

1 ENGROSSED SENATE AMENDMENT
TO

2 ENGROSSED HOUSE
3 BILL NO. 1319

By: Wright, Farley, Reynolds
and Ritze of the House

4 and

5 Sykes of the Senate

6
7
8 An Act relating to driving under the influence;
9 enacting the Mark McGee Act of 2011; amending 21 O.S.
10 2001, Section 852.1, as last amended by Section 122,
11 Chapter 234, O.S.L. 2009 (21 O.S. Supp. 2010, Section
12 852.1), which relates to child endangerment;
13 providing for the prosecution of persons under
14 specified statutes; amending 47 O.S. 2001, Section
15 11-902, as last amended by Section 3, Chapter 310,
16 O.S.L. 2009 (47 O.S. Supp. 2010, Section 11-902),
17 which relates to penalties for driving under the
18 influence of alcohol; clarifying scope of certain
19 prohibited acts; modifying and adding statutory
20 references; modifying penalties; clarifying
21 evaluation and assessment program requirements;
22 providing for noncodification; and providing an
23 effective date.
24

17 AUTHORS: Add the following Senate Coauthors: Brecheen and Ivester

18 AMENDMENT NO. 1. Page 9, line 5, restore all stricken language and
19 delete all new language

1 Passed the Senate the 19th day of April, 2011.

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3 _____
4 Presiding Officer of the Senate

5 Passed the House of Representatives the ____ day of _____,
6 2011.

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8 _____
9 Presiding Officer of the House
10 of Representatives

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21 evaluation and assessment program requirements;
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23 effective date.
24

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. NEW LAW A new section of law not to be
codified in the Oklahoma Statutes reads as follows:

This act shall be known and may be cited as the "Mark McGee Act
of 2011".

1 SECTION 2. AMENDATORY 21 O.S. 2001, Section 852.1, as
2 last amended by Section 122, Chapter 234, O.S.L. 2009 (21 O.S. Supp.
3 2010, Section 852.1), is amended to read as follows:

4 Section 852.1 A. A person who is the parent, guardian, or
5 person having custody or control over a child as defined in Section
6 1-1-105 of Title 10A of the Oklahoma Statutes, commits child
7 endangerment when the person:

8 1. Knowingly permits physical or sexual abuse of a child;

9 2. Knowingly permits a child to be present at a location where
10 a controlled dangerous substance is being manufactured or attempted
11 to be manufactured as defined in Section 2-101 of Title 63 of the
12 Oklahoma Statutes;

13 3. Knowingly permits a child to be present in a vehicle when
14 the person knows or should have known that the operator of the
15 vehicle is impaired by or is under the influence of alcohol or
16 another intoxicating substance; or

17 4. Is the driver, operator, or person in physical control of a
18 vehicle in violation of Section 11-902 of Title 47 of the Oklahoma
19 Statutes while transporting or having in the vehicle such child or
20 children.

21 However, it is an affirmative defense to this paragraph if the
22 person had a reasonable apprehension that any action to stop the
23 physical or sexual abuse or deny permission for the child to be in
24

1 the vehicle with an intoxicated person would result in substantial
2 bodily harm to the person or the child.

3 Nothing in this subsection shall prohibit the prosecution of a
4 person pursuant to the provisions of Section 11-902 or 11-904 of
5 Title 47 of the Oklahoma Statutes.

6 B. The provisions of this section shall not apply to any
7 parent, guardian or other person having custody or control of a
8 child for the sole reason that the parent, guardian or other person
9 in good faith selects and depends upon spiritual means or prayer for
10 the treatment or cure of disease or remedial care for such child.
11 This subsection shall in no way limit or modify the protections
12 afforded said child in Section 852 of this title or Section 1-4-904
13 of Title 10A of the Oklahoma Statutes.

14 C. Any person convicted of violating any provision of this
15 section shall be guilty of a felony punishable by imprisonment in
16 the custody of the Department of Corrections for a term of not more
17 than four (4) years, or by a fine not exceeding Five Thousand
18 Dollars (\$5,000.00), or by both such fine and imprisonment.

