

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO

CASE NO 2014-1557

Plaintiff-Appellant

ON APPEAL FROM CUYAHOGA
COUNTY COURT OF APPEALS,
EIGHTH APPELLATE DISTRICT

v.

DEAN KLEMBUS

COURT OF APPEALS CASE NO. 100068

Defendant-Appellee

APPELLANT-STATE OF OHIO'S MERIT BRIEF

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I. INTRODUCTION AND SUMMARY

The Eighth District Court of Appeals held in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, that the repeat OVI specification codified under R.C. 2941.1413(A) was unconstitutional on its face, relying upon this Court's decision in *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979). The majority in *Klembus* found that the repeat OVI specification that a prosecutor's unfettered discretion to choose between significantly different punishments when charging similarly situated OVI offenders constituted an equal protection violation. Since the decision in *Klembus*, a conflict between the appellate districts has arisen on whether the repeat OVI specification codified in R.C. 2941.1413(A) violates the equal protection clause. In *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528 declined to follow the Eighth District's decision in *Klembus* under the rationale that the OVI offense and OVI specification are not two separate offenses but instead was a sentencing enhancement. *See also State v. Burkhead*, 12th Dist. Butler No. CA2014-02-028, 2015-Ohio-1085, *State v. Stephens*, 3rd Dist. Seneca No. 13-14-28, 2015-Ohio-1078 and *State v. Redick*, 11th Dist. Lake No. 2014-L-082, 2015-Ohio-1215.

The State takes the position that the unproven potential for unequal enforcement of the laws between equally situated defendants is not a basis to strike down a statute as unconstitutional on its face. A discriminatory prosecution claim is best left where the challenging party presents evidence that the statute has been unequally applied based upon an unjustifiable standard. In this case, the record is devoid of any evidence that the prosecutors abused its discretion in charging Klembus with the repeat OVI specification in R.C. 2941.1413(A) while make a conscious decision to not charge similarly situated defendants with the same specification.

Under the first proposition of law, the State argues, that when applying the appropriate analysis to a facial challenge to R.C. 2941.1413(A), this Court should hold that it has not been

proven beyond a reasonable doubt that R.C. 2941.1413(A) is unconstitutional under all circumstances. With respect to the second proposition of law, the State argues that the ability for the prosecution to exercise discretion does not render a statute on its face unconstitutional. The enforcement of criminal laws are subject to discretion by the prosecution. But discretion in the enforcement of the laws should not amount to a violation of the Equal Protection Clause. It is only where it is alleged that discretion is actually being abused based upon an unjustifiable standard should a court entertain an Equal Protection Clause argument. Without such evidence, Klembus should not prevail on his Equal Protection claim.

II. STATEMENT OF THE CASE AND FACTS

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). Count one of the indictment alleged that Klembus,

Did operate any vehicle, streetcar, or trackless trolley within this state, when at the time of the operation he was under the influence of alcohol, a drug of abuse, or a combination of them.

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 [...]

The indictment also included both furthermore findings and specifications for prior OVI offenses pursuant to R.C. 2941.1413(A) with the following language:

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

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. During the hearing, counsel for Klembus, cited *State v. Wilson*, 58 Ohio St.2d 52 (1979) and argued that equal protection is violated when two applications of the criminal law prescribe different

penalties while requiring the State to prove identical elements. (Tr. 5). 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 – which included one year on the base OVI and one year on the specification. On appeal Klembus argued that the trial court should have dismissed the repeat OVI offender specification, on its face, violated the equal protection clause. The Court found the OVI specification on its face in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-1830 and released a reconsidered opinion, for clarification purposes in *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227. The Eighth District acknowledged that Klembus was raising a facial challenge to the OVI specification. *Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, ¶7. The court acknowledged that Klembus was arguing that the statute gave the state unfettered discretion to choose between two significantly different punishments when charging similarly situated OVI offenders, and that the discretion permitted an arbitrary and unequal operation of the OVI sentencing provisions. *Klembus*, ¶16.

The majority in *Klembus* recognized that there is no equal protection issue if all offenders in a class are treated equally. *Klembus*, ¶15, citing *Conley v. Shearer*, 64 Ohio St.3d 284, 289, 1992 Ohio 133, 595 N.E.2d 862 (1992). But with respect to the case at hand, the court viewed the OVI specification statute as arbitrarily permitting the prosecutor to enforce the law unequally and found the lack of a requirement that R.C. 2941.1413(A) be applied uniformly irrational. *Klembus*,

¶ 21, 23. It is this apparent reasoning, which led the court to conclude that the OVI specification was unconstitutional on its face in violation of the equal protection clause. *Klembus*, ¶ 26.

The State sought a discretionary review with this Court to resolve the issue of whether the repeat OVI specification codified in R.C. 2941.1413(A) is facially unconstitutional under the Equal Protection Clause of the United States and Ohio Constitution.

This Court accepted the following propositions of law for review:

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.

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.

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. The standard to be applied under the rational basis test in a facial attack to a statute under the equal protection challenge is whether there is a rational basis for treatment of the classification under the statute.

The Equal Protection Clauses require that all similarly situated individuals be treated in a similar manner. *Ohio Apt. Assn't v. Levin*, 127 Ohio St. 3d 76, 2010-Ohio-4414, 936 N.E.2d 919 citing *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, 839 N.E.2d 1, ¶7

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). Legislative enactments are presumed valid. *State v. Collier*, 62 Ohio St.3d 267, 269, 581 N.E.2d 552 (1991).

Typically, an equal protection claim falls into three major categories. The first category is a claim that the statute discriminates on its face. The second category is a claim that the neutral application of a facially neutral statute has a disparate impact. The third category involves a claim that a facially neutral statute is being unequally administered. *E & T Realty v. Strickland*, 830 F.2d 1107, citing J. Nowak, R. Routunda & J. Young, *Constitutional law* 600 (2d ed. 1983). In this case, Klembus has maintained his challenge as a facial challenge rather than a challenge under the latter two categories.

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 in question infringes on a fundamental right – therefore, the rational basis level of scrutiny applies. *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 avowed interest in punishing repeat OVI offenders and protecting the public from the serious threat posed by habitual drunk drivers is undisputed, it is only the means and ends that is in dispute. *Klembus*, ¶24.

II. Klembus cannot prove that R.C. 2941.1413(A) will be invalid under all circumstances because there are some instances in which R.C. 2941.1413(A) requires different proof from the base OVI charge.

At issue is R.C. 2941.1413(A) in relation to the underlying charge of OVI under R.C. 4511.19(A)(1)(a). Under the established method of determining whether a statute is unconstitutional on its face, this Court needs to address whether R.C. 2941.1413(A) will be unconstitutional under all circumstances under the appropriate level of scrutiny.

A facial challenge is decided by considering the statute itself without regard to extrinsic facts. *See Global Knowledge Training L.L.C. v. Levin*, 127 Ohio St.3d 34, 2010-Ohio-4411, 936 N.E.2d 463. A plaintiff succeeds in a facial challenge to the constitutionality of the statute only by establishing that there are no set of circumstances that the statute would validly apply. *See Pickaway Cty. Skilled Gaming L.L.C. v. DeWine*, 2011-Ohio-278, 2011-Ohio-278-947 N.E.2d 273. Moreover, facial challenges to legislation are generally disfavored. *State v. Icon Entertainment Group, Inc.*, 160 Ohio Misc. 2d 9, 2010-Ohio-5719, 937 N.E.2d 1112 (Franklin County Mun. Ct. 2010). The standard to be applied in this case is that, “under the rational basis test for equal protection, a court will uphold the statute if, under any conceivable set of facts, the classifications drawn in the statute bears a rational relationship to a legitimate end of government not prohibited by the Constitution.” *Harper v. State*, 292 Ga. 557, 560-561, 738 S.E.2d 584 (Ga. 2013).

Klembus’ facial challenge is that the OVI specification will require no additional proof from the base charge.

R.C. 2941.1413 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.

In this case, Klembus was charged with a fourth-degree felony OVI because he had been convicted of five or more equivalent offenses within the past twenty years. As charged in this case, the repeat OVI specification also required proof of five or more equivalent convictions within the past twenty years. However, it will not always be the case that the base felony OVI charge will contain the same requisite proof as the specifications and there are circumstances in which the specification will not attach.

