

persistent offender, the trial court also ruled that Severe would be sentenced by the court rather than through jury sentencing.

The jury found Severe guilty as charged. On December 6, 2007, the trial court sentenced her to three years in the Missouri Department of Corrections. This appeal followed.

I. Analysis

Section 577.023.1(4)(a) states that a “persistent offender” is a person “who has pleaded guilty to or has been found guilty of two or more intoxication-related traffic offenses.” One of the two prior convictions used by the State to prove that Severe was a “persistent offender” was a 1999 driving while intoxicated offense to which she pled guilty in the Albany Municipal Division of the Circuit Court of Gentry County, and for which she received a suspended imposition of sentence (“SIS”).

The Missouri Supreme Court has only recently held that “prior municipal offenses resulting in an SIS cannot be used to enhance punishment under section 577.023.” *Turner v. State*, 245 S.W.3d 826, 829 (Mo. banc 2008). *Turner* overruled prior caselaw which had held that municipal offenses resulting in suspended imposition of sentence *did* constitute “intoxication-related traffic offenses” under § 577.023. *See State v. Meggs*, 950 S.W.2d 609, 612 (Mo. App. S.D. 1997).

In light of *Turner*, and given the disposition of Severe’s 1999 municipal offense, the State concedes on appeal that her sentence “is no longer properly supported by two valid convictions,” and that Severe is therefore entitled to a new sentencing hearing.²

As in *State v. Emery*, 95 S.W.3d 98 (Mo. banc 2003), while Severe and the State agree that her existing sentence cannot stand, “[t]he parties disagree, however, as to how this Court

² The State concedes Severe’s entitlement to resentencing even though she did not preserve any objection below and therefore seeks review of her sentence only for plain error.

should remedy the error.” *Id.* at 99. Like in *Emery*, “[t]he state requests remand for resentencing and an opportunity to prove [Severe’s] prior and persistent offender status” through the presentation of additional evidence. *Id.* On the other hand, Severe requests that this Court reverse her conviction and remand to the trial court with instructions to sentence her within the range of a class A misdemeanor.

Section 577.023.8 specifies that, “[i]n a jury trial, the facts [establishing persistent offender status] shall be pleaded, established and found *prior* to submission to the jury outside of its hearing.” (Emphasis added.) Interpreting the identical language of § 558.021.2,³ *Emery* held that the State must adhere to the specific procedure mandated by the statute, and that an appellate court could not order a further evidentiary hearing on remand which would violate the statute’s timing requirements:

The state is required to plead facts in the information or indictment that the defendant is a prior or persistent offender and must offer evidence to prove such status *prior to the case’s submission to the jury*. . . . [¶] Where the state fails to present evidence before the case is submitted to the jury, which is the timing the statute explicitly requires, there is no basis on which to sentence *Emery* as a prior and persistent offender. [¶] *To remand and allow the state now to present evidence of Emery’s alleged prior and persistent offender status would violate the timing requirement of [the statute].*

Emery, 95 S.W.3d at 100-01 (emphasis added; citations omitted).

In *Emery*, the State conceded that the trial court had erred in sentencing the defendant as a prior and persistent offender because at trial the State failed to present evidence to prove the alleged prior offenses. 95 S.W.3d at 101. Because a remand which allowed the State to present additional evidence of the defendant’s prior convictions “would require the sentencing court to

³ At the time *Emery* was decided, the statute at issue in the present case was numbered § 577.023.6, RSMo 2000. Like *Emery*, *State v. Rose*, 169 S.W.3d 132 (Mo. App. E.D. 2005), recognizes that “[s]ection 577.023 follows the same procedures as Section 558.021 to establish persistent DWI offender status.” *Id.* at 136-37.

commit error by violating” the timing requirement of the statute, *id.* at 101-02, the Supreme Court in *Emery* remanded “for resentencing without regard to prior or persistent offender status.” *Id.* at 100.⁴

We conclude that the Supreme Court’s holding in *Emery* is controlling here.

As discussed above, the State failed to prove that Severe was a “persistent offender” because it concededly failed to present evidence, prior to the submission of the case to the jury, of two prior convictions which constitute “intoxication-related traffic offenses” under the Supreme Court’s interpretation of § 577.023 in *Turner*. Under *Emery*, the State is precluded from submitting additional evidence in any future sentencing hearing to attempt to prove that Severe is, in fact, a “persistent offender.” “To remand and allow the state now to present evidence of [Severe’s] alleged . . . persistent offender status would violate the timing requirement of” the statute. *Emery*, 95 S.W.3d at 101. To repeat, “[i]n a jury trial, the facts [establishing persistent offender status] *shall* be pleaded, established and found *prior* to submission to the jury outside of its hearing.” § 577.023.8 (emphasis added). The statute makes no allowance for the State to prove persistent offender status after the case has been submitted to the jury.

