

**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 REPLY BRIEF**

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## APPELLANT'S REPLY BRIEF

### 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.

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

- I. **Klembus' challenge was sustained under an equal protection analysis. Any due process claim is non-specific and duplicative of his equal protection arguments.**

This case was decided under Equal Protection analysis. In doing so, the Eighth District held that the repeat OVI offender specification, on its face violates the constitutional guarantees of equal protection. *State v. Klembus*, 8th Dist. Cuyahoga No. 100068, 2014-Ohio-3227, ¶ 24.

In his merit brief, Appellee argues that the repeat OVI offender specification also violates due process. Appellee further cites generally to *Bank of America v. Macho*, 8<sup>th</sup> Dist. Cuyahoga No. 96124, 2011-Ohio-5495 and argues that a violation exists because the "arbitrariness of the statute is underscored by the unfettered discretion given to prosecutors to pick and choose between prosecuting or not prosecuting the Specification." *Appellee Brief*, pg. 5. As the Eighth District made clear, Appellee's due process arguments and equal protections arguments are duplicative. Contrary to Appellee's claims, the issue in this case was whether there was a violation of the equal protection clause. *Klembus*, ¶ 9-10.

Aside from the duplicative arguments, Klembus offers no explanation as to how a procedural due process claim exists where Klembus entered a plea of no contest or how a substantive due process violation is implicated. Neither Klembus nor the Eighth District held that

the substantial due process analysis differed from the equal protection analysis. *Klembus*, ¶9. The Eighth District held that the statute was in violation of the equal protection clause, and accordingly, there is not a due process issue but rather an equal protection issue before this Court. Alternatively, the due process claims can be rejected because Klembus merely reiterates his equal protection argument as he has not provided any basis to distinguish his equal protection and due process argument.

**II. This Case Is Not About Selective Prosecution. Appellee Has Made This Case About The Potential Harm Of Prosecutorial Discretion. This Claim Is Not Recognized Under Equal Protection Analysis.**

Appellee states concisely that this case is not about whether the State of Ohio is invidiously discriminating against Mr. Klembus, either personally or because he is a member of a class of individuals and that instead the issue is whether the statute is unconstitutional on its face. Appellee brief, pg. 5. Both points are true.

The State of Ohio and amicus curiae's points of selective prosecution are in direct response to the reasons why the Eighth District Court of Appeals found the statute unconstitutional on its face. In the opinion below, the Eighth District relied upon *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979) and held the repeat OVI offender specification unconstitutional because, "a repeat OVI offender charged with the specification *may be treated differently* from other members of his class, who are not subject to the repeat OVI offender specification." *Klembus*, ¶ 21. The State questions how the possibility of selective prosecution or how a prosecutor's discretion in charging amounts to a declaration that a statute is unconstitutional on its face. The State's position is that selective prosecution becomes a real issue with cognizable constitutional claims where the prosecution engages in selective enforcement of the laws on a impermissible basis such as race. This point was made clear in *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979);

*Oyler v. Boles*, 368 U.S. 448, 82 S.Ct. 501 (1962); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

Moreover, these arguments were raised in direct rebuttal to Appellee's reliance upon *State v. Wilson*, 58 Ohio St.2d 52, 388 N.E.2d 745 (1979). The Eighth District construed Appellee's contentions as follows, "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 provision." *Klembus*, ¶ 16. The Eighth District agreed holding that the OVI 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." *Klembus*, ¶ 22. The words "allows" and "may" indicate that the Eighth District only found a possibility of arbitrary enforcement. The possibility of arbitrary and unequal operation of the OVI sentencing provision cannot rise to the level of an equal protection violation. The State submits that it is only in the case of selective prosecution that the Equal Protection Clause of the United States Constitution is violated.

There is no evidence that the State of Ohio invidiously discriminated against Appellee. This Court must reverse the judgment of the Eighth District where as Appellee implicitly acknowledges that this not a case about selective prosecution on an unconstitutional basis.