Under R.C. 4511.19(G)(1)(d), a person may be charged with a fourth-degree OVI, if they have either: (1) been convicted of five or more equivalent convictions within the past twenty years, or (2) have been convicted of three or four equivalent OVI offenses within the past six years. As R.C. 4511.19(G)(1)(d) states:

(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 [...]

Therefore, there are instances in which the repeat OVI specification will not apply to a fourth-degree felony OVI. Where a habitual drunk driver has been convicted of only three OVI's within the past six years, the specification cannot attach as a matter of law. Therefore, not all defendants charged with a fourth-degree felony OVI are similarly situated. Some will not be charged with the repeat OVI specification, but those with at least five OVI convictions within the past twenty years will be charged. It is also possible that a defendant will have three or four OVI's within the past six years, but also have additional OVI's within a twenty year period, thereby satisfying both the requirement of having three or four OVI's within the past six years and five within the past

twenty. It is only where all five or more OVI's are older than six years but within twenty years are there identical elements. This structure rationally distinguishes OVI offenders who have only been convicted of three or four OVI offenses with those who have been convicted of at least five. As the dissent in *Klembus* and other appellate districts recognized, what is at issue in this case is a sentencing enhancement and not two separate offenses. *Klembus*, ¶¶36-37 (McCormack, J. dissenting), *State v. Hartsook*, 12th Dist. Warren No. CA2014-01-020, 2014-Ohio-4528, *State v. Burkhead*, 12th Dist. Butler No. CA2014-02-028, 2015-Ohio-1085, *State v. Stephens*, 3rd Dist. Seneca No. 13-14-28, 2015-Ohio-1078 and *State v. Redick*, 11th Dist. Lake No. 2014-L-082, 2015-Ohio-1215.

The specification may also attach to a third-degree felony OVI offense. An OVI offense is a felony of the third degree if the defendant had been previously convicted of a felony OVI.

(e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:

(i) If the offender is being sentenced 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 a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of section 2929.13 of the Revised Code if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, 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.

Therefore, there are instances in which proof of the OVI specification will be different from the proof of the underlying OVI offense. Further, there will be instances in which a defendant

will not be charged with a felony OVI and with the OVI specification because of legal impossibility. Klembus should not prevail on a facial challenge where there are situations where proof of the OVI offense is different from the OVI specification. Therefore, a violation of the OVI statute and the proof required to prove the OVI specification will not always be the same. Even if they were, the State argues, as more detailed under the second proposition of law, that it is not an Equal Protection Clause violation.

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 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). These principles are consistent with legal standards established by this Court for reviewing a claim of denial of equal protection based on selective prosecution. “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.” *Id.*; *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 531, 709 N.E.2d 1148 (1999). Here, Klembus asks this Court depart from these well-established standards and instead asks this Court to follow legal standards applied in *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979).

The Eighth District erred when it relied upon *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979) to support its holding that where 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.” *Wilson*, 58 Ohio St.2d at 55-56. The *Wilson* court adopted the reasoning of the lower court decision in *State v. Wilson* (May 25, 1978), 60 Ohio App.2d, 377 N.E. 1206 without fully considering whether the lower court applied the correct legal standard.

The decision of the *Wilson* court to adopt the legal standard applied by the lower court was problematic because the lower court also did not thoroughly consider the appropriate legal standard for determining when two overlapping statutes violate the Equal Protection Clause. In *State v. Wilson*, 60 Ohio App.2d, 377 N.E. 1206 (1978), the Eighth District considered whether a violation of equal protection occurred because an aggravated burglary statute, R.C. 2911.11(A)(3) prohibited nearly identical activity as a burglary statute, R.C. 2911.12, yet the aggravated burglary statute imposed increased penalties. This legal question presented an issue of first impression before the Eighth District. *Id.* at fn. 6 (Day, J., dissenting). To resolve this issue of first impression, the Eighth District relied upon *Roush v. White*, 389 F. Supp. 396 (N.D. Ohio 1975), which provided a legal standard for reviewing whether equal protection is violated when a prosecutor chooses from among two overlapping statutes when prosecuting a single criminal act. In *White*, the Northern District of Ohio held that equal protection is violated when the State has the discretion to choose

among different overlapping statutes to prosecute the “same acts.” *White*, 389 F. Supp. 396, 402-403. However, in adopting this legal standard, the *White* court did not rely upon any legal precedent in adopting such a standard, nor did it conduct any detailed analysis when determining the appropriate legal standard to apply. Shortly after the opinions in *Wilson* and *White* were decided, the United Supreme Court directly rejected the legal standard applied by the *White* court and provided guidance on the appropriate legal standard for reviewing the type of equal protection challenge raised in this case.

More particularly, in *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979), the United States Supreme Court considered and rejected the type of equal protection challenge addressed in *Wilson* and *White*. The issue before the high court was whether prosecutorial discretion violated the Equal Protection Clause when a defendant could be sentenced under a federal firearms statute, in spite of the fact that a similar federal statute prescribed lesser punishment. *Batchelder*, 442 U.S. 114 at 125. In addressing this issue, the United States Supreme Court closely considered the concern by the United States Court of Appeals for the Seventh Circuit, which had “expressed serious doubts about the constitutionality of two statutes that provide different penalties for identical conduct.” *Id.* at 124 (internal quotation marks omitted). The Seventh Circuit had found the two statutes unconstitutional because they were legislatively redundant and “could produce unequal justice.” *Id.* Nevertheless, after a thorough review of this issue, the Supreme Court found the analysis of the Seventh Circuit to be “factually and legally unsound.” *Id.*

In direct contrast to *Wilson* and *Roush*, the Supreme Court held that when a criminal act violates multiple statutes, the Government may prosecute under either statute provided that “it does not discriminate against any *class of defendant*.” *Id.* at 118 (Emphasis added). This does not

mean however that a prosecutor's discretion is unfettered. As the defense has emphasized throughout this case, a prosecutor's discretion is not without its limits and is "of course, subject to constitutional constraints." *Id.* However, the true abuse of a prosecutor's discretion in violation of the equal protection clause comes where a statute is selectively enforced based upon an unjustifiable standard. A prosecutor's discretion to select between multiple statutes that proscribe an act can be summarized by the following:

There is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements. In the former situation, once he determines that the proof will support conviction under either statute, his decision is indistinguishable from the one he faces in the latter context. 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.

Batchelder, supra, at 125.

Because *Batchelder* clearly permits for discretion in prosecuting under similar overlapping statutes, the critical question before this Court today is whether the OVI statute or the OVI specification violate equal protection concerns on other grounds. As previously stated, although several types of equal protection challenges may be raised, this case is limited to whether a facially neutral statute is being unequally administered in a prejudicial manner. A review of case precedent in the United States Supreme Court instructs that in order to demonstrate this type of equal protection violation, a defendant must show that the relevant statutes in question have been applied based on an unjustifiable standard such as race, class, or other impermissible classification.

This type of categorical challenge stems as far back as the United States Supreme Court's decision in *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The Court described the rule in *Yick Wo* as follows, "[t]hrough the law itself be fair on its face and impartial

in appearance, yet, if it is applied and administered by public authority with an evil and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.” *Yick Wo*, 373-374.

In *Yick Wo*, the high court reviewed the constitutionality of the enforcement of an ordinance that that preclude a person from operating a laundry in a wooden building without a permit. Although two-thirds of those laundries were operated by Chinese operators, virtually all were denied a permit. The Court found that,

“this discrimination is admitted. No reason for it is shown, and the conclusion cannot be resisted, that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protections of the law and a violation of the Fourteenth Amendment...”

Yick Wo, ¶ 374.

The 1962 decision in *Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501 (1962) confirmed that equal protection violations in these types of cases are limited to instances of selective prosecution based upon an unjustifiable standard such as race, religion or other arbitrary classification. *Oyler*, 368 U.S. at 456. In *Oyler*, the court reviewed the selective prosecution of life sentences imposed under West Virginia’s habitual criminal statute. *Id.* at 449. This statute “provides for a mandatory life sentence upon the third conviction of a crime punishable by confinement in a penitentiary.” *Id.* However, petitioners alleged that the act had been arbitrarily applied to “only a minority of those subject to its provisions,” thereby violating the Equal Protection Clause of the Fourteenth Amendment. *Id.* The high court reviewed petitioners’ claim and found that no violation of equal protection in this case. In rejecting the equal protection challenge, the court concluded that “the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional

violation.” *Id.* at 456. The court reasoned that “[e]ven 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 arbitrary.” Therefore, the court held that “grounds supporting a denial of equal protection were not alleged.” *Id.*, citing *Snowden v. Hughes*, 321 U.S. 1 (1944); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (by implication); *Oregon v. Hicks*, 213 Ore. 619, 325 P.2d 794 (1958)¹.