The State cites *State v. Cobb*, 875 S.W.2d 533 (Mo. banc 1994), to support its claim that it should be allowed the opportunity to present additional evidence of Severe’s criminal history on remand, despite the Supreme Court’s later decision in *Emery*. The State argues that *Cobb*

⁴ See also *State v. Darden*, 263 S.W.3d 760, 766-67 (Mo. App. W.D. 2008) (noting that *Emery* prohibits presentation of new evidence on remand where a prior and persistent offender determination is vacated on appeal); *State v. Rose*, 169 S.W.3d 132, 136 (Mo. App. E.D. 2005) (“the trial court is not at liberty to reopen the proceedings and allow the State to present additional evidence as to a defendant’s prior and persistent status”); *State v. Gibson*, 122 S.W.3d 121, 131 (Mo. App. W.D. 2003) (citing *Emery*; “in remanding for re-sentencing, the trial court, in a jury-tried case, is not at liberty to reopen the § 577.023 hearing inasmuch as [what is now § 577.023.8] mandates that the facts of a defendant’s prior or persistent offender status must be pleaded, established and found *prior* to submission to the jury”).

stands for the proposition that “there is no prohibition in allowing the State to attempt to prove the existence of another prior offense for DWI enhancement purposes where the need for remand was caused by a new judicial interpretation of the enhancement statute.” We disagree.

In *Cobb*, “[w]hile [the defendant’s] case was pending before the Court of Appeals, Eastern District, [the Supreme Court] determined in *State v. Stewart*, 832 S.W.2d 911 (Mo. banc 1992), that Missouri’s persistent DWI offender statute, § 577.023, can only be invoked by proof of *three* prior convictions committed within a ten-year period.” 875 S.W.2d at 534. *Cobb* is thus similar to the situation in this case: a new judicial decision altered the legal landscape after trial, and rendered the State’s showing of “persistent offender” status deficient, even though it would have passed muster under the statutory interpretation prevailing at the time of trial. *Cobb* ordered the case remanded to the circuit court for resentencing, “with instructions to permit the State to present whatever evidence it has to establish defendant’s status as a persistent offender.” *Id.* at 537.

Despite the obvious factual similarities, however, we believe *Cobb* is simply not relevant here. *Cobb* held only that “*double jeopardy* is no obstacle in this noncapital proceeding to permitting the state to present whatever evidence it may have at a resentencing to establish the defendant is, as he was charged and sentenced the first time, a persistent offender.” *Id.* at 537 (emphasis added). As pointed out in *Emery*, “[n]o issue was raised as to the timing required by the statute” in *Cobb*. *Emery*, 95 S.W.3d at 102. Indeed, neither the majority nor dissenting opinions in *Cobb* so much as mention the statutory requirement that “persistent offender” status “shall be pleaded, established, and found *prior to submission to the jury*.”⁵

⁵ Two of the additional cases *Emery* cited (see 95 S.W.3d at 102 n.5), *State v. Greer*, 879 S.W.2d 683, 684 (Mo. App. W.D. 1994), and *State v. Herrett*, 965 S.W.2d 363, 364-65 (Mo. App. E.D. 1998), follow *Cobb*, and like *Cobb* make no mention of the persistent offender statute’s timing requirements. The third case *Emery* cites at 95 S.W.3d at 102 n.5, *State v. Wynn*, 666 S.W.2d 862, 862

In this case, Severe makes no argument that her rights under the Double Jeopardy Clause would be violated by allowing the State to present additional evidence regarding her prior convictions. Rather, the issue we decide involves statutory interpretation, not constitutional principles. With respect to the interpretation of § 577.023.8, we conclude that the Supreme Court’s more recent decision in *Emery* controls, and that “a remand [for consideration of new evidence] would require the sentencing court to commit error by violating” § 577.023.8’s explicit, unambiguous direction as to when evidence of prior convictions must be submitted and considered during a jury trial. 95 S.W.3d at 102. *See also State v. Rose*, 169 S.W.3d 132, 136 (Mo. App. E.D. 2005) (although “[a] remand to the trial court to determine whether Defendant is a prior and persistent offender and to resentence him does not violate double jeopardy,” *Emery* prohibits this practice as a matter of statutory construction); *State v. Gibson*, 122 S.W.3d 121, 131 (Mo. App. W.D. 2003) (drawing same distinction).

