

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 17-0783

---

RICHARD EUGENE NOLL,  
Plaintiff-Appellant,

vs.

IOWA DISTRICT COURT FOR  
MUSCATINE COUNTY,  
Defendant-Appellee.

---

APPEAL FROM THE IOWA DISTRICT COURT  
FOR MUSCATINE COUNTY  
THE HONORABLE GARY P. STRAUSSER, JUDGE

---

**APPELLEE'S BRIEF**

---

THOMAS J. MILLER  
Attorney General of Iowa

**DARREL MULLINS**  
Assistant Attorney General  
Hoover State Office Building, 2nd Floor  
Des Moines, Iowa 50319  
(515) 281-5976  
(515) 281-4902 (fax)  
[darrel.mullins@ag.iowa.gov](mailto:darrel.mullins@ag.iowa.gov)

ALAN OSTERGREN  
Muscatine County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

FINAL

## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	3
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....	6
ROUTING STATEMENT.....	8
STATEMENT OF THE CASE.....	8
ARGUMENT.....	9
<b>I. <i>Bown v. State</i>, 475 N.W.2d 3 (Iowa 1991) Held That     The Code Permitted Habitual Offender Sentencing For     Those Convicted Of Third-Offense Operating While     Intoxicated Who Have Qualifying Prior Offenses.     Amendments To The Code Were Not Intended To     Abrogate <i>Bown</i> But Rather To Comply With Federal     Law Regarding Highway Funds.....</b>	<b>9</b>
CONCLUSION.....	22
REQUEST FOR NONORAL SUBMISSION.....	22
CERTIFICATE OF COMPLIANCE .....	23

## TABLE OF AUTHORITIES

### Authorities

#### State Cases

<i>Ackelson v. Manley Toy Direct, L.L.C.</i> , 832 N.W.2d 678 (Iowa 2013) .....	18
<i>Beldon v. State</i> , 926 N.E.2d 480 (Ind. 2010).....	18
<i>Bown v. State</i> , 475 N.W.2d 3 (Iowa 1991) .....	9, 10, 12, 13
<i>Brakke v. Iowa Dept. Nat. Resources</i> , 897 N.W.2d 522 (Iowa 2017).....	20
<i>Case v. Olson</i> , 234 Iowa 869, 14 N.W.2d 717 (1944) .....	20
<i>Commonwealth v. Grimes</i> , 698 S.W.2d 836 (Ky. 1985) .....	19
<i>Freeman v. State</i> , 658 N.E.2d 68 (Ind. 1995) .....	18
<i>Lawson v. State</i> , 746 S.W.2d 544 (Ark. 1988) .....	13, 18
<i>People v. Bewersdorf</i> , 475 N.W.2d 231 (Mich. 1991) .....	19
<i>State v. Alexander</i> , 2006 WL 3798920 (Iowa Ct. App. Dec. 28, 2006).....	17
<i>State v. Anaya</i> , 933 P.2d 223 (N.M. 1996).....	18
<i>State v. Brooks</i> , 629 A.2d 1347 (N.H. 1993).....	19
<i>State v. Campa</i> , 814 P.2d 748 (Ariz. 1991) .....	18
<i>State v. Chapman</i> , 287 N.W.2d 697 (Neb. 1980).....	13
<i>State v. Delaney</i> , 658 N.W.2d 416 (Wis. 2003) .....	19
<i>State v. Dudley</i> , S.Ct. No. 10-1764, 2013 WL 105331 (Iowa Ct. App. Jan. 9, 2013) .....	17
<i>State v. Ewanchen</i> , 799 S.W.2d 607 (Mo. Ct. App. 1990).....	19