19 SECTION 3. AMENDATORY 47 O.S. 2001, Section 11-902, as
20 last amended by Section 3, Chapter 310, O.S.L. 2009 (47 O.S. Supp.
21 2010, Section 11-902), is amended to read as follows:

22 Section 11-902. A. It is unlawful and punishable as provided
23 in this section for any person to drive, operate, or be in actual
24 physical control of a motor vehicle within this state, whether upon

1 public roads, highways, streets, turnpikes, other public places or
2 upon any private road, street, alley or lane which provides access
3 to one or more single or multi-family dwellings, who:

4 1. Has a blood or breath alcohol concentration, as defined in
5 Section 756 of this title, of eight-hundredths (0.08) or more at the
6 time of a test of such person's blood or breath administered within
7 two (2) hours after the arrest of such person;

8 2. Is under the influence of alcohol;

9 3. Is under the influence of any intoxicating substance other
10 than alcohol which may render such person incapable of safely
11 driving or operating a motor vehicle; or

12 4. Is under the combined influence of alcohol and any other
13 intoxicating substance which may render such person incapable of
14 safely driving or operating a motor vehicle.

15 B. The fact that any person charged with a violation of this
16 section is or has been lawfully entitled to use alcohol or a
17 controlled dangerous substance or any other intoxicating substance
18 shall not constitute a defense against any charge of violating this
19 section.

20 C. 1. Any person who is convicted of a violation of the
21 provisions of this section shall be ~~deemed~~ guilty of a misdemeanor
22 for the first offense and shall participate in an assessment and
23 evaluation ~~by an assessment agency or assessment personnel certified~~
24 ~~by the Department of Mental Health and Substance Abuse Services~~

1 ~~pursuant to Section 3-460 of Title 43A of the Oklahoma Statutes~~
2 pursuant to subsection G of this section and shall follow all
3 recommendations made in the assessment and evaluation ~~and~~. Such
4 person shall be punished by imprisonment in jail for not less than
5 ten (10) days nor more than one (1) year. ~~Any person convicted of a~~
6 ~~violation for a first offense shall~~ and be fined not more than One
7 Thousand Dollars (\$1,000.00).

8 2. Any person who, within ten (10) years ~~after a previous~~
9 ~~conviction~~ of the date following the completion of the execution of
10 any sentence or deferred judgment for a violation of this section or
11 a violation pursuant to the provisions of any law of this state or
12 another state prohibiting the ~~offense~~ offenses provided in
13 subsection A of this section, ~~is convicted of~~ Section 11-904 of this
14 title or paragraph 4 of subsection A of Section 852.1 of Title 21 of
15 the Oklahoma Statutes, commits a second offense pursuant to the
16 provisions of this section or has a prior conviction in a municipal
17 criminal court of record for the violation of a municipal ordinance
18 prohibiting the offense provided for in subsection A of this section
19 and within ten (10) years of ~~such municipal conviction is convicted~~
20 the date following the completion of the execution of such sentence
21 or deferred judgment commits a second offense pursuant to the
22 ~~provision~~ provisions of this section shall be ~~deemed~~ guilty of a
23 felony and shall participate in an assessment and evaluation ~~by an~~
24 ~~assessment agency or assessment personnel certified by the~~

1 ~~Department of Mental Health and Substance Abuse Services pursuant to~~
2 ~~Section 3-460 of Title 43A of the Oklahoma Statutes~~ pursuant to
3 subsection G of this section and shall be sentenced to:

- 4 a. follow all recommendations made in the assessment and
5 evaluation for treatment at the defendant's expense,
6 or
- 7 b. placement in the custody of the Department of
8 Corrections for not less than one (1) year and not to
9 exceed five (5) years and a fine of not more than Two
10 Thousand Five Hundred Dollars (\$2,500.00), or
- 11 c. treatment, imprisonment and a fine within the
12 limitations prescribed in subparagraphs a and b of
13 this paragraph.

14 However, if the treatment in ~~subparagraph a~~ subsection G of this
15 ~~paragraph~~ section does not include residential or inpatient
16 treatment for a period of not less than five (5) days, the person
17 shall serve a term of imprisonment of at least five (5) days.