As the State points out, *Emery* also noted that, unlike the case before it, “there was no prosecutorial laxity” in *Cobb*, because a subsequent change of law was the sole cause of the State’s failure to properly establish that defendant was a persistent offender at his original trial. *Emery*, 95 S.W.3d at 101. The same is true here: but for the Supreme Court’s recent clarification of the law in *Turner*, the State’s showing of Severe’s prior convictions at trial would have been sufficient to prove that she was in fact a persistent offender. Nevertheless, we do not believe we are free to limit *Emery* to cases of “prosecutorial laxity.” To do so, we would have to rely on *Emery*’s distinction of the *Cobb* case, when *Cobb* itself does not so much as cite to § 577.023.8’s timing requirements. This seems a slender reed on which to base a rule of law.

(Mo. App. E.D. 1984), involves appellate review after a trial court had already permitted the State to present belated evidence of prior convictions; in that situation, *Wynn* held that a “harmless error” analysis properly applied. *See State v. Cullen*, 39 S.W.3d 899, 906 (Mo. App. E.D. 2001) (distinguishing *Wynn* on this basis).

Further, *Emery* adopted a strict, literal reading of § 577.023.8's timing requirements. It characterized the question before it as "whether this Court should order the trial court to commit a second error in order to correct its previous error," and answered "no" based on "the old adage that two wrongs do not make a right." 95 S.W.3d at 101. *Emery* also expressly rejected the State's argument that new evidence should be permitted on remand where the defendant would not be prejudiced thereby. If the harmlessness of receiving evidence belatedly is insufficient to excuse a technical violation of § 577.023.8, we fail to see how the lack of "prosecutorial laxity" or misconduct can justify our departure from the statute's explicit requirements.

Emery discussed at length and followed *State v. Cullen*, 39 S.W.3d 899 (Mo. App. E.D. 2001). See *Emery*, 95 S.W.3d at 101-02. *Cullen* affirmed a trial court's refusal to permit the State to present evidence of prior convictions after trial, where the State had failed to present adequate documentation of one of the defendant's prior convictions before submission of the case to the jury. *Cullen* is, if anything, more emphatic than *Emery* that a court cannot knowingly permit the State to present evidence in direct violation of the statute's timing requirement, invoking the ethical principles under which the judiciary must operate.

Canon 3 of Missouri's Code of Judicial Conduct states, in pertinent part: "A judge shall be faithful to the law . . ." Thus, in the case at bar, *it was not only the right but the duty of the trial judge to refuse to intentionally commit error, even "harmless" error*, that involved a direct violation of the statute, and specifically to refuse to countenance what Missouri appellate courts have criticized as "prosecutorial laxity" in failing to comply with the timeliness requirements regarding proof of alleged persistent offender status. . . . [¶] *This Court will not order the trial court to intentionally commit error . . .*

Cullen, 39 S.W.3d at 906-07 (emphasis added; citations omitted). While the quoted passage refers to "prosecutorial laxity," we believe its essential point is that a court cannot, on a going-forward basis, permit proceedings to take place which the court knows to be in violation of

statutory requirements. That principle applies equally here, whatever the cause of the State's failure to comply with those statutory requirements in the first instance.

We recognize that the State's argument seeks what may well be a sensible outcome: that the State should be permitted to present new evidence of prior convictions where it relied at trial on the law then existing, and made what would have been an adequate showing under the then-prevailing law. But the same could be said of the situation in *Emery*: that it would be entirely sensible to permit the State to present new evidence of prior convictions on a remand, where it could be shown that the defendant would not be prejudiced by the belated proffer. Despite these pragmatic considerations, however, the Supreme Court in *Emery* held that the persistent-offender statute categorically forbade a court from taking action, prospectively, which the court knew to be in violation of the statute's explicit timing requirements, even if the departure from the statute's mandates would be harmless. We are bound by that decision, unless and until clarified by the Supreme Court.