<i>State v. Hill</i> , S.Ct. No. 03-2017, 2004 WL 1252744 (Iowa Ct. App. June 9, 2004) .....	17
<i>State v. Iowa Dist. Ct. for Mahaska Cty.</i> , 620 N.W.2d 271 (Iowa 2000).....	16, 17, 18
<i>State v. Maxwell</i> , 743 N.W.2d 185 (Iowa 2008) .....	21
<i>State v. Osterkamp</i> , S.Ct. No. 12-1898, 2014 WL 1494899 (Iowa Ct. App. Apr. 16, 2014) .....	17
<i>State v. O'Malley</i> , 593 N.W.2d 517 (Iowa Ct. App. 1999).....	17
<i>State v. Riley</i> , S.Ct. No. 99-1668, 2000 WL 1160744 (Iowa Ct. App. Aug. 16, 2000) .....	17
<i>State v. Roberts</i> , S.Ct. No. 02-2067, 2004 WL 239837 (Iowa Ct. App. Feb. 11, 2004) .....	17
<i>State v. Santamaria</i> , S.Ct. No. 11-1880, 2012 WL 3196799 (Iowa Ct. App. Aug. 8, 2012).....	17
<i>State v. Schultz</i> , 604 N.W.2d 60 (Iowa 1999) .....	11
<i>State v. Viers</i> , S.Ct. No. 15-1586, 2016 WL 6636705 (Iowa Ct. App. Nov. 2016) .....	17

**State Statutes**

Iowa Code § 321J.2 .....	13, 14, 16, 20
Iowa Code § 321J.2(c).....	15
Iowa Code § 321J.2(1)(a) (2009).....	9
Iowa Code § 321J.2(2) (1987) .....	13
Iowa Code § 321J.2(2)(c) (1987).....	13, 14, 16, 20
Iowa Code § 321J.2(5) .....	10, 11, 20

Iowa Code § 321J.2(5)(a).....	9, 15
Iowa Code § 321J.2(5)(a), (b), (c), (d) .....	12
Iowa Code § 321J.5 .....	12
Iowa Code § 902.3 .....	14
Iowa Code § 902.8 .....	12, 13, 15, 20
Iowa Code § 902.9 .....	10, 11, 14, 15
Iowa Code § 902.9(1).....	11
Iowa Code § 902.9(1)(c) .....	12
Iowa Code § 902.9(1)(e) .....	9, 20
Iowa Code § 902.9(5).....	16

**State Rule**

Iowa R. App. P. 6.903(3) .....	9
--------------------------------	---

**Other Authorities**

Leg. Fiscal Note, HF 2230-OWI Third Offenses (LSB 5332 HV) .....	16
79 G.A. ch. 1042 (2002).....	14, 15, 16, 20
83 G.A. ch. 1124 (2010).....	14, 15

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. ***Bown v. State*, 475 N.W.2d 3 (Iowa 1991) Held That The Code Permitted Habitual Offender Sentencing For Those Convicted Of Third-Offense Operating While Intoxicated Who Have Qualifying Prior Offenses. Did The Legislature Intend To Abrogate *Bown* When It Amended Portions Of The Code To Comply With Federal Law Regarding Highway Funds?**

### Authorities

*Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678 (Iowa 2013)  
*Beldon v. State*, 926 N.E.2d 480 (Ind. 2010)  
*Bown v. State*, 475 N.W.2d 3 (Iowa 1991)  
*Brakke v. Iowa Dept. Nat. Resources*, 897 N.W.2d 522 (Iowa 2017)  
*Case v. Olson*, 234 Iowa 869, 14 N.W.2d 717 (1944)  
*Commonwealth v. Grimes*, 698 S.W.2d 836 (Ky. 1985)  
*Freeman v. State*, 658 N.E.2d 68 (Ind. 1995)  
*Lawson v. State*, 746 S.W.2d 544 (Ark. 1988)  
*People v. Bewersdorf*, 475 N.W.2d 231 (Mich. 1991)  
*State v. Alexander*, 2006 WL 3798920 (Iowa Ct. App. Dec. 28, 2006)  
*State v. Anaya*, 933 P.2d 223 (N.M. 1996)  
*State v. Brooks*, 629 A.2d 1347 (N.H. 1993)  
*State v. Campa*, 814 P.2d 748 (Ariz. 1991)  
*State v. Chapman*, 287 N.W.2d 697 (Neb. 1980)  
*State v. Delaney*, 658 N.W.2d 416 (Wis. 2003)  
*State v. Dudley*, S.Ct. No. 10-1764, 2013 WL 105331 (Iowa Ct. App. Jan. 9, 2013)  
*State v. Ewanchen*, 799 S.W.2d 607 (Mo. Ct. App. 1990)  
*State v. Hill*, S.Ct. No. 03-2017, 2004 WL 1252744 (Iowa Ct. App. June 9, 2004)  
*State v. Iowa Dist. Ct. for Mahaska Cty.*, 620 N.W.2d 271 (Iowa 2000)  
*State v. Maxwell*, 743 N.W.2d 185 (Iowa 2008)