Klembus’s argument of potential arbitrary enforcement of the OVI specification as a violation of the Equal Protection Clause is far from the type of clear and unjustified discrimination required by precedent established by the United States Supreme Court. He does not claim that the OVI specification is selectively prosecuted based on an unjustifiable standard such as race, religion, or other suspect classification. Here, neither the OVI statute nor the OVI specification directs the State to apply to offenders in an unequal manner. No evidence has been introduced that the State has targeted any suspect classes under either statute. Therefore, it cannot be said that the statute is discriminatory on its face. Without any evidence of selective prosecution or unequal enforcement of the OVI specification based on an unjustifiable standard, there should be no finding that a statute violates the equal protection clause on its face simply because there is a possibility that the specification may not be applied uniformly.

The equal protection challenge raised by Klembus has been rejected by numerous states. A majority of states have recognized that *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979) is dispositive on the issue of whether the Equal Protection Clause is violated when an act

¹ The Court also considered that the allegations might simply highlight a failure to prosecution based on the Government’s lack of knowledge of offenders’ prior offenses. *Oyler v. Boles*, 368 U.S. 448, 455-56. The court found that the failure to prosecute based on a lack of knowledge of defendants’ prior offenses did not violate the Equal Protection Clause. *Id.*

violates multiple criminal statutes and the Government exercises its discretion to select which statute to prosecute that act. *Maiden v. State*, 2014 Ark. 294, 438 S.W.3d 263; *People v. Wilkinson* (2004), 33 Cal. 4th 821, 838-839, 94 P.3d 551; *Brank v. State*, Del. Supr. 528 A.2d 1185, 1191 (Del. 1987); *Newby v. United States*, 797 A.2d 1233, 1240 (D.C. 2002); *State v. Cogswell*, 521 So. 1081, 1082 (Fla. 1988); *Isom v. State*, 261 Ga. 596, 408 S.E.2d 701 (1991); *State v. Larsen*, 135 Idaho 754, 758, 24 P.3d 702 (2001); *Hale v. Commonwealth*, 396 S.W.3d 841, 849 (Ky. 2013); *Davis v. State*, 319 Md. 56, 570 A.2d 855 (1990) (rev'd on other grounds); *Commonwealth v. Pagan*, 445 Mass. 161, 171, 834 N.E.2d 240 (2005); *People v. Petrella*, 424 Mich. 221, 380 N.W.2d 11 (1985); *State v. Watts*, 601 S.W.2d 617, 619-622 (Mo. 1980); *State v. Miller*, 216 Neb. 72, 74-75, 341 N.W.2d 915 (1983); *Villanueva v. State*, 117 Nev. 664, 667-668, n.2, 27 P.3d 443 (2001); *State v. Peck*, 140 N.H. 333, 334-336, 666 A.2d 962 (1995); *State v. Arellano*, 123 N.M. 589, 943 P.2d 1042 (N.M. 1997); *People v. Mannix*, 302 A.D.2d 297, 297, 756 N.Y.S.2d 33 (2003); *State v. Savastano*, 354 Ore. 64, 81, 309 P.3d 1083 (2013); *Commonwealth v. Pittman*, 515 Pa. 272, 280-282, 528 A.2d 138 (1987); *State v. Padula*, 551 A.2d 687, 690 (R.I. 1988); *Strickland v. State*, 276 S.C. 17, 20-22, 274 S.E.2d 430 (1981); *State v. Secrest*, 331 N.W.2d 580, 583-584 (SD 1983); *State v. Thomas*, 635 S.W.2d 114, 117 (Tenn. 1982); *McDonald v. Commonwealth*, 274 Va. 249, 259, 645 S.E.2d 918 (2007); *Kennewick v. Fountain*, 116 Wn.2d 189, 192-194, 802 P.2d 1371 (1991); *State v. Cissell*, 127 Wis.2d 205, 378 N.W.2d 691 (1985); *Johnson v. State*, 2003 Wy 9, 61 P.3d 1234 (Wyo. 2003), ¶ 27.

While a majority of states have adopted the holding in *Batchelder*, it is important to acknowledge a small minority of states courts that have declined to apply its holding. This minority of states have departed from *Batchelder* and concluded that their respective state constitutions violated overlapping statutes that proscribed different criminal penalties for similar

offenses. *State v. Williams*, 2007 UT 98, 175 P.3d 1029, ¶ 20 (“We have, however, determined that article I, section 24 of the Utah Constitution, while embodying the same general principles as the United States Constitution, may under certain circumstances, provide different and greater protection of individual rights”); *See, e.g., People v. Marcy*, 628 P.2d 69, 75 (Colo. 1981) (en banc) (“separate statutes proscribing with different penalties what ostensibly might be different acts, but offering no intelligent standard for distinguishing the proscribed conduct, run afoul of equal protection under state constitutional doctrine”). In these cases, each court found that their respective state constitution afforded more protection than the federal constitution analyzed under *Batchelder*. These courts therefore held that the heightened protection afforded by their state constitution precluded them from applying *Batchelder*.

Here, by contrast, the analysis applied in *Batchelder* concerning equal protection challenges should extend to both the federal and Ohio equal protection requirements. It is well settled through previous holdings by this Court that provisions of the federal and Ohio equal protection are “functionally equivalent, necessitating the same analysis.” *State v. Thompson*, 95 Ohio St.3d 264, 266, 2002-Ohio-2124, ¶ 9, 767 N.E.2d 251, 255 (2002); *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401, ¶ 11. As such, the holding in *Batchelder* should apply in equal force to equal protection challenges under the federal and Ohio state constitution. *See, e.g., supra, Johnson v. State*, 2003 Wy. 9 (“In our research, we have found no precedents that convince us that we should regard our state constitution as providing greater rights than those identified by the United States Supreme Court in *Bachleder*”); *see also, e.g., State v. Rooney*, 2011 Vt. 14, ¶ 27 (“Apart from his inability to distinguish *Batchelder*, defendant offers little in the way of explaining why the Vermont Constitution compels a different result from that held by the Court in *Batchelder* * * * The underlying premise of this [state

constitutional analysis] — that the statutory scheme at issue unconstitutionally creates two classes of similarly situated individuals — is faulty.”); *see also State v. Larsen, supra*, 135 Idaho 754, 758, citing *State v. Payan*, 132 Idaho 614, 617, 977 P.2d, 231 (Ct. App. 1998) (“holding the reasoning in *Batchelder* to be equally applicable in analysis under the equal protection provision in the Idaho Constitution”).

CONCLUSION

The Eighth District Court of Appeals rendered the repeat OVI specification unenforceable when it declared it to be unconstitutional on its face. Without any evidence of disparate application of the sentence enhancing specification, Appellee cannot meet the burden of demonstrating the statute to be unconstitutional on its face. As written, the repeat OVI specification has rational and valid applications. Therefore, this Court should reverse the Eighth District’s opinion and find that the repeat OVI specification constitutional on its face.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 11th day of May, 2015 to the following via electronic mail.

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NO.

IN THE SUPREME COURT OF OHIO

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

14-1557

STATE OF OHIO
Plaintiff-Appellant

-vs-

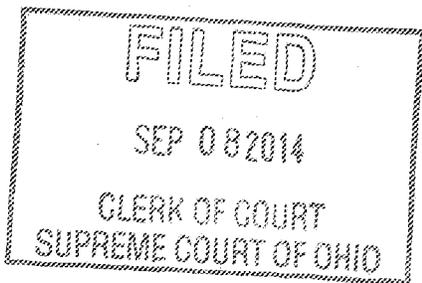
DEAN KLEMBUS
Defendant-Appellee

NOTICE OF APPEAL

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NOTICE OF APPEAL OF APPELLANT STATE OF OHIO

Appellant State of Ohio hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District in *State of Ohio v. Dean Klembus* entered in Court of Appeals case No. 100068 on July 24, 2014.