**III. *State v. Wilson* is inapposite; *Batchelder* controls on the issue of Equal Protection analysis.**

Appellee argues that the decision in *Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 is distinguishable. In support of his argument, Appellee points to the difference between and notes that in this case the trial judge still had discretion to impose a sentence within the lower penalty range.

Appellee next argues that *Batchelder* only dealt with “partial redundancy” between the statutes. As argued in the Appellant’s merit brief and below, for the same reasons why this Court should show that the Appellee cannot prove that the repeat OVI offender specification will always require the same elements as the base charge, this Court should recognize there is only partial redundancy between the repeat OVI specification and the base charges. There will be in certain instances only a partial overlap rather than identical elements in all applications of the repeat OVI statute.

Appellee then argues that *Batchelder* dealt with two statutes, not one. Appellee cites to a district court’s order in *United States v. Percival*, 727 F.Supp. 1015 (E.D. Va., 1990), which dealt in part with what sentence was appropriate. The Court did not appear to discuss the ramifications of the equal protection clause. Central to Appellee’s equal protection analysis is *State v. Wilson*, 55 Ohio St.2d 52 (1979). But just as *Batchelder* dealt with two statutes, this Court’s decision in *Wilson*, 58 Ohio St. 2d 52 also concerned two statutes. If Appellee argues that *Batchelder* is distinguishable and inapplicable because it dealt with two different statutes, then by his logic this Court’s decision in *Wilson* is inapplicable as it concerns two different statutes. *Wilson*, 55 (describing the issue as involving R.C. 2911.11(A)(3) and R.C. 2911.12). Nevertheless, regardless of whether two statutes are involved or whether a single statute, with a separate specification is involved, there is no appreciable difference that should compel this Court to strike the repeat OVI

specification as being unconstitutional on its face for violating the equal protection clause. Further, the fact that *Wilson* dealt with two statutes, the aggravated burglary statute and the burglary statute, calls into question its viability in light of *Batchelder*. In *State v. Pickering*, 462 A.2d 1151 (Me. 1983), the Supreme Judicial Court of Maine dealt with prohibited conduct that was contained in identical statutes that was coextensive and identical.<sup>1</sup> Although it recognized some of the same arguments that Appellee suggests, the Maine Supreme Court was not prepared to state as a matter of constitutional doctrine, that such a grant of discretion was improper. *Pickering*, at 1162.

#### **IV. Appellee Has Not Articulated a Compelling Argument as to Whether Ohio's Equal Protection Clause Can Provide Greater Protection**

Appellee finally suggests for the first time, other than in his brief opposing jurisdiction, that Ohio's Equal Protection Clause can provide greater protection. Appellee urges this Court to follow the suggestion in *LaFave* that this Court can bypass *Batchelder* under Ohio's Constitution. This Court should not accept this invitation. In the opinion below, the Eighth District Court of Appeals found that the United States and Ohio Equal Protection Clause were essentially the same. *Klembus*, ¶9-10, 13. See also *American Association of University Professors v. Central State University*, 87 Ohio St. 3d 55 (1999). The Eighth District purported to apply the Equal Protection Clause of the Fourteenth Amendment to find the OVI specification unconstitutional. Appellee does not offer any compelling argument as far as how or why the Ohio Constitution provides greater protection than the United States Constitution on the issue of equal protection.

#### **V. The Statute Has Not Been Proven To Be Unconstitutional On Its Face**

The State would still prevail in the absence of the United States Supreme Court's decision in *United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198 (1979).

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<sup>1</sup> *Pickering* dealt with conduct, specifically drunk driving, that was punishable under a criminal provision and a civil provision.

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).

The Eighth District’s holding that the repeat OVI specification is unconstitutional on its face is predicated on the argument that the OVI specification requires the same elements as the base charge.

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. 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. *See* R.C. 4511.19(G)(1)(e). 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 in which proof of the OVI offense differs from the proof of 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.

## 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**

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