*State v. Osterkamp*, S.Ct. No. 12-1898, 2014 WL 1494899  
(Iowa Ct. App. Apr. 16, 2014)  
*State v. O'Malley*, 593 N.W.2d 517 (Iowa Ct. App. 1999)  
*State v. Riley*, S.Ct. No. 99-1668, 2000 WL 1160744  
(Iowa Ct. App. Aug. 16, 2000)  
*State v. Roberts*, S.Ct. No. 02-2067, 2004 WL 239837  
(Iowa Ct. App. Feb. 11, 2004)  
*State v. Santamaria*, S.Ct. No. 11-1880, 2012 WL 3196799  
(Iowa Ct. App. Aug. 8, 2012)  
*State v. Schultz*, 604 N.W.2d 60 (Iowa 1999)  
*State v. Viers*, S.C, t. No. 15-1586, 2016 WL 6636705  
(Iowa Ct. App. Nov. 2016)  
Iowa Code § 321J.2  
Iowa Code § 321J.2(c)  
Iowa Code § 321J.2(1)(a) (2009)  
Iowa Code § 321J.2(2)(c) (1987)  
Iowa Code § 321J.2(5)  
Iowa Code § 321J.2(5)(a)  
Iowa Code § 321J.2(5)(a), (b), (c), (d)  
Iowa Code § 321J.5  
Iowa Code § 902.3  
Iowa Code § 902.8  
Iowa Code § 902.9  
Iowa Code § 902.9(1)  
Iowa Code § 902.9(1)(c)  
Iowa Code § 902.9(1)(e)  
Iowa Code § 902.9(5)  
Iowa R. App. P. 6.903(3)  
Leg. Fiscal Note, HF 2230-OWI Third Offenses  
(LSB 5332 HV)  
79 G.A. ch. 1042 (2002)  
83 G.A. ch. 1124 (2010)

## **ROUTING STATEMENT**

The Court should transfer this matter to the Court of Appeals.  
Iowa R. App. P. 6.1101(3).

## **STATEMENT OF THE CASE**

### **Nature of the Case**

Richard Noll pleaded guilty in Muscatine County District Court to Third Offense Operating While Intoxicated as an habitual offender. *See* Iowa Code §§ 321J.2(2)(c), 902.9(1)(c) (2009). He contends the habitual offender sentence is illegal.

The Honorable Gary P. Strausser presided.

### **Course of Proceedings**

The government accepts the Noll's statement of the procedural history of the case. Iowa R. App. P. 6.903(3).

### **Facts**

The facts of Noll's offense are not germane. However, Noll did admit that "he has two prior convictions for Operating While Intoxicated" and "two prior felony convictions for Operating While Intoxicated, Third Offense." Order Setting Sent.; App. 9.



## ARGUMENT

- I. ***Bown v. State*, 475 N.W.2d 3 (Iowa 1991) Held That The Code Permitted Habitual Offender Sentencing For Those Convicted Of Third-Offense Operating While Intoxicated Who Have Qualifying Prior Offenses. Amendments To The Code Were Not Intended To Abrogate *Bown* But Rather To Comply With Federal Law Regarding Highway Funds.**

### **Preservation of Error and Standard of Review**

The government does not challenge error preservation or the nature of review. Iowa R. App. P. 6.903(3).