This felony case did not originate in the Court of Appeals and is one of public or great general interest. This case is also a claimed appeal of right as it raises a substantial constitutional question.

Respectfully Submitted,

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SERVICE

A copy of the foregoing has been sent via U.S. Mail and electronically served upon John Martin, Cuyahoga County Public Defender's Office, 310 Lakeside Avenue, Cleveland, Ohio 44113 and the Office of the Ohio Public Defender on this 5th day of September, 2014.



Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Andrea Rocco, Clerk of Courts

STATE OF OHIO

Appellee

COA NO.
100068

LOWER COURT NO.
CR-12-562381-A

-vs-

COMMON PLEAS COURT

DEAN M. KLEMBUS

Appellant

MOTION NO. 474789

Date 07/24/14

Journal Entry

Motion by appellee for reconsideration is granted. The journal entry and decision released May 1, 2014 (2014-Ohio-1830) is hereby vacated and substituted with the journal entry and opinion issued July 24, 2014.

RECEIVED FOR FILING

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CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
By E. Rocco Deputy



Presiding Judge EILEEN A. GALLAGHER,
Concurs

Judge TIM MCCORMACK, Concurs

Eileen T. Gallagher
EILEEN T. GALLAGHER
Judge

JUL 24 2014

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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FILED AND JOURNALIZED
PER APP.R. 22(C)

JUL 24 2014

CUYAHOGA COUNTY CLERK
OF THE COURT OF APPEALS
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ALL PARTIES.-COSTS TAKEN

ON RECONSIDERATION¹

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.

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.

{¶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. 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

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.

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).

{¶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 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

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.

protection. In determining whether a cumulative punishment violates 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 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,

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).

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.

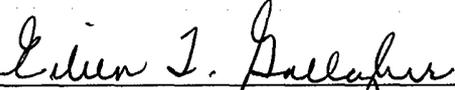
{¶27} Judgment is reversed in part and remanded to the trial court with instructions to vacate the repeat OVI offender specification from the indictment.

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.

The State of Ohio, }
Cuyahoga County. } ss.

I, ANDREA F. ROCCO, Clerk of the Court of

Appeals within and for said County, and in whose custody the files, Journals and records of said Court are required by the laws of the State of Ohio, to be, kept, hereby certify that the foregoing is taken and copied from the Journal entry dated on 07/24/2014 CA 100068

of the proceedings of the Court of Appeals within and for said Cuyahoga County, and that the said foregoing copy has been compared by me with the original entry on said Journal entry dated on 07/24/2014 CA 100068 and that the same is correct transcript thereof.

In Testimony Whereof, I do hereunto subscribe my name officially, and affix the seal of said court, at the Court House in the City of Cleveland, in said County, this 24th day of JULY A.D. 20 14

ANDREA F. ROCCO, Clerk of Courts

By _____ Deputy Clerk

United States Code Annotated Currentness

Constitution of the United States

Annotated

→ Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

→ **AMENDMENTXIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT**

Section 1. 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.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

OH Const. Art. I, § 2

Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)

Article I. Bill of Rights (Refs & Annos)

►O Const I Sec. 2 Equal protection and benefit

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

CREDIT(S)

(1851 constitutional convention, adopted eff. 9-1-1851)

OH Const. Art. I, § 16

Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)

Article I. Bill of Rights (Refs & Annos)

→O Const I Sec. 16 Redress for injury; due process

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

CREDIT(S)

(1912 constitutional convention, am. eff. 1-1-13; 1851 constitutional convention, adopted eff. 9-1-1851)

[ORC Ann. 2941.1413](#)

Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 4 (SB 1) with gaps of file 1 (HB 7) and file 2 (HB 53).

[Page's Ohio Revised Code Annotated](#) > [Title 29: Crimes — Procedure](#) > [Chapter 2941: Indictment](#) > [Form and Sufficiency](#)

§ 2941.1413 Specification concerning additional prison term for certain repeat OVI offenders.

- (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](#).

History

[150 v H 163](#), § 1, eff. 9-23-04.

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[ORC Ann. 4511.19](#)

Current through Legislation passed by the 131st General Assembly and filed with the Secretary of State through file 4 (SB 1) with gaps of file 1 (HB 7) and file 2 (HB 53).

Page's Ohio Revised Code Annotated > Title 45: Motor Vehicles — Aeronautics — Watercraft > Chapter 4511: Traffic Laws — Operation of Motor Vehicles > Driving While Intoxicated

§ 4511.19 Operation while under the influence of alcohol or drug of abuse or with specified concentration of alcohol or drug in certain bodily substances; chemical test; penalties; underage alcohol consumption.

(A)

- (1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:
 - (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.
 - (b) The person has a concentration of eight-hundredths of one per cent or more but less than seventeen-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.
 - (c) The person has a concentration of ninety-six-thousandths of one per cent or more but less than two hundred four-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.
 - (d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.
 - (e) The person has a concentration of eleven-hundredths of one gram or more but less than two hundred thirty-eight-thousandths of one gram by weight of alcohol per one hundred milliliters of the person's urine.
 - (f) The person has a concentration of seventeen-hundredths of one per cent or more by weight per unit volume of alcohol in the person's whole blood.
 - (g) The person has a concentration of two hundred four-thousandths of one per cent or more by weight per unit volume of alcohol in the person's blood serum or plasma.
 - (h) The person has a concentration of seventeen-hundredths of one gram or more by weight of alcohol per two hundred ten liters of the person's breath.
 - (i) The person has a concentration of two hundred thirty-eight-thousandths of one gram or more by weight of alcohol per one hundred milliliters of the person's urine.
 - (j) Except as provided in division (K) of this section, the person has a concentration of any of the following controlled substances or metabolites of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds any of the following:
 - (i) The person has a concentration of amphetamine in the person's urine of at least five hundred nanograms of amphetamine per milliliter of the person's urine or has a concentration of amphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of amphetamine per milliliter of the person's whole blood or blood serum or plasma.
 - (ii) The person has a concentration of cocaine in the person's urine of at least one hundred fifty nanograms of cocaine per milliliter of the person's urine or has a concentration of cocaine in

the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine per milliliter of the person's whole blood or blood serum or plasma.

- (iii) The person has a concentration of cocaine metabolite in the person's urine of at least one hundred fifty nanograms of cocaine metabolite per milliliter of the person's urine or has a concentration of cocaine metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of cocaine metabolite per milliliter of the person's whole blood or blood serum or plasma.
- (iv) The person has a concentration of heroin in the person's urine of at least two thousand nanograms of heroin per milliliter of the person's urine or has a concentration of heroin in the person's whole blood or blood serum or plasma of at least fifty nanograms of heroin per milliliter of the person's whole blood or blood serum or plasma.
- (v) The person has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's urine of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's urine or has a concentration of heroin metabolite (6-monoacetyl morphine) in the person's whole blood or blood serum or plasma of at least ten nanograms of heroin metabolite (6-monoacetyl morphine) per milliliter of the person's whole blood or blood serum or plasma.
- (vi) The person has a concentration of L.S.D. in the person's urine of at least twenty-five nanograms of L.S.D. per milliliter of the person's urine or a concentration of L.S.D. in the person's whole blood or blood serum or plasma of at least ten nanograms of L.S.D. per milliliter of the person's whole blood or blood serum or plasma.
- (vii) The person has a concentration of marihuana in the person's urine of at least ten nanograms of marihuana per milliliter of the person's urine or has a concentration of marihuana in the person's whole blood or blood serum or plasma of at least two nanograms of marihuana per milliliter of the person's whole blood or blood serum or plasma.
- (viii) Either of the following applies:
 - (I) The person is under the influence of alcohol, a drug of abuse, or a combination of them, and, as measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least fifteen nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least five nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.
 - (II) As measured by gas chromatography mass spectrometry, the person has a concentration of marihuana metabolite in the person's urine of at least thirty-five nanograms of marihuana metabolite per milliliter of the person's urine or has a concentration of marihuana metabolite in the person's whole blood or blood serum or plasma of at least fifty nanograms of marihuana metabolite per milliliter of the person's whole blood or blood serum or plasma.
- (ix) The person has a concentration of methamphetamine in the person's urine of at least five hundred nanograms of methamphetamine per milliliter of the person's urine or has a concentration of methamphetamine in the person's whole blood or blood serum or plasma of at least one hundred nanograms of methamphetamine per milliliter of the person's whole blood or blood serum or plasma.
- (x) The person has a concentration of phencyclidine in the person's urine of at least twenty-five nanograms of phencyclidine per milliliter of the person's urine or has a concentration of phencyclidine in the person's whole blood or blood serum or plasma of at least ten

nanograms of phencyclidine per milliliter of the person's whole blood or blood serum or plasma.