18 3. Any person who is convicted of a second felony offense
19 pursuant to the provisions of this section or a violation pursuant
20 to the provisions of any law of this state or another state
21 prohibiting the offenses provided for in subsection A of this
22 section, Section 11-904 of this title or paragraph 4 of subsection A
23 of Section 852.1 of Title 21 of the Oklahoma Statutes shall
24 participate in an assessment and evaluation ~~by an assessment agency~~

1 ~~or assessment personnel certified by the Department of Mental Health~~
2 ~~and Substance Abuse Services pursuant to Section 3-460 of Title 43A~~
3 ~~of the Oklahoma Statutes~~ pursuant to subsection G of this section
4 and shall be sentenced to:

- 5 a. follow all recommendations made in the assessment and
6 evaluation for treatment at the defendant's expense,
7 two hundred forty (240) hours of community service and
8 use of an ignition interlock device, or
- 9 b. placement in the custody of the Department of
10 Corrections for not less than one (1) year and not to
11 exceed ten (10) years and a fine of not more than Five
12 Thousand Dollars (\$5,000.00), or
- 13 c. treatment, imprisonment and a fine within the
14 limitations prescribed in subparagraphs a and b of
15 this paragraph.

16 However, if the treatment in ~~subparagraph a~~ subsection G of this
17 ~~paragraph~~ section does not include residential or inpatient
18 treatment for a period of not less than ten (10) days, the person
19 shall serve a term of imprisonment of at least ten (10) days.

20 4. Any person who is convicted of a third or subsequent felony
21 offense pursuant to the provisions of this section or a violation
22 pursuant to the provisions of any law of this state or another state
23 prohibiting the offenses provided for in subsection A of this
24 section, Section 11-904 of this title or paragraph 4 of subsection A

1 of Section 852.1 of Title 21 of the Oklahoma Statutes shall
2 participate in an assessment and evaluation ~~by an assessment agency~~
3 ~~or assessment personnel certified by the Department of Mental Health~~
4 ~~and Substance Abuse Services pursuant to Section 3-460 of Title 43A~~
5 ~~of the Oklahoma Statutes~~ pursuant to subsection G of this section
6 and shall be sentenced to:

- 7 a. follow all recommendations made in the assessment and
8 evaluation for treatment at the defendant's expense,
9 followed by not less than one (1) year of supervision
10 and periodic testing at the defendant's expense, four
11 hundred eighty (480) hours of community service, and
12 use of an ignition interlock device for a minimum of
13 thirty (30) days, or
14 b. placement in the custody of the Department of
15 Corrections for not less than one (1) year and not to
16 exceed twenty (20) years and a fine of not more than
17 Five Thousand Dollars (\$5,000.00), or
18 c. treatment, imprisonment and a fine within the
19 limitations prescribed in subparagraphs a and b of
20 this paragraph.

21 However, if the person does not undergo residential or inpatient
22 treatment pursuant to ~~subparagraph a~~ subsection G of this ~~paragraph~~
23 section the person shall serve a term of imprisonment of at least
24 ten (10) days.

1 5. Any person who, ~~within ten (10) years~~ after a previous
2 conviction of a violation of murder in the second degree or
3 manslaughter in the first degree in which the death was caused as a
4 result of driving under the influence of alcohol or other
5 intoxicating substance, ~~is convicted of~~ commits a violation of this
6 section shall be ~~deemed~~ guilty of a felony and shall be punished by
7 imprisonment in the custody of the Department of Corrections for not
8 less than five (5) years and not to exceed twenty (20) years, and a
9 fine of not more than Ten Thousand Dollars (\$10,000.00).

10 6. Provided, however, a conviction from another state shall not
11 be used to enhance punishment pursuant to the provisions of this
12 subsection if that conviction is based on a blood or breath alcohol
13 concentration of less than eight-hundredths (0.08).

14 7. In any case in which a defendant is charged with a second or
15 subsequent driving under the influence of alcohol or other
16 intoxicating substance offense within any municipality with a
17 municipal court other than a court of record, the charge shall be
18 presented to the county's district attorney and filed with the
19 district court of the county within which the municipality is
20 located.