### **Merits**

Richard Noll committed third-offense Operating While Intoxicated. Order Setting Sent.; App. 9; see Iowa Code § 321J.2(1)(a) (2009). Normally, this “D” felony would require, among other things, a five-year sentence. Iowa Code §§ 321J.2(5)(a), 902.9(1)(e). But, he had been convicted of that offense twice before, making him an habitual offender. Iowa Code § 902.8. He was therefore sentenced to an indeterminate fifteen-year prison term. Sent. Order; App. 12; see Iowa Code § 902.9(1)(c). This is consistent with *Bown v. State*, 475 N.W.2d 3, 7 (Iowa 1991).

Noll, however, contends that section 321J.2(5)(a) caps punishment for all third or subsequent instances of operating while

intoxicated to five years. Appellant's Pr. Br. pp. 15, 22, 28. He believes that legislation abrogated *Bown*.

To the contrary, the Legislature left in place the general designation of third-offense operating while intoxicated as a "D" felony. To the extent it amended the punishment for the offense, it did so only for a third offense and then to require a mandatory minimum term of incarceration irrespective of whether it occurs in jail or prison. The intent of this amendment was to preserve federal highway funding. *Bown* remains good law.

Noll proposes that Iowa Code section 902.9 limits punishment to "that prescribed by statute," if there is one, and Iowa Code section 321J.2(5) provides it.

The rules which govern statutory interpretation are well-established.

When the text of a statute is plain and its meaning clear, the court should not search for a meaning beyond the express terms of the statute . . . . However, where the language of a statute is ambiguous, so that reasonable minds would differ on the meaning, we turn to our rules of interpretation. The polestar of statutory interpretation is to give effect to the legislative intent of a statute. We "consider the objects sought to be accomplished and the evils and mischiefs sought to be remedied,

seeking a result that will advance, rather than defeat, the statute’s purpose.” Our goal is to look at what the legislature said, not what it might or should have said. In looking at the language used, we will not construe a statute in a way which creates an impractical or absurd result, nor will we speculate as to the probable legislative intent beyond what the language clearly states. Finally, we are mindful that criminal statutes are to be strictly construed with doubts resolved in favor of the accused.

*State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999) (citations omitted).

Noll’s argument turns on the meaning of the first sentence of Iowa Code section 902.9: “The maximum sentence for any person convicted of a felony shall *be that prescribed by statute* or, if not prescribed by statute, if other than a Class “A” felony shall be determined” according to the balance of the section. Iowa Code § 902.9(1) (emph. added). Noll asserts that Iowa Code section 321J.2(5) provides that punishment. It reads, in pertinent part,

A third offense is punishable by all of the following:

*a.* Commitment to the custody of the director of the department of corrections for an indeterminate term not to exceed five years, with a mandatory minimum term of thirty days.

(1) If the court does not suspend a person’s sentence of commitment to the custody of the director of the department of corrections

under this paragraph “a”, the person shall be assigned to a facility pursuant to section 905.513.

(2) If the court suspends a person’s sentence of commitment to the custody of the director of the department of corrections under this paragraph “a”, the court shall order the person to serve not less than thirty days nor more than one year in the county jail, and the person may be committed to treatment in the community under section 907.6.

Iowa Code § 321J.5. This section further provides for a minimum fine of \$3125 and maximum fine of \$9375 as well as for license revocation and substance abuse education. *Id.* § 321J.5(b), (c), (d).

Habitual offenders face additional penal consequences. An habitual offender is one who has twice before been convicted of a class “C” or “D” offense. *Id.* § 902.8. An habitual offender shall be confined for no more than 15 years and is not eligible for parole until three years has passed. *Id.* §§ 902.8, 902.9(1)(c).