- (xi) The state board of pharmacy has adopted a rule pursuant to [section 4729.041 of the Revised Code](#) that specifies the amount of salvia divinorum and the amount of salvinorin A that constitute concentrations of salvia divinorum and salvinorin A in a person's urine, in a person's whole blood, or in a person's blood serum or plasma at or above which the person is impaired for purposes of operating any vehicle, streetcar, or trackless trolley within this state, the rule is in effect, and the person has a concentration of salvia divinorum or salvinorin A of at least that amount so specified by rule in the person's urine, in the person's whole blood, or in the person's blood serum or plasma.
- (2) No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:
 - (a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;
 - (b) Subsequent to being arrested for operating the vehicle, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under [section 4511.191 of the Revised Code](#), and being advised by the officer in accordance with [section 4511.192 of the Revised Code](#) of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.
- (B) No person under twenty-one years of age shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:
 - (1) The person has a concentration of at least two-hundredths of one per cent but less than eight-hundredths of one per cent by weight per unit volume of alcohol in the person's whole blood.
 - (2) The person has a concentration of at least three-hundredths of one per cent but less than ninety-six-thousandths of one per cent by weight per unit volume of alcohol in the person's blood serum or plasma.
 - (3) The person has a concentration of at least two-hundredths of one gram but less than eight-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.
 - (4) The person has a concentration of at least twenty-eight one-thousandths of one gram but less than eleven-hundredths of one gram by weight of alcohol per one hundred milliliters of the person's urine.
- (C) In any proceeding arising out of one incident, a person may be charged with a violation of division (A)(1)(a) or (A)(2) and a violation of division (B)(1), (2), or (3) of this section, but the person may not be convicted of more than one violation of these divisions.
- (D)
 - (1)
 - (a) In any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(a) of this section or for an equivalent offense that is vehicle-related, the result of any test of any blood or urine withdrawn and analyzed at any health care provider, as defined in [section 2317.02 of the Revised Code](#), may be admitted with expert testimony to be considered with any other relevant and competent evidence in determining the guilt or innocence of the defendant.
 - (b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section or for an equivalent offense that is vehicle-related, the court may admit evidence on the concentration of alcohol, drugs of abuse, controlled substances, metabolites of a controlled substance, or a combination of them in the defendant's whole blood, blood serum or plasma,

breath, urine, or other bodily substance at the time of the alleged violation as shown by chemical analysis of the substance withdrawn within three hours of the time of the alleged violation. The three-hour time limit specified in this division regarding the admission of evidence does not extend or affect the two-hour time limit specified in division (A) of [section 4511.192 of the Revised Code](#) as the maximum period of time during which a person may consent to a chemical test or tests as described in that section. The court may admit evidence on the concentration of alcohol, drugs of abuse, or a combination of them as described in this division when a person submits to a blood, breath, urine, or other bodily substance test at the request of a law enforcement officer under [section 4511.191 of the Revised Code](#) or a blood or urine sample is obtained pursuant to a search warrant. Only a physician, a registered nurse, an emergency medical technician-intermediate, an emergency medical technician-paramedic, or a qualified technician, chemist, or phlebotomist shall withdraw a blood sample for the purpose of determining the alcohol, drug, controlled substance, metabolite of a controlled substance, or combination content of the whole blood, blood serum, or blood plasma. This limitation does not apply to the taking of breath or urine specimens. A person authorized to withdraw blood under this division may refuse to withdraw blood under this division, if in that person's opinion, the physical welfare of the person would be endangered by the withdrawing of blood.

The bodily substance withdrawn under division (D)(1)(b) of this section shall be analyzed in accordance with methods approved by the director of health by an individual possessing a valid permit issued by the director pursuant to [section 3701.143 of the Revised Code](#).

- (c) As used in division (D)(1)(b) of this section, "emergency medical technician-intermediate" and "emergency medical technician-paramedic" have the same meanings as in [section 4765.01 of the Revised Code](#).
- (2) In a criminal prosecution or juvenile court proceeding for a violation of division (A) of this section or for an equivalent offense that is vehicle-related, if there was at the time the bodily substance was withdrawn a concentration of less than the applicable concentration of alcohol specified in divisions (A)(1)(b), (c), (d), and (e) of this section or less than the applicable concentration of a listed controlled substance or a listed metabolite of a controlled substance specified for a violation of division (A)(1)(j) of this section, that fact may be considered with other competent evidence in determining the guilt or innocence of the defendant. This division does not limit or affect a criminal prosecution or juvenile court proceeding for a violation of division (B) of this section or for an equivalent offense that is substantially equivalent to that division.
- (3) Upon the request of the person who was tested, the results of the chemical test shall be made available to the person or the person's attorney, immediately upon the completion of the chemical test analysis.

If the chemical test was obtained pursuant to division (D)(1)(b) of this section, the person tested may have a physician, a registered nurse, or a qualified technician, chemist, or phlebotomist of the person's own choosing administer a chemical test or tests, at the person's expense, in addition to any administered at the request of a law enforcement officer. If the person was under arrest as described in division (A)(5) of [section 4511.191 of the Revised Code](#), the arresting officer shall advise the person at the time of the arrest that the person may have an independent chemical test taken at the person's own expense. If the person was under arrest other than described in division (A)(5) of [section 4511.191 of the Revised Code](#), the form to be read to the person to be tested, as required under [section 4511.192 of the Revised Code](#), shall state that the person may have an independent test performed at the person's expense. The failure or inability to obtain an additional chemical test by a person shall not preclude the admission of evidence relating to the chemical test or tests taken at the request of a law enforcement officer.

- (4)
- (a) As used in divisions (D)(4)(b) and (c) of this section, "national highway traffic safety administration"

means the national highway traffic safety administration established as an administration of the United States department of transportation under [96 Stat. 2415](#) (1983), [49 U.S.C.A. 105](#).

- (b) In any criminal prosecution or juvenile court proceeding for a violation of division (A) or (B) of this section, of a municipal ordinance relating to operating a vehicle while under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse, or of a municipal ordinance relating to operating a vehicle with a prohibited concentration of alcohol, a controlled substance, or a metabolite of a controlled substance in the whole blood, blood serum or plasma, breath, or urine, if a law enforcement officer has administered a field sobriety test to the operator of the vehicle involved in the violation and if it is shown by clear and convincing evidence that the officer administered the test in substantial compliance with the testing standards for any reliable, credible, and generally accepted field sobriety tests that were in effect at the time the tests were administered, including, but not limited to, any testing standards then in effect that were set by the national highway traffic safety administration, all of the following apply:
 - (i) The officer may testify concerning the results of the field sobriety test so administered.
 - (ii) The prosecution may introduce the results of the field sobriety test so administered as evidence in any proceedings in the criminal prosecution or juvenile court proceeding.
 - (iii) If testimony is presented or evidence is introduced under division (D)(4)(b)(i) or (ii) of this section and if the testimony or evidence is admissible under the Rules of Evidence, the court shall admit the testimony or evidence and the trier of fact shall give it whatever weight the trier of fact considers to be appropriate.
- (c) Division (D)(4)(b) of this section does not limit or preclude a court, in its determination of whether the arrest of a person was supported by probable cause or its determination of any other matter in a criminal prosecution or juvenile court proceeding of a type described in that division, from considering evidence or testimony that is not otherwise disallowed by division (D)(4)(b) of this section.