21 D. Any person who is convicted of a violation of driving under
22 the influence with a blood or breath alcohol concentration of
23 fifteen-hundredths (0.15) or more pursuant to this section shall be
24 deemed guilty of aggravated driving under the influence. A person

1 convicted of aggravated driving under the influence shall
2 participate in an assessment and evaluation ~~by an assessment agency~~
3 ~~or assessment personnel certified by the Department of Mental Health~~
4 ~~and Substance Abuse Services pursuant to Section 3-460 of Title 43A~~
5 ~~of the Oklahoma Statutes~~ pursuant to subsection G of this section
6 and shall comply with all recommendations for treatment. Such
7 person shall be sentenced to not less than one (1) year of
8 supervision and periodic testing at the defendant's expense, ~~four~~
9 ~~hundred eighty (480) hours of community service,~~ and an ignition
10 interlock device for a minimum of ~~thirty (30)~~ ninety (90) days.
11 Nothing in this subsection shall preclude the defendant from being
12 charged or punished as provided in paragraph 1, 2, 3, 4 or 5 of
13 subsection C of this section. Any person who is convicted pursuant
14 to the provisions of this subsection shall be guilty of a
15 misdemeanor for a first offense and shall be punished as provided in
16 paragraph 1 of subsection C of this section. Any person who, within
17 ten (10) years of the completion of the execution of any sentence or
18 deferred judgment, commits a second violation of this subsection
19 shall be guilty of a felony and shall be punished as provided in
20 paragraph 2 of subsection C of this section. Any person who commits
21 a second felony offense pursuant to this subsection shall, upon
22 conviction, be guilty of a felony and shall be punished as provided
23 in paragraph 3 of subsection C of this section. Any person who is
24 convicted of a third or subsequent felony offense pursuant to the

1 provisions of this subsection shall be guilty of a felony and shall
2 be punished as provided in paragraph 4 of subsection C of this
3 section.

4 E. When a person is sentenced to imprisonment in the custody of
5 the Department of Corrections, the person shall be processed through
6 the Lexington Assessment and Reception Center or at a place
7 determined by the Director of the Department of Corrections. The
8 Department of Corrections shall classify and assign the person to
9 one or more of the following:

10 1. The Department of Mental Health and Substance Abuse Services
11 pursuant to paragraph 1 of subsection A of Section 612 of Title 57
12 of the Oklahoma Statutes; or

13 2. A correctional facility operated by the Department of
14 Corrections with assignment to substance abuse treatment.

15 F. The Department of Public Safety is hereby authorized to
16 reinstate any suspended or revoked driving privilege when the person
17 meets the statutory requirements which affect the existing driving
18 privilege.

19 G. Any person who is found guilty of a violation of the
20 provisions of this section shall be ordered to participate in, ~~prior~~
21 ~~to sentencing,~~ an alcohol and drug substance abuse evaluation and
22 assessment program offered by a certified assessment agency or
23 certified assessor for the purpose of evaluating and assessing the
24 receptivity to treatment and prognosis of the person and shall, at

1 the expense of the defendant, follow all recommendations made in the
2 assessment and evaluation for treatment. The court shall order the
3 person to reimburse the agency or assessor for the evaluation and
4 assessment. The fee for an evaluation and assessment shall be the
5 amount provided in subsection C of Section 3-460 of Title 43A of the
6 Oklahoma Statutes. The evaluation and assessment shall be conducted
7 at a certified assessment agency, the office of a certified assessor
8 or at another location as ordered by the court. The agency or
9 assessor shall, within seventy-two (72) hours from the time the
10 person is evaluated and assessed, submit a written report to the
11 court for the purpose of assisting the court in its ~~final~~ sentencing
12 determination. The court shall, as a condition of any sentence
13 imposed, including deferred and suspended sentences, require the
14 person to participate in and successfully complete all
15 recommendations from the evaluation, such as an alcohol and
16 substance abuse treatment program pursuant to Section 3-452 of Title
17 43A of the Oklahoma Statutes. If such report indicates that the
18 evaluation and assessment shows that the defendant would benefit
19 from a ten-hour or twenty-four-hour alcohol and drug substance abuse
20 course or a treatment program or both, the court shall, as a
21 condition of any sentence imposed, including deferred and suspended
22 sentences, require the person to follow all recommendations
23 identified by the evaluation and assessment and ordered by the
24 court. No person, agency or facility operating an evaluation and