Thus, the question is whether a person who has committed third-offense operating while intoxicated may also be punished as an habitual offender because he or she has two prior felony convictions. The Iowa Supreme Court held in *Bown v. State* that habitual offender sentencing did apply. 475 N.W.2d 3, 7 (Iowa 1991). Bown argued the

most he could be sentenced was five years as a “D” felon. At the time, the Code provided that,

A person who violates this section commits:

...

c. a class “D” felony for a third offense and each subsequent offense and shall be imprisoned in the county jail for a determinate sentence of not more than one year but not less than thirty days, or committed to the custody of the director of the department of corrections, and assess a fine of not less than seven hundred dollars.

Iowa Code § 321J.2(2)(c) (1987). The Court reasoned that there was no ambiguity: by classifying the offense as a “D” felony, “which falls under the definition of a habitual offender provided in section 902.8, the legislature clearly intended to increase the length of punishment for third OWI offenders who have had two prior felony convictions.” *Bown*, 475 N.W.2d at 6.

The court turned away arguments derived from two out-of-state decisions, *Lawson v. State*, 746 S.W.2d 544 (Ark. 1988) and *State v. Chapman*, 287 N.W.2d 697 (Neb. 1980). Collectively, those decisions stood upon a principle that specific punishments control over general ones. *Lawson*, 746 S.W.2d at 546; *Chapman*, 287 N.W.2d at 699. Section 321J.2(2) (1987), the *Bown* Court reasoned, did not give a

specific prison term. 475 N.W.2d at 6. The Court remarked on apparent Legislative concern for the dangers posed by repeat drunk drivers. *Id.* Finally, the Court found that out-of-state decisions rested on unique statutes but, in any case, the trend was toward allowing habitual offender sentencing. *Id.*

In 2002, the Legislature amended section 321J.2(2)(c) (2001), 902.3, and 902.9. *See* 79 G.A. ch. 1042 (2002). The amendment stated, in relevant part, that a person who violates section 321J.2 commits,

c. A class “D” felony for a third offense and each subsequent offense, and shall be committed to the custody of the director of the department of corrections for an indeterminate term not to exceed five years, shall be confined for a mandatory minimum term of thirty days, and shall be assessed a fine of not less than two thousand five hundred dollars nor more than seven thousand five hundred dollars.

*Id.*

In April 2010, the Legislature amended section 321J.2. 83 G.A. ch. 1124 (2010). Similar to earlier iterations, it provided that it is a “class ‘D’ felony for a third offense and each subsequent offense.” *Id.* § 1; *see* Iowa Code § 321J.2(2)(c).

A “third offense” was “punishable by...[c]ommitment to the custody of the director of the department of corrections for an indeterminate term not to exceed five years, with a mandatory minimum of thirty days.” 83 G.A. ch. 1124, sec. 1. Unlike the earlier iteration, it did not specify a punishment for a “third offense and each subsequent offense.” *Compare* 83 G.A. ch. 1124, sec. 1 [321J.2(5)] *with* 79 G.A. ch. 1042, sec. 1 [321J.2(2)(c) (emphasis added)].

Accordingly, under the holding and reasoning of *Bown*, a person may be subject to habitual offender sentencing if they commit a third or subsequent offense and have two prior felonies. This is true because section 321J.2(c) continues to assign a third or subsequent offense as a “D” felony, without specifying punishment. Then, section 321J.2(5)(a) provides that a “third offense” is punishable by commitment to department of correction for five years. Punishment for “each subsequent offense” remains as undefined as the provision at issue in *Bown*.

Moreover, there is no specific language in section 321J.2 exempting a third or subsequent offense from habitual offender sentencing. Neither do sections 902.8 or 902.9 address how a “D” felony drunk driver may be punished. *See* 79 G.A. ch. 1042, § 3

(striking language from section 902.9(5) stating “A class ‘D’ felon, such felony being for a violation of section 321J.2, may be sentenced to imprisonment for up to one year in the county jail”).