(E)

- (1) Subject to division (E)(3) of this section, in any criminal prosecution or juvenile court proceeding for a violation of division (A)(1)(b), (c), (d), (e), (f), (g), (h), (i), or (j) or (B)(1), (2), (3), or (4) of this section or for an equivalent offense that is substantially equivalent to any of those divisions, a laboratory report from any laboratory personnel issued a permit by the department of health authorizing an analysis as described in this division that contains an analysis of the whole blood, blood serum or plasma, breath, urine, or other bodily substance tested and that contains all of the information specified in this division shall be admitted as prima-facie evidence of the information and statements that the report contains. The laboratory report shall contain all of the following:
 - (a) The signature, under oath, of any person who performed the analysis;
 - (b) Any findings as to the identity and quantity of alcohol, a drug of abuse, a controlled substance, a metabolite of a controlled substance, or a combination of them that was found;
 - (c) A copy of a notarized statement by the laboratory director or a designee of the director that contains the name of each certified analyst or test performer involved with the report, the analyst's or test performer's employment relationship with the laboratory that issued the report, and a notation that performing an analysis of the type involved is part of the analyst's or test performer's regular duties;
 - (d) An outline of the analyst's or test performer's education, training, and experience in performing the type of analysis involved and a certification that the laboratory satisfies appropriate quality control standards in general and, in this particular analysis, under rules of the department of health.
- (2) Notwithstanding any other provision of law regarding the admission of evidence, a report of the type

described in division (E)(1) of this section is not admissible against the defendant to whom it pertains in any proceeding, other than a preliminary hearing or a grand jury proceeding, unless the prosecutor has served a copy of the report on the defendant's attorney or, if the defendant has no attorney, on the defendant.

- (3) A report of the type described in division (E)(1) of this section shall not be prima-facie evidence of the contents, identity, or amount of any substance if, within seven days after the defendant to whom the report pertains or the defendant's attorney receives a copy of the report, the defendant or the defendant's attorney demands the testimony of the person who signed the report. The judge in the case may extend the seven-day time limit in the interest of justice.
- (F) Except as otherwise provided in this division, any physician, registered nurse, emergency medical technician-intermediate, emergency medical technician-paramedic, or qualified technician, chemist, or phlebotomist who withdraws blood from a person pursuant to this section or [section 4511.191](#) or [4511.192 of the Revised Code](#), and any hospital, first-aid station, or clinic at which blood is withdrawn from a person pursuant to this section or [section 4511.191](#) or [4511.192 of the Revised Code](#), is immune from criminal liability and civil liability based upon a claim of assault and battery or any other claim that is not a claim of malpractice, for any act performed in withdrawing blood from the person. The immunity provided in this division also extends to an emergency medical service organization that employs an emergency medical technician-intermediate or emergency medical technician-paramedic who withdraws blood under this section. The immunity provided in this division is not available to a person who withdraws blood if the person engages in willful or wanton misconduct.

As used in this division, "emergency medical technician-intermediate" and "emergency medical technician-paramedic" have the same meanings as in [section 4765.01 of the Revised Code](#).

(G)

- (1) Whoever violates any provision of divisions (A)(1)(a) to (i) or (A)(2) of this section is guilty of operating a vehicle under the influence of alcohol, a drug of abuse, or a combination of them. Whoever violates division (A)(1)(j) of this section is guilty of operating a vehicle while under the influence of a listed controlled substance or a listed metabolite of a controlled substance. The court shall sentence the offender for either offense under Chapter 2929. of the Revised Code, except as otherwise authorized or required by divisions (G)(1)(a) to (e) of this section:
- (a) Except as otherwise provided in division (G)(1)(b), (c), (d), or (e) of this section, the offender is guilty of a misdemeanor of the first degree, and 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 jail term of three consecutive days. As used in this division, three consecutive days means seventy-two consecutive hours. The court may sentence an offender to both an intervention program and a jail term. The court may impose a jail term in addition to the three-day mandatory jail term or intervention program. However, in no case shall the cumulative jail term imposed for the offense exceed six months.

The court may suspend the execution of the three-day jail term under this division if the court, in lieu of that suspended term, places the offender under a community control sanction pursuant to [section 2929.25 of the Revised Code](#) and requires the offender to attend, for three consecutive days, a drivers' intervention program certified under [section 5119.38 of the Revised Code](#). The court also may suspend the execution of any part of the three-day jail term under this division if it places the offender under a community control sanction pursuant to [section 2929.25 of the Revised Code](#) for part of the three days, requires the offender to attend for the suspended part of the term a drivers' intervention program so certified, and sentences the offender to a jail term equal to the remainder of the three consecutive days that the offender does not spend attending the program. The court may require the offender, as a condition of community control and in

addition to the required attendance at a drivers' intervention program, to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 5119. of the Revised Code by the director of mental health and addiction services that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose on the offender any other conditions of community control that it considers necessary.

- (ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of at least three consecutive days and a requirement that the offender attend, for three consecutive days, a drivers' intervention program that is certified pursuant to [section 5119.38 of the Revised Code](#). As used in this division, three consecutive days means seventy-two consecutive hours. If the court determines that the offender is not conducive to treatment in a drivers' intervention program, if the offender refuses to attend a drivers' intervention program, or if the jail at which the offender is to serve the jail term imposed can provide a driver's intervention program, the court shall sentence the offender to a mandatory jail term of at least six consecutive days.

The court may require the offender, under a community control sanction imposed under [section 2929.25 of the Revised Code](#), to attend and satisfactorily complete any treatment or education programs that comply with the minimum standards adopted pursuant to Chapter 5119. of the Revised Code by the director of mental health and addiction services, in addition to the required attendance at drivers' intervention program, that the operators of the drivers' intervention program determine that the offender should attend and to report periodically to the court on the offender's progress in the programs. The court also may impose any other conditions of community control on the offender that it considers necessary.

- (iii) In all cases, a fine of not less than three hundred seventy-five and not more than one thousand seventy-five dollars;
 - (iv) In all cases, a class five license suspension of the offender's driver's or commercial driver's license or permit or nonresident operating privilege from the range specified in division (A)(5) of [section 4510.02 of the Revised Code](#). The court may grant limited driving privileges relative to the suspension under [sections 4510.021](#) and [4510.13 of the Revised Code](#).
- (b) 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 one violation of division (A) or (B) of this section or one other equivalent offense is guilty of a misdemeanor of the first 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 jail term of ten consecutive days. The court shall impose the ten-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the ten-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court shall require the offender to be assessed by a community addiction services provider that is authorized by [section 5119.21 of the Revised Code](#), subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The purpose of the assessment is to

determine the degree of the offender's alcohol usage and to determine whether or not treatment is warranted. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

- (ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, except as otherwise provided in this division, a mandatory jail term of twenty consecutive days. The court shall impose the twenty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the twenty-day mandatory jail term. The cumulative jail term imposed for the offense shall not exceed six months.

In addition to the jail term or the term of house arrest with electronic monitoring or continuous alcohol monitoring or both types of monitoring and jail term, the court shall require the offender to be assessed by a community addiction service provider that is authorized by [section 5119.21 of the Revised Code](#), subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The purpose of the assessment is to determine the degree of the offender's alcohol usage and to determine whether or not treatment is warranted. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

- (iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than five hundred twenty-five and not more than one thousand six hundred twenty-five dollars;
 - (iv) In all cases, a class four license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of [section 4510.02 of the Revised Code](#). The court may grant limited driving privileges relative to the suspension under [sections 4510.021 and 4510.13 of the Revised Code](#).
 - (v) In all cases, if the vehicle is registered in the offender's name, immobilization of the vehicle involved in the offense for ninety days in accordance with [section 4503.233 of the Revised Code](#) and impoundment of the license plates of that vehicle for ninety days.
- (c) 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 two violations of division (A) or (B) of this section or other equivalent offenses is guilty of a misdemeanor. 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 jail term of thirty consecutive days. The court shall impose the thirty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the thirty-day mandatory jail term. Notwithstanding the jail terms set forth in [sections 2929.21 to 2929.28 of the Revised Code](#), the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.
 - (ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) of this section, a mandatory jail term of sixty consecutive days. The court shall impose

the sixty-day mandatory jail term under this division unless, subject to division (G)(3) of this section, it instead imposes a sentence under that division consisting of both a jail term and a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The court may impose a jail term in addition to the sixty-day mandatory jail term. Notwithstanding the jail terms set forth in [sections 2929.21 to 2929.28 of the Revised Code](#), the additional jail term shall not exceed one year, and the cumulative jail term imposed for the offense shall not exceed one year.