Our decision to apply *Emery* in a straightforward fashion, and bar the State from presenting new evidence of prior convictions on remand, is bolstered by an additional consideration: as a general proposition, once it is determined that the Supreme Court's post-trial decision in *Turner* applies here, that decision should be applied *as if it had always been the law*. Where a Supreme Court decision announcing a new rule of law is silent concerning its application to other cases (like *Turner*), it will generally be applied retroactively to all cases pending in the trial courts or on direct appeal, if the decision is properly characterized as substantive rather than procedural. *See, e.g., State v. Ferguson*, 887 S.W.2d 585, 587 (Mo. banc 1994); *State v. Stewart*, 83 S.W.2d 911, 914 (Mo. banc 1992); *State v. Reeder*, 18 S.W.3d 569,

575-76 (Mo. App. E.D. 2005). (In contrast, new decisions denominated “procedural” are generally applied prospectively only.)

The Supreme Court explained this rule in *Shepherd v. Consumers Cooperative Association*, 384 S.W.2d 635 (Mo. banc 1964):

“where, as in this case, former decisions are found to have approved an incorrect rule of general or substantive law, we have, in overruling such former cases, applied the correct rule in the case in which it is announced, and in doing so made it retroactive in effect, and have thereafter applied the correct rule in all cases coming before us, though in doing so it operates retroactively. * * * *In matters of general law, former cases are overruled because the ruling therein never was the law and the case in hand is decided the same as if such overruled case had never been written.* Such has been our constant practice, as the published reports show * * *.”

Id. at 640 (emphasis added; quoting *Koebel v. Tieman Coal & Material Co.*, 85 S.W.2d 519, 524 (Mo. 1935)).

As noted, the State concedes that *Turner* should apply here. Given this concession, we are to apply *Turner* as if any earlier, contrary decisions “had never been written.” Seen in this light, and in light of the State’s further concession that its showing of Severe’s prior convictions failed to satisfy the standards of § 577.023 (as interpreted in *Turner*), this is a case in which the State simply failed to prove at the appropriate time that Severe had two prior convictions for intoxication-related traffic offenses. From this perspective, the applicability of *Emery* is clear.⁶

The dissenting opinion credibly argues that practical considerations justify a conclusion opposite to the one we reach. As discussed above, however, *Emery* and *Cullen* read the timing

⁶ The Supreme Court “has the authority to determine whether a decision changing a rule of law is to be applied retrospectively or prospectively.” *State v. Walker*, 616 S.W.2d 48, 48 (Mo. banc 1981). Concerns over the State’s reliance on prior decisions, and/or the unfairness of applying *Turner* to cases tried before *Turner* was issued, were more appropriately addressed to the Supreme Court in *Turner* itself, to argue against the retroactive application of that decision. The Supreme Court has considered such factors in deciding whether a new decision should be applied retroactively or prospectively only. *See, e.g., T.C.H. v. K.M.H.*, 693 S.W.2d 802, 805 (Mo. banc 1985) (observing that “there is no public policy or precedent and no prior reliance on the application of § 491.020 that outweighs” the interests served by retroactive application of new statutory interpretation).

requirements of the persistent-offender statute as mandatory, admitting of no exceptions. In particular, both *Emery* and *Cullen* expressly reject a “harmless error” analysis, and for that reason we cannot follow the dissent’s suggested approach, which is rooted in its view that a remand for further evidence would cause “no prejudice to the defendant.” In addition, we do not believe *Emery* can plausibly be limited to cases in which the State makes no offer of proof. For example, in the *Cullen* case *Emery* followed, the State *attempted* to prove two prior convictions, but failed to present adequate documentation as to one of the two offenses before the jury’s verdict was returned. Later cases have similarly involved attempts to establish prior convictions which were merely deficient – not wholly lacking. *See State v. Rose*, 169 S.W.3d 132, 136-37 (Mo. App. E.D. 2005) (applying *Emery* where before jury submission the State failed to establish *the date* of defendant’s prior convictions, at a time when § 577.023’s definition of a “persistent offender” included a date restriction); *State v. Gibson*, 122 S.W.3d 121, 131 (Mo. App. W.D. 2003) (applying *Emery* where one of two prior convictions on which State presented evidence at trial did not qualify as an intoxication-related traffic offense).

