment." *Id.* The prosecutor's inquiry can include consideration of factors related to the offender's "culpability, as distinguished from his legal

guilt." *Id*. "Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Id*. at 795.

The wide-ranging nature of the prosecutor's decision also plays a role in determining whether the non-prosecuted persons were "similarly situated" to the prosecuted offender. As stated in *United States v. Smith*, 231 F.3d 800, 810 (11th Cir. 2000):

> [n]either this Court nor the Supreme Court has definitively explained what constitutes a "similarly situated" individual in this context, but the definition is informed by the Supreme Court's recognition of legitimate factors that may motivate a prosecutor's decision to bring a case against a particular defendant. Those factors include "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan." *Armstrong*, 517 U.S. at 465 * * *.
>
> In light of those legitimate factors, we define a "similarly situated" person for selective prosecution purposes as one who engaged in the same type of conduct, which means that the comparator committed the same basic crime in substantially the same manner as the defendant – so that any prosecution of that individual would have the same deterrence value and would be related in the same way to the Government's enforcement priorities and enforcement plan – and against whom the evidence was as strong or stronger than that against the defendant.
>
> "[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining 'due process,' to impose on law enforcement officials our personal and private notions of fairness and to disregard the limits that bind judges in their judicial function." *Lovasco*, 431 U.S. at 790.

B. A prosecutor's charging decision is entitled to a strong presumption of regularity by a court

"A selective-prosecution claim asks a court to exercise judicial power over a special province of the Executive." *Armstrong* 517 U.S. at 464 (internal quotation marks omitted). "In the ordinary case, '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.'" *Id*. at 464, quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364, 98 S.Ct. 663, 54L.Ed.2d 604 (1978).

"Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts." *Id*. "It also stems from a concern not to unnecessarily impair the performance of a core executive constitutional function." *Id*. "Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 610.

A presumption of regularity attaches to the prosecutor's decision to prosecute. *Armstrong*, 517 U.S. at 464. "In order to dispel the presumption that a prosecutor has not violated equal protection, *a criminal defendant must present clear evidence to the contrary*." *Id*. (emphasis added; internal quotation marks omitted).

C. Based upon the presumption of regularity, a claim of selective prosecution must fail where a defendant offers no evidence supporting his claim

"With a selective-prosecution claim the burden is upon the defendant; the prosecutor is presumed not to have discriminated. In order to dispel that presumption, a criminal defendant must present 'clear evidence to the contrary.'" *State v. Keene*, 81 Ohio St.3d 646, 653, 1998-

Ohio-342, 693 N.E.2d 246 citing *Armstrong* quoting *United States v. Chem. Found, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed 131 (1926).

Here, defendant did not even attempt to carry his burden of establishing an equal protection violation based upon his allegation of selective prosecution. Defendant's motion provided no evidence, or even allegations, to properly support a claim of selective prosecution under the equal protection clause. Defendant did not assert that the repeat OVI offender specification was brought based upon his race, religion, or other improper classification. Indeed, the Eighth District expressly recognized that defendant "d[id] not claim to belong to a 'suspect class' or that the repeat OVI offender specification infringes upon a fundamental right." *Klembus*, ¶16.

Instead, defendant merely argued that a prosecutor having any discretion at all in the decision to submit the repeat OVI offender specification to the grand jury, in and of itself, violates equal protection. The Eighth District adopted this reasoning, stating that:

> the repeat OVI offender specification allows the prosecutor to arbitrarily subject individuals, 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.

Klembus, ¶21 (emphasis added) (E.T. Gallagher, J.; E.A. Gallagher, P.J., concurring). The *Klembus* court further clarified that defendant's "class is composed of offenders with similar histories of OVI convictions." *Id*. at ¶23.

Two problems are immediately apparent from this reasoning. First, defendant's membership in the "class" is based upon his own criminal conduct over the course of the previous 20 years. Defendant's membership in the "class" is therefore entirely of his own doing, rather than based upon some immutable characteristic. Second, undersigned amici curiae are

unaware of any prior recognition of this alleged "class" of individuals as a class entitled to the same constitutional protection afforded to individuals given their membership in a class based upon race or religion. Indeed, the *Klembus* court appears to have simply assumed the existence of such a "class" for purposes of its decision. Beyond these two problems, there exists a much deeper flaw with the lower court's reasoning.