- (iii) In all cases, notwithstanding the fines set forth in Chapter 2929. of the Revised Code, a fine of not less than eight hundred fifty and not more than two thousand seven hundred fifty dollars;
 - (iv) In all cases, a class three license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(3) of [section 4510.02 of the Revised Code](#). The court may grant limited driving privileges relative to the suspension under [sections 4510.021 and 4510.13 of the Revised Code](#).
 - (v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with [section 4503.234 of the Revised Code](#). Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.
 - (vi) In all cases, the court shall order the offender to participate with a community addiction services provider authorized by [section 5119.21 of the Revised Code](#), subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The operator of the services provider shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.
- (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.

- (ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) 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 one hundred twenty consecutive days in accordance with division (G)(1) of [section 2929.13 of the Revised Code](#) or a mandatory prison term of one hundred twenty 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 one hundred twenty-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.
- (iii) In all cases, notwithstanding [section 2929.18 of the Revised Code](#), a fine of not less than one thousand three hundred fifty nor more than ten thousand five hundred dollars;
- (iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of [section 4510.02 of the Revised Code](#). The court may grant limited driving privileges relative to the suspension under [sections 4510.021 and 4510.13 of the Revised Code](#).
- (v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with [section 4503.234 of the Revised Code](#). Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.
- (vi) In all cases, the court shall order the offender to participate with a community addiction services provider authorized by [section 5119.21 of the Revised Code](#), subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The operator of the services provider shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.
- (vii) In all cases, if the court sentences the offender to a mandatory term of local incarceration, in addition to the mandatory term, the court, pursuant to [section 2929.17 of the Revised Code](#), may impose a term of house arrest with electronic monitoring. The term shall not commence until after the offender has served the mandatory term of local incarceration.

- (e) An offender who previously has been convicted of or pleaded guilty to a violation of division (A) of this section that was a felony, regardless of when the violation and the conviction or guilty plea occurred, is guilty of a felony of the third degree. The court shall sentence the offender to all of the following:
- (i) If the offender is being sentenced 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 a mandatory prison term of sixty consecutive days in accordance with division (G)(2) of [section 2929.13 of the Revised Code](#) if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a sixty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, 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.
 - (ii) If the sentence is being imposed for a violation of division (A)(1)(f), (g), (h), or (i) or division (A)(2) 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 a mandatory prison term of one hundred twenty consecutive days in accordance with division (G)(2) of [section 2929.13 of the Revised Code](#) if the offender is not convicted of and does not plead guilty to a specification of that type. The court may impose a prison term in addition to the mandatory prison term. The cumulative total of a one hundred twenty-day mandatory prison term and the additional prison term for the offense shall not exceed five years. In addition to the mandatory prison term or mandatory prison term and additional prison term the court imposes, 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.
 - (iii) In all cases, notwithstanding [section 2929.18 of the Revised Code](#), a fine of not less than one thousand three hundred fifty nor more than ten thousand five hundred dollars;
 - (iv) In all cases, a class two license suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(2) of [section 4510.02 of the Revised Code](#). The court may grant limited driving privileges relative to the suspension under [sections 4510.021 and 4510.13 of the Revised Code](#).
 - (v) In all cases, if the vehicle is registered in the offender's name, criminal forfeiture of the vehicle involved in the offense in accordance with [section 4503.234 of the Revised Code](#). Division (G)(6) of this section applies regarding any vehicle that is subject to an order of criminal forfeiture under this division.
 - (vi) In all cases, the court shall order the offender to participate with a community addiction services provider authorized by [section 5119.21 of the Revised Code](#), subject to division (I) of this section, and shall order the offender to follow the treatment recommendations of the services provider. The operator of the services provider shall determine and assess the degree of the offender's alcohol dependency and shall make recommendations for treatment. Upon the request of the court, the services provider shall submit the results of the assessment to the court, including all treatment recommendations and clinical diagnoses related to alcohol use.

- (2) An offender who is convicted of or pleads guilty to a violation of division (A) of this section and who subsequently seeks reinstatement of the driver's or occupational driver's license or permit or nonresident operating privilege suspended under this section as a result of the conviction or guilty plea shall pay a reinstatement fee as provided in division (F)(2) of [section 4511.191 of the Revised Code](#).
- (3) If an offender is sentenced to a jail term under division (G)(1)(b)(i) or (ii) or (G)(1)(c)(i) or (ii) of this section and if, within sixty days of sentencing of the offender, the court issues a written finding on the record that, due to the unavailability of space at the jail where the offender is required to serve the term, the offender will not be able to begin serving that term within the sixty-day period following the date of sentencing, the court may impose an alternative sentence under this division that includes a term of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring.

As an alternative to a mandatory jail term of ten consecutive days required by division (G)(1)(b)(i) of this section, the court, under this division, may sentence the offender to five consecutive days in jail and not less than eighteen consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the five consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The five consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of twenty consecutive days required by division (G)(1)(b)(ii) of this section, the court, under this division, may sentence the offender to ten consecutive days in jail and not less than thirty-six consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the ten consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed six months. The ten consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to a mandatory jail term of thirty consecutive days required by division (G)(1)(c)(i) of this section, the court, under this division, may sentence the offender to fifteen consecutive days in jail and not less than fifty-five consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the fifteen consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The fifteen consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

As an alternative to the mandatory jail term of sixty consecutive days required by division (G)(1)(c)(ii) of this section, the court, under this division, may sentence the offender to thirty consecutive days in jail and not less than one hundred ten consecutive days of house arrest with electronic monitoring, with continuous alcohol monitoring, or with both electronic monitoring and continuous alcohol monitoring. The cumulative total of the thirty consecutive days in jail and the period of house arrest with electronic monitoring, continuous alcohol monitoring, or both types of monitoring shall not exceed one year. The thirty consecutive days in jail do not have to be served prior to or consecutively to the period of house arrest.

- (4) If an offender's driver's or occupational driver's license or permit or nonresident operating privilege is suspended under division (G) of this section and if [section 4510.13 of the Revised Code](#) permits the court to grant limited driving privileges, the court may grant the limited driving privileges in accordance with that section. If division (A)(7) of that section requires that the court impose as a condition of the privileges that the offender must display on the vehicle that is driven subject to the privileges restricted license plates that are issued under [section 4503.231 of the Revised Code](#), except as provided in division (B) of that section, the court shall impose that condition as one of the conditions of the limited driving privileges granted to the offender, except as provided in division (B) of [section 4503.231 of the Revised Code](#).
- (5) Fines imposed under this section for a violation of division (A) of this section shall be distributed as

follows:

- (a) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii), thirty-five dollars of the fine imposed under division (G)(1)(b)(iii), one hundred twenty-three dollars of the fine imposed under division (G)(1)(c)(iii), and two hundred ten dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to an enforcement and education fund established by the legislative authority of the law enforcement agency in this state that primarily was responsible for the arrest of the offender, as determined by the court that imposes the fine. The agency shall use this share to pay only those costs it incurs in enforcing this section or a municipal OVI ordinance and in informing the public of the laws governing the operation of a vehicle while under the influence of alcohol, the dangers of the operation of a vehicle under the influence of alcohol, and other information relating to the operation of a vehicle under the influence of alcohol and the consumption of alcoholic beverages.
- (b) Fifty dollars of the fine imposed under division (G)(1)(a)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. If the offender is being sentenced for a violation of division (A)(1)(a), (b), (c), (d), (e), or (j) of this section and was confined as a result of the offense prior to being sentenced for the offense but is not sentenced to a term of incarceration, the fifty dollars shall be paid to the political subdivision that paid the cost of housing the offender during that period of confinement. The political subdivision shall use the share under this division to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs of any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.
- (c) Twenty-five dollars of the fine imposed under division (G)(1)(a)(iii) and fifty dollars of the fine imposed under division (G)(1)(b)(iii) of this section shall be deposited into the county or municipal indigent drivers' alcohol treatment fund under the control of that court, as created by the county or municipal corporation under division (F) of [section 4511.191 of the Revised Code](#).
- (d) One hundred fifteen dollars of the fine imposed under division (G)(1)(b)(iii), two hundred seventy-seven dollars of the fine imposed under division (G)(1)(c)(iii), and four hundred forty dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be paid to the political subdivision that pays the cost of housing the offender during the offender's term of incarceration. The political subdivision shall use this share to pay or reimburse incarceration or treatment costs it incurs in housing or providing drug and alcohol treatment to persons who violate this section or a municipal OVI ordinance, costs for any immobilizing or disabling device used on the offender's vehicle, and costs of electronic house arrest equipment needed for persons who violate this section.
- (e) Fifty dollars of the fine imposed under divisions (G)(1)(a)(iii), (G)(1)(b)(iii), (G)(1)(c)(iii), (G)(1)(d)(iii), and (G)(1)(e)(iii) of this section shall be deposited into the special projects fund of the court in which the offender was convicted and that is established under division (E)(1) of section 2303.201, division (B)(1) of section 1901.26, or division (B)(1) of [section 1907.24 of the Revised Code](#), to be used exclusively to cover the cost of immobilizing or disabling devices, including certified ignition interlock devices, and remote alcohol monitoring devices for indigent offenders who are required by a judge to use either of these devices. If the court in which the offender was convicted does not have a special projects fund that is established under division (E)(1) of section 2303.201, division (B)(1) of section 1901.26, or division (B)(1) of [section 1907.24 of the Revised Code](#), the fifty dollars shall be deposited into the indigent drivers interlock and alcohol monitoring fund under division (I) of [section 4511.191 of the Revised Code](#).
- (f) Seventy-five dollars of the fine imposed under division (G)(1)(a)(iii), one hundred twenty-five dollars of the fine imposed under division (G)(1)(b)(iii), two hundred fifty dollars of the fine