To the extent this is unclear, the Legislature’s Fiscal Note suggests a different reason for amending 321J.2(2)(c) (2000) than exempting felony drunk drivers from habitual offender sentencing. The Iowa Supreme Court had in held in 2000 that “there was no mandatory minimum term for OWI 3<sup>rd</sup> and subsequent offenders that are sentenced to the Department of Corrections.” Leg. Fiscal Note, HF 2230-OWI Third Offenses (LSB 5332 HV); see *State v. Iowa Dist. Ct. for Mahaska Cty.*, 620 N.W.2d 271, 274-75 (Iowa 2000) (holding Iowa Code § 321J.2(2)(c) (1999) establishes a mandatory minimum only for jail terms, not prison terms). “This ruling,” the Note explained, “places Iowa in noncompliance with federal law regarding highway funds” to the tune of a loss of \$3.37 million in fiscal year 2002. *Id.* That would grow to \$6.74 million in 2003 unless the Legislature enacted a law establishing a mandatory minimum. *Id.* The fiscal note discusses the impact of HF 2230, but nowhere does it address or suggest habitual offender sentencing no longer applies for repeat felony drunk drivers. *Id.*



The timing of the 2002 amendment is also telling. It came one year and four months after *State v. Iowa Dist. Ct. for Mahaska Cty. Bown* excited no similar hurried effort to amend section 321J.2.

Habitual offender sentencing for repeat felony drunk drivers was (and is) a common practice. The Court of Appeals has addressed OWI 3<sup>rd</sup> cases where habitual offender sentencing was imposed before and after the 2002 amendment. *See, e.g., State v. O'Malley*, 593 N.W.2d 517 (Iowa Ct. App. 1999); *State v. Viers*, S.Ct. No. 15-1586, 2016 WL 6636705 (Iowa Ct. App. Nov. 2016); *State v. Osterkamp*, S.Ct. No. 12-1898, 2014 WL 1494899 (Iowa Ct. App. Apr. 16, 2014); *State v. Dudley*, S.Ct. No. 10-1764, 2013 WL 105331 (Iowa Ct. App. Jan. 9, 2013); *State v. Santamaria*, S.Ct. No. 11-1880, 2012 WL 3196799 (Iowa Ct. App. Aug. 8, 2012); *State v. Alexander*, S.Ct. No. 04-1357, 2006 WL 3798920 (Iowa Ct. App. Dec. 28, 2006); *State v. Roberts*, S.Ct. No. 02-2067, 2004 WL 239837 (Iowa Ct. App. Feb. 11, 2004); *State v. Hill*, S.Ct. No. 03-2017, 2004 WL 1252744 (Iowa Ct. App. June 9, 2004); *State v. Riley*, S.Ct. No. 99-1668, 2000 WL 1160744 (Iowa Ct. App. Aug. 16, 2000).

The reaction to *Mahaska* and the inaction following *Bown* and the Court of Appeals decisions above imply legislative acquiescence. *See Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, (Iowa 2013) (discussing principles of legislative acquiescence).

To be sure, some states bar “stacking” a general habitual offender sentence on a “specific” sentence for operating while intoxicated. *See, e.g., Lawson*, 746 S.W.2d at 40. But, the jurisdictions are split. *See State v. Anaya*, 933 P.2d 223, 240-41 (N.M. 1996). And, some jurisdictions that once precluded “stacking” now permit it, typically following legislative action. *Compare Freeman v. State*, 658 N.E.2d 68, 70-71 (Ind. 1995) (precluding use of habitual offender sentence to enhance specific sentence for OWI) *with Beldon v. State*, 926 N.E.2d 480, 483 (Ind. 2010) (following Legislative action allowing habitual offender sentencing).