The two-judge majority in this matter reached its conclusion despite explicitly recognizing, approximately one year prior to the instant decision, that a defendant must establish intentional or purposeful discrimination in order to sustain a claim of selective prosecution. *See Cleveland v. Thorne*, 8th Dist. Nos. 98365/98474/98503/98695/98696/98697, 2013-Ohio-1029, ¶27 ("Selectivity in enforcement does not constitute a constitutional violation unless the discrimination is intentional or purposeful. * * * Moreover, the mere existence of a potential discriminatory purpose does not, by itself, show that such purpose motivated a particular defendant's prosecution.") (citations and quotations omitted) (E.A. Gallagher, J., and E.T. Gallagher, J., concurring). Thus, not only did the *Klembus* majority depart from precedent established by this Court and the Supreme Court of the United States, it also departed from its own precedent in reaching the conclusion that the mere possibility of discrimination automatically equals actual discrimination in all circumstances. Additionally, for aught that appears in this record, the prosecutor may very well have charged every such recidivist OVI offender in the same way, which would have meant there was no discrimination at all.

Because defendant failed to even allege a discriminatory purpose in the decision to charge him with the repeat OVI offender specification, his equal protection claim, based upon selective prosecution, failed at a fundamental level. As a result, it should have been flatly rejected by the Eighth District, based upon well-established precedent. Instead, the lower court

engaged in a flawed analysis, ultimately concluding that the lack of a requirement that the R.C. 2941.1413 specification be applied with uniformity to all offenders rendered it incapable of being applied to any offender. *Id.* ¶¶22-23.

The standard endorsed by the Eighth District in this case of requiring uniform application of punishment is incredibly troubling, as it represents both a significant departure from precedent as well as an unjustified intrusion into the Executive Branch's authority. Indeed, because the Cuyahoga County Prosecutor had probable cause to believe defendant committed the crimes and specifications as defined by the General Assembly, it must be **presumed** that there is no equal protection violation. *Armstrong*, *supra*. This presumption is well-established throughout Ohio courts, including the Eighth District. *See State v. Norris*, 1st Dist. Nos. C-010299-010302, 2002-Ohio-1033, ¶14 ("The standard is 'intentional and purposeful discrimination.'") quoting *State v. Freeman*, 20 Ohio St.3d 55, 58, 485 N.E.2d 1043 (1985); *State v. Turner*, 2nd Dist. No. 23880, 2011-Ohio-393, ¶26 (same); *In re Kister*, 2nd Dist. No. 10CA19, 2011-Ohio-2678, ¶74 (same); *LeFever v. State*, 10th Dist. No. 12AP-1034, 2013-Ohio-4606, ¶29 ("there is a strong presumption of regularity in prosecutorial discretion.") (citations and quotations omitted); *State v. Spivey*, 7th Dist. No. 00CA106, 2002-Ohio-1149, *10 (overcoming presumption requires "clear evidence to the contrary"); *State v. Loza*, 12th Dist. No. CA96-10-214, 1997 WL 634348 (Oct. 13, 1997), *5 (same); *Thorne*, *supra* at ¶27 ("The defendant's burden of establishing discriminatory prosecution is a heavy one.") The Eighth District's decision to ignore the presumption and requisite standard of proof must be reversed.

D. The exercise of prosecutorial discretion includes the ability to influence sentencing through selection of charges and enhancing specifications

"Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion

would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. *Such discretion is an integral feature of the criminal justice system, and is appropriate*, so long as it is not based upon improper factors." *United States v. LaBonte*, 520 U.S. 751, 762, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997) (emphasis added) citing *Armstrong*, 517 U.S. at 464-65.

In *LaBonte*, the Supreme Court of the United States entertained, and rejected, the same argument that defendant raised in the instant matter. One of the issues in *LaBonte* was a federal sentencing provision that enhanced the possible maximum prison term for repeat violent offenders and repeat drug offenders, upon a third conviction for such offenses. *LaBonte*, 520 U.S. at 753. In order for the enhanced maximum to apply to a particular defendant, the United States Attorney was required to file a notice that the enhanced penalty would be sought. *Id.* at 755.

In an appeal to the high court, LaBonte asserted that the exercise of prosecutorial discretion to seek the enhancement with one defendant while choosing not to file the notice against a second defendant would result in an "unwarranted disparity" between the sentences imposed for the two defendants. The Supreme Court rejected this argument out of hand, noting that "[a]ny disparity in the maximum statutory penalties between defendants who do and those who do not receive the notice is a foreseeable – but hardly improper – consequence of the statutory notice requirement." *Id.* at 762.