imposed under division (G)(1)(c)(iii), and five hundred dollars of the fine imposed under division (G)(1)(d)(iii) or (e)(iii) of this section shall be transmitted to the treasurer of state for deposit into the indigent defense support fund established under [section 120.08 of the Revised Code](#).

- (g) The balance of the fine imposed under division (G)(1)(a)(iii), (b)(iii), (c)(iii), (d)(iii), or (e)(iii) of this section shall be disbursed as otherwise provided by law.
- (6) If title to a motor vehicle that is subject to an order of criminal forfeiture under division (G)(1)(c), (d), or (e) of this section is assigned or transferred and division (B)(2) or (3) of [section 4503.234 of the Revised Code](#) applies, in addition to or independent of any other penalty established by law, the court may fine the offender the value of the vehicle as determined by publications of the national automobile dealers association. The proceeds of any fine so imposed shall be distributed in accordance with division (C)(2) of that section.
- (7) In all cases in which an offender is sentenced under division (G) of this section, the offender shall provide the court with proof of financial responsibility as defined in [section 4509.01 of the Revised Code](#). If the offender fails to provide that proof of financial responsibility, the court, in addition to any other penalties provided by law, may order restitution pursuant to [section 2929.18](#) or [2929.28 of the Revised Code](#) in an amount not exceeding five thousand dollars for any economic loss arising from an accident or collision that was the direct and proximate result of the offender's operation of the vehicle before, during, or after committing the offense for which the offender is sentenced under division (G) of this section.
- (8) As used in division (G) of this section, "electronic monitoring," "mandatory prison term," and "mandatory term of local incarceration" have the same meanings as in [section 2929.01 of the Revised Code](#).
- (H) Whoever violates division (B) of this section is guilty of operating a vehicle after underage alcohol consumption and shall be punished as follows:
- (1) Except as otherwise provided in division (H)(2) of this section, the offender is guilty of a misdemeanor of the fourth degree. In addition to any other sanction imposed for the offense, the court shall impose a class six suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(6) of [section 4510.02 of the Revised Code](#).
- (2) If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one or more violations of division (A) or (B) of this section or other equivalent offenses, the offender is guilty of a misdemeanor of the third degree. In addition to any other sanction imposed for the offense, the court shall impose a class four suspension of the offender's driver's license, commercial driver's license, temporary instruction permit, probationary license, or nonresident operating privilege from the range specified in division (A)(4) of [section 4510.02 of the Revised Code](#).
- (3) If the offender also is convicted of or also pleads guilty to a specification of the type described in [section 2941.1416 of the Revised Code](#) and if the court imposes a jail term for the violation of division (B) of this section, the court shall impose upon the offender an additional definite jail term pursuant to division (E) of [section 2929.24 of the Revised Code](#).
- (4) The offender shall provide the court with proof of financial responsibility as defined in [section 4509.01 of the Revised Code](#). If the offender fails to provide that proof of financial responsibility, then, in addition to any other penalties provided by law, the court may order restitution pursuant to [section 2929.28 of the Revised Code](#) in an amount not exceeding five thousand dollars for any economic loss arising from an accident or collision that was the direct and proximate result of the offender's operation of the vehicle before, during, or after committing the violation of division (B) of this section.
- (I)
- (1) No court shall sentence an offender to an alcohol treatment program under this section unless the

treatment program complies with the minimum standards for alcohol treatment programs adopted under Chapter 5119. of the Revised Code by the director of mental health and addiction services.

- (2) An offender who stays in a drivers' intervention program or in an alcohol treatment program under an order issued under this section shall pay the cost of the stay in the program. However, if the court determines that an offender who stays in an alcohol treatment program under an order issued under this section is unable to pay the cost of the stay in the program, the court may order that the cost be paid from the court's indigent drivers' alcohol treatment fund.
- (J) If a person whose driver's or commercial driver's license or permit or nonresident operating privilege is suspended under this section files an appeal regarding any aspect of the person's trial or sentence, the appeal itself does not stay the operation of the suspension.
- (K) Division (A)(1)(j) of this section does not apply to a person who operates a vehicle, streetcar, or trackless trolley while the person has a concentration of a listed controlled substance or a listed metabolite of a controlled substance in the person's whole blood, blood serum or plasma, or urine that equals or exceeds the amount specified in that division, if both of the following apply:
- (1) The person obtained the controlled substance pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs.
- (2) The person injected, ingested, or inhaled the controlled substance in accordance with the health professional's directions.
- (L) The prohibited concentrations of a controlled substance or a metabolite of a controlled substance listed in division (A)(1)(j) of this section also apply in a prosecution of a violation of division (D) of [section 2923.16 of the Revised Code](#) in the same manner as if the offender is being prosecuted for a prohibited concentration of alcohol.
- (M) All terms defined in [section 4510.01 of the Revised Code](#) apply to this section. If the meaning of a term defined in [section 4510.01 of the Revised Code](#) conflicts with the meaning of the same term as defined in [section 4501.01](#) or [4511.01 of the Revised Code](#), the term as defined in [section 4510.01 of the Revised Code](#) applies to this section.
- (N)
- (1) The Ohio Traffic Rules in effect on January 1, 2004, as adopted by the supreme court under authority of [section 2937.46 of the Revised Code](#), do not apply to felony violations of this section. Subject to division (N)(2) of this section, the Rules of Criminal Procedure apply to felony violations of this section.
- (2) If, on or after January 1, 2004, the supreme court modifies the Ohio Traffic Rules to provide procedures to govern felony violations of this section, the modified rules shall apply to felony violations of this section.

History

GC § 6307-19; 119 v 766, § 19; Bureau of Code Revision, 10-1-53; 125 v 461; 130 v 1083 (Eff 7-11-63); 132 v H 380 (Eff 1-1-68); 133 v H 874 (Eff 9-16-70); 134 v S 14 (Eff 12-3-71); 135 v H 995 (Eff 1-1-75); 139 v S 432 (Eff 3-16-83); 141 v S 262 (Eff 3-20-87); 143 v S 131 (Eff 7-25-90); 143 v H 837 (Eff 7-25-90); 145 v S 82 (Eff 5-4-94); 148 v S 22 (Eff 5-17-2000); 149 v S 163, § 1. Eff 4-9-2003; 149 v S 123, § 1, eff. 1-1-04; 149 v H 490, § 1, eff. 1-1-04; 149 v S 163, § 3, eff. 1-1-04; 150 v H 87, § 1, eff. 6-30-03; 150 v H 87, § 4, eff. 1-1-04; 150 v H 163, § 1, eff. 9-23-04; 151 v S 8, § 1, eff. 8-17-06; 151 v H 461, § 1, eff. 4-4-07; 152 v S 209, § 1, eff. 3-26-08; 152 v S 17, § 1, eff. 9-30-08; 152 v H 215, § 1, eff. 4-7-09; 153 v S 58, § 1, eff. 9-17-10; 2011 HB 5, § 1, eff. Sept. 23, 2011; 2013 HB 59, § 101.01, eff. Sept. 29, 2013.