The dissent also notes that, if interpreted as we do today, *Emery* would have the effect of overruling multiple prior cases. This Court has already recognized, however, that at least one of its prior decisions was overruled – *sub silentio* – by *Emery*. *See State v. Darden*, 263 S.W.3d 760, 767 (Mo. App. W.D. 2008) (noting that “*Emery* effectively overruled [*State v.*] *Vaught*[, 34 S.W.3d 293 (Mo. App. W.D. 2000),] as to presenting new evidence on remand”). Further, neither of the pre-*Emery* cases the dissent cites (*Vickers v. State*, 956 S.W.2d 405, 407 (Mo. App. S.D. 1997), and *State v. Russ*, 945 S.W.2d 633, 636 (Mo. App. E.D. 1997)) discuss § 577.023.8’s timing requirements, making those decisions of limited relevance in light of *Emery*’s later reading of the statutory mandate.

While this case was under submission, the Eastern District decided *Bizzell v. State*, No. ED90303, 2008 WL 4540395 (Mo. App. E.D. Oct. 8, 2008), which involved a situation functionally identical to the one with which we are presented: an individual who was found to be a persistent DWI offender based, in part, on a municipal offense for which the individual received a suspended imposition of sentence. Like in this case, *Turner* was decided after the trial in *Bizzell*. The Eastern District concluded that the finding that the defendant was a persistent offender had to be vacated in light of *Turner*. The court then stated that “Defendant’s sentence as a persistent driving while intoxicated offender is reversed and remanded to the trial court *with instructions to allow the State to present other evidence to establish Defendant’s persistent offender status.*” *Id.* at *1 (emphasis added). The body of the court’s opinion cites no authority for the remand instructions it specified. The opinion’s Conclusion, however, states: “The cause is remanded to the trial court for resentencing with instructions to allow the State to present new evidence of Defendant’s status as a persistent offender. *See State v. Cobb*, 875 S.W.2d 533 (Mo. banc 1994).” *Id.* at *2.

It is not clear whether, in *Bizzell*, the defendant even contested the proposition that the State should be allowed to present new evidence of prior convictions on remand. And as explained above, we do not believe *Cobb* answers the question. The Eastern District’s decision does not cite *Emery* or § 577.023.8’s timing requirements. For these reasons we respectfully refuse to follow *Bizzell* on this point.⁷

⁷ With two specifically identified qualifications that are irrelevant here, Judge Robert H. Dierker has stated emphatically that, in *Emery*, “[t]he Supreme Court of Missouri has settled the issue of when a defendant’s status as a prior or persistent offender must be proved: *the statute means what it says, and the defendant’s status must be proved before the jury retires.*” 32 MISSOURI PRACTICE SERIES: MISSOURI CRIMINAL LAW § 56:11, at 537 (2d ed. 2004) (emphasis added). Yet in another volume of the same series, Judge Dierker draws a contrary conclusion: citing *Cobb*, he states that despite the general rule, “in some cases, the State’s failure to offer evidence of prior convictions on a timely basis can be cured at a later point.” 28 MISSOURI PRACTICE SERIES: MISSOURI CRIMINAL LAW HANDBOOK § 33:11,

Accordingly, this matter will “remanded for resentencing, but will not be remanded for further error” through the introduction of new evidence concerning Severe’s alleged status as a “persistent offender.” *Emery*, 95 S.W.3d at 102. On appeal, Severe implicitly concedes that the State adduced sufficient evidence at trial to prove that she is a “prior offender” because she had previously pled guilty to *one* “intoxication-related traffic offense,” which occurred within the five years prior to her current offense. *See* § 577.023.1(5). At her trial the State presented evidence that Severe had pled guilty to driving while intoxicated in the Associate Division of the Circuit Court of Gentry County, Missouri, stemming from a January 27, 2002 arrest. The trial court necessarily found that this conviction was adequately proven when it found Severe to be a persistent offender. *See State v. Gibson*, 122 S.W.3d 121, 131 (Mo. App. W.D. 2003). Therefore, on remand, the trial court is to enter a conviction for the class A misdemeanor of driving while intoxicated, and Severe should be sentenced accordingly. *See* § 577.023.2.⁸

II. Conclusion

The judgment is reversed, and the case remanded for entry of a conviction of the class A misdemeanor of driving while intoxicated, and resentencing accordingly.

Alok Ahuja, Judge

Chief Judge Newton concurs; Judge Holliger dissents in separate opinion attached.

at 446 (2008 ed.). In this context our disagreement with our dissenting colleague, and with our colleagues in the Eastern District, is perhaps forgivable.

⁸ Because there was sufficient evidence to prove that Severe was a “prior offender” (even if not a “persistent offender”), she was not entitled to jury sentencing. § 577.023.15.