Most courts agree that the majority of jurisdictions allow a general habitual offender statute to enhance a specific punishment for felony drunk driving. *See State v. Campa*, 814 P.2d 748, 751-52 (Ariz. 1991) (stating “[n]owhere in the 1982 amendment to Title 28 did the legislature attempt to exempt the newly declared class 5 felonies from the general felony enhancement provisions of Title 13”); *People v.*

*Bewersdorf*, 475 N.W.2d 231, 236 (Mich. 1991) (given the legislature was aware of “the habitual offender act,” not allowing such sentencing “would produce the absurd result of assuring recidivist drunk drivers that there could be no increase in punishment for convictions after the third”); *State v. Ewanchen*, 799 S.W.2d 607, 609 (Mo. Ct. App. 1990) (permitting persistent offender sentencing notwithstanding that the driving while intoxicated charge was already enhanced because, in part, “[n]either statute prohibits application of the other”); *State v. Brooks*, 629 A.2d 1347, 1348-49 (N.H. 1993) (finding no double jeopardy violation in imposing both habitual offender and driving while intoxicated sentences); *State v. Delaney*, 658 N.W.2d 416, 423-24 (Wis. 2003) (concluding the state legislature did not intend to exempt felony OWI conviction from general penalty enhancement provisions, relying in part on *Bown*); *Commonwealth v. Grimes*, 698 S.W.2d 836, 836-37 (Ky. 1985) (finding no double jeopardy defect in “allowing a second offense trafficking conviction to be enhanced by the” persistent felony offender statute).

The government appreciates that the question is subject to dueling maxims of statutory construction. *See, e.g., Delaney*, 658 N.W.2d at 424 (Abrahamson, C.J. dissenting and arguing that a “rule

of interpretation cannot, by itself, be dispositive in interpreting a statute because almost every rule can be countered by an opposing rule”). An ambiguous statute should not be read to yield an absurd result, nor will the “absurdity doctrine” permit a literal reading to cause the same. *See Brakke v. Iowa Dept. Nat. Resources*, 897 N.W.2d 522, 538 (Iowa 2017) (“The court should give effect to the spirit of the law rather than the letter, especially so where adherence to the letter would result in absurdity, or injustice, or would lead to contradiction, or would defeat the plain purpose of the act, or where the provision was inserted through inadvertence” quoting *Case v. Olson*, 234 Iowa 869, 873, 14 N.W.2d 717, 719 (1944)).

Iowa Code section 321J.2(5) does provide a specific punishment for a third instance of operating while intoxicated. But, it continues to define the crime as a “D” felony and does not prescribe punishment for subsequent offenses. Neither does it state that Iowa Code section 902.8 or 902.9(1)(e) are inapplicable.

Section 321J.2(2)(c) generally states that a third or subsequent offense is a “D” felony. This implicates section 902.8. To the extent 79 G.A. CH. 1042 changed Iowa Code section 321J.2(2)(c) (2001), contemporaneous legislative history confirms it had nothing to do

with capping the punishment for repeat drunk drivers. Indeed, while it is not unheard of for the Legislature to reduce punishment for an offense, capping punishment at five years for a fourth, six, or tenth instance of drunk driving runs counter to the policy of deterring and punishing incorrigible offenders through increasingly stern measures. *See State v. Maxwell*, 743 N.W.2d 185, 191-92 (Iowa 2008) (holding failure to apply habitual offender sentencing to repeat drug offender ran counter to legislative intent of increasing punishment for recidivists).

Accordingly, the district court correctly found that Noll's sentence was legal. Having admitted to two prior "D" felony convictions for operating while intoxicated, it was proper to sentence Noll as an habitual offender upon conviction for this latest offense.

## CONCLUSION

The district court ruling should be affirmed.

## REQUEST FOR NONORAL SUBMISSION

The undersigned asks to be heard only if the Court grants the Noll's request for oral argument.

Respectfully submitted,

THOMAS J. MILLER  
Attorney General of Iowa



---

**DARREL MULLINS**  
Assistant Attorney General  
Hoover State Office Bldg., 2nd Fl.  
Des Moines, Iowa 50319  
(515) 281-5976  
[darrel.mullins@ag.iowa.gov](mailto:darrel.mullins@ag.iowa.gov)

## CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **2,742** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: April 24, 2018



---

**DARREL MULLINS**

Assistant Attorney General  
Hoover State Office Bldg., 2nd Fl.  
Des Moines, Iowa 50319  
(515) 281-5976  
[darrel.mullins@ag.iowa.gov](mailto:darrel.mullins@ag.iowa.gov)