The ability of a prosecutor to select charges or enhancements in order to influence the sentence ultimately imposed upon a defendant is well-established at the federal level. *See United States v. Mills*, 925 F.2d 455, 461-62 (D.C. Cir. 1991) ("The second [argument], also widely rejected, is that due process cannot tolerate a related enhancement of the prosecutor's influence

over sentencing."), modified on other grounds, 964 F.2d 1186 (D.C. Cir. 1992); *United States v. Neal*, 577 Fed.Appx. 434, 451 (6th Cir. 2014) ("Prosecutors are afforded discretion in determining whether to seek such [sentencing] enhancements and are limited only in that they may not base the decision on 'improper factors.'") citing *LaBonte*; *United States v. Smith*, 502 F.3d 680, 690-91 (7th Cir. 2007) ("Prosecutors always have discretion to decide which charges to bring, and this discretion extends to charges that carry enhanced statutory maximum penalties."); *United States v. Jensen*, 425 F.3d 698, 707 (9th Cir. 2005) (seeking enhanced punishment based upon statutory provision is proper exercise of prosecutorial discretion); *United States v. Cespedes*, 151 F.3d 1329, 1333 (11th Cir. 1998) (the power of a prosecutor to unilaterally increase a mandatory minimum by including sentencing enhancement "affords prosecutors a power no greater than that traditionally exercised by the executive branch in the charging decision.") citing *LaBonte*; *Mistretta v. United States*, 488 U.S. 361, 364, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) ("Historically, federal sentencing * * * never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government."); *United States v. Batchelder*, 442 U.S. 114, 125, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) ("The prosecutor may be influenced by the penalties available upon conviction, but this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.") (citations omitted).

It must also be noted that, at the federal level, the discretion of the prosecutor also extends to the consideration of whether to file a "substantial-assistance" motion, which allows for a downward departure from the mandatory minimum prison term that would otherwise be required by the federal sentencing guidelines for certain offenders. *See Wade v. United States*, 504 U.S. 181, 185-86, 112 S.Ct. 1840, 118 L.Ed.2d 524 (1992) ("Because we see no reason why

courts should treat a prosecutor's refusal to file a substantial-assistance motion differently from a prosecutor's other decisions * * * we hold that federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive.") (citation omitted). So, whether seeking an increased maximum or a reduced mandatory minimum, prosecutorial discretion is broad enough to encompass both.

This Court has recognized and upheld prosecutorial discretion in charging decisions that ultimately have an effect upon the punishment that is available, if the defendant is convicted as charged. "[P]rosecutors have indictment discretion." *State v. Mink*, 101 Ohio St.3d 350, 2004-Ohio-1580, 805 N.E.2d 1064, ¶103 citing *State v. Jenkins*, 15 Ohio St.3d 164, 169-70, 473 N.E. 264 (1984) (absent evidence to the contrary, prosecutor's decision to charge death specifications is presumed to be proper exercise of prosecutorial discretion).

Here, by enacting R.C. 2941.1413, the General Assembly has explicitly authorized additional punishment for recidivist OVI offenders, where those offenders have been convicted of five or more OVI offenses within the previous 20 years. In fact, if a defendant is convicted of the R.C. 2941.1413 specification, the General Assembly has required that the offender serve a mandatory prison term of at least one year (with a maximum of five years), in addition to any other prison sentence imposed on the underlying OVI charge. Much like the notice that is required in federal court for certain recidivist offenders before an increased maximum sentence is a possibility, (*LaBonte*, *supra*), the General Assembly has required the R.C. 2941.1413 specification to be explicitly enumerated in an indictment before an offender, upon conviction, will be subject to the increased punishment.

The choice of the Cuyahoga County Prosecutor in this case to seek the additional, mandatory punishment prescribed by R.C. 2941.1413 was a matter well-within the bounds of prosecutorial discretion. In the absence of any refuting evidence, the exercise of prosecutorial discretion is presumed to comport with constitutional requirements. Where other defendants have made arguments to the contrary in the past, those challenges have been soundly rejected by Ohio courts, including this Court, as well as federal courts throughout the United States, up to and including the Supreme Court. This case is no different. Consequently, this Court should reach the same result as the authorities noted above. The decision of the Eighth District should be reversed.

CONCLUSION

For the foregoing reasons, amici curiae Ohio Prosecuting Attorneys Association and Franklin County Prosecutor Ron O'Brien support plaintiff-appellant State of Ohio and urges this Court to reverse the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail, this day, May 6, 2015, to John Martin, Assistant Public Defender 310 Lakeside Ave., Ste 200, Cleveland, Ohio 44113; Counsel for Defendant-Appellee, and to Daniel T. Van, Assistant Prosecuting Attorney, at The Justice Center, 1200 Ontario St., Cleveland, Ohio 44113, counsel for Plaintiff-Appellant.

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