**In the
Missouri Court of Appeals
Western District**

STATE OF MISSOURI,

Respondent,

v.

VANESSA J. SEVERE,

Appellant.

WD69162

Filed: November 25, 2008

DISSENT

I respectfully dissent from that part of the remand in this case that refuses to permit the state prior to resentencing to supplement its proof that defendant is a prior and persistent DWI offender.

I also respectfully acknowledge that, as the majority states, both this district and the eastern district have, on the basis of *State v. Emery*, 95 S.W.3d 98 (Mo. banc 2003), held that a remand for resentencing does not permit the state to correct any deficiency in the proof it earlier presented of prior or persistent status. *See State v. Gibson*, 122 S.W.3d 121, 131 (Mo. App. W.D. 2003); *State v. Darden*, 263 S.W.3d 760, 767-69 (Mo. App. W.D. 2008); *State v. Rose*, 169 S.W.3d 132, 136-37 (Mo. App. E.D. 2005).⁹

⁹Although the majority would disagree with the decision in *State v. Bizzell*, _S.W.3d _ (Mo. App. E.D.), 2008 WL 4540395 (No. ED 90303, decided Oct. 7, 2008), I believe that is unnecessary since *Rose* and *Bizzell* are internally inconsistent decisions within the same district and the majority can simply choose which one to follow.

Respectfully, I believe that all of these decisions read *Emery* too broadly with the result that criminal defendants, as with a multiple DWI offender here, who have committed past criminal acts will, because of possibly correctible technical errors, be treated with a leniency not intended by the legislature. If this lesser punishment was required by statutory language, constitutional principle, or the *Emery* decision, I would join in the majority. But I believe that none of these reasons require a departure from long standing holdings in this context.

And the availability of remand to correct error in proof of enhanced sentencing status does have a long history. In *State v. Russ*, the defendant complained on appeal that he had been improperly sentenced as a prior and persistent offender because the evidence adduced by the state did not clearly show that the two crimes occurred on different dates or that he was represented by counsel on one of the cases. 945 S.W.2d 633, 634 (Mo. App. E.D. 1997). Agreeing that the evidence was insufficient, the court nevertheless remanded for resentencing and an evidentiary hearing to allow the state an opportunity to correct the error. *Id.* at 636. In *Vickers v. State*, the state conceded that defendant had been improperly sentenced as a prior and persistent offender because the information alleged that one of his prior convictions was for forgery when, in fact, it was for stealing. 956 S.W.2d 405, 406 (Mo. App. S.D. 1997). Again the court remanded for an evidentiary hearing and even permitted the state to file an amended information concerning the incorrectly described conviction, noting that the principle that this was the proper relief is “well established.” *Id.* at 407. Dozens of other similar cases with similar results are collected in West’s Missouri Digest, Criminal Law 1181.5(9).

I do not believe the Supreme Court in *Emery* intended to reverse *sub silentio* such a well entrenched and well established principle. Rather, I believe the result proposed by the majority here and found in *Rose*, *Darden* and *Gibson* is not only not required by *Emery*, but is in conflict

with the opinion of the Supreme Court in *State v. Cobb*, 875 S.W.2d 533 (Mo. banc 1994). The *Emery* court discussed *Cobb* (which granted a remand for additional evidence) and did not overrule it. 95 S.W.3d at 101-02. The facts in *Emery* were drastically different because the prosecutor did not even attempt to present proof of prior convictions until after the jury had received the case. *Id.* The Court simply followed the statute requiring proof before submission and refused to overlook prosecutorial laxity. *Id.*

I do not believe *Emery* is based on any broader principle, nor have any of the other cases the majority relies upon articulated any legal or logical basis for extending *Emery*. There is no prejudice to the defendant. If the state cannot correct the error or deficiency upon remand, she gets the lesser sentence she seeks. If the state can correct the error, she gets the sentence the legislature and law intends. There is no constitutional principle involved. The convictions which permit enhanced sentencing status are not elements of the crime charged and have no effect on guilt or innocence. Remand, therefore, does not involve considerations of double jeopardy. *Cobb*, 875 S.W.2d at 536-37; *Price v. Georgia*, 398 U.S. 323, 329 (1970).

I would remand for the opportunity for the state to prove another qualifying conviction to justify the felony DWI. If it has no such evidence the court must sentence her as a misdemeanor offender.

Ronald R. Holliger, Judge