1 assessment program certified by the Department of Mental Health and
2 Substance Abuse Services shall solicit or refer any person evaluated
3 and assessed pursuant to this section for any treatment program or
4 substance abuse service in which such person, agency or facility has
5 a vested interest; however, this provision shall not be construed to
6 prohibit the court from ordering participation in or any person from
7 voluntarily utilizing a treatment program or substance abuse service
8 offered by such person, agency or facility. If a person is
9 sentenced to imprisonment in the custody of the Department of
10 Corrections and the court has received a written evaluation report
11 pursuant to the provisions of this subsection, the report shall be
12 furnished to the Department of Corrections with the judgment and
13 sentence. Any evaluation and assessment report submitted to the
14 court pursuant to the provisions of this subsection shall be handled
15 in a manner which will keep such report confidential from the
16 general public's review. Nothing contained in this subsection shall
17 be construed to prohibit the court from ordering judgment and
18 sentence in the event the defendant fails or refuses to comply with
19 an order of the court to obtain the evaluation and assessment
20 required by this subsection. If the defendant fails or refuses to
21 comply with an order of the court to obtain the evaluation and
22 assessment, the Department of Public Safety shall not reinstate
23 driving privileges until the defendant has complied in full with
24 such order. Nothing contained in this subsection shall be construed

1 to prohibit the court from ordering judgment and sentence and any
2 other sanction authorized by law for failure or refusal to comply
3 with an order of the court.

4 H. Any person who is found guilty of a violation of the
5 provisions of this section may be required by the court to attend a
6 victims impact panel program, if such a program is offered in the
7 county where the judgment is rendered, and to pay a fee, not less
8 than Fifteen Dollars (\$15.00) nor more than Twenty-five Dollars
9 (\$25.00) as set by the governing authority of the program and
10 approved by the court, to the program to offset the cost of
11 participation by the defendant, if in the opinion of the court the
12 defendant has the ability to pay such fee.

13 I. Any person who is found guilty of a felony violation of the
14 provisions of this section ~~may~~ shall be required to submit to
15 electronic monitoring as authorized and defined by Section 991a of
16 Title 22 of the Oklahoma Statutes.

17 ~~J. Any person who, within ten (10) years after a previous~~
18 ~~conviction of a violation of this section or a violation pursuant to~~
19 ~~the provisions of law of another state prohibiting the offense~~
20 ~~provided in subsection A of this section or a violation of a~~
21 ~~municipal ordinance prohibiting the offense provided in subsection A~~
22 ~~of this section, pleads guilty or nolo contendere or is convicted of~~
23 ~~a violation of this section shall not be required to undergo the~~
24 ~~alcohol and drug substance evaluation program required by subsection~~

1 ~~G of this section. The court shall, as a condition of any sentence~~
2 ~~imposed, including deferred and suspended sentences, require the~~
3 ~~person to participate in and successfully complete all~~
4 ~~recommendations from the evaluation, such as an alcohol and drug~~
5 ~~substance abuse treatment program pursuant to Section 3-452 of Title~~
6 ~~43A of the Oklahoma Statutes.~~

7 K. Any person who is found guilty of a violation of the
8 provisions of this section who has been sentenced by the court to
9 perform any type of community service shall not be permitted to pay
10 a fine in lieu of performing the community service.

11 ~~H.~~ K. When a person is found guilty of a violation of the
12 provisions of this section, the court shall order, in addition to
13 any other penalty, the defendant to pay a one-hundred-dollar
14 assessment to be deposited in the Drug Abuse Education and Treatment
15 Revolving Fund created in Section 2-503.2 of Title 63 of the
16 Oklahoma Statutes, upon collection.

17 ~~M.~~ L. 1. When a person is eighteen (18) years of age or older,
18 and is the driver, operator, or person in physical control of a
19 vehicle, and is convicted of violating any provision of this section
20 while transporting or having in the motor vehicle any child less
21 than eighteen (18) years of age, the fine shall be enhanced to
22 double the amount of the fine imposed for the underlying driving
23 under the influence (DUI) violation which shall be in addition to
24 any other penalties allowed by this section.

1 2. Nothing in this subsection shall prohibit the prosecution of
2 a person pursuant to Section 852.1 of Title 21 of the Oklahoma
3 Statutes who is in violation of any provision of this section or
4 Section 11-904 of this title.

5 M. Any plea of guilty, nolo contendere or finding of guilt for
6 a violation of this section or a violation pursuant to the
7 provisions of any law of this state or another state prohibiting the
8 offenses provided for in subsection A of this section, Section 11-
9 904 of this title, or paragraph 4 of subsection A of Section 852.1
10 of Title 21 of the Oklahoma Statutes, shall constitute a conviction
11 of the offense for the purpose of this section for a period of ten
12 (10) years following the completion of any court-imposed
13 probationary term.

14 N. If qualified by knowledge, skill, experience, training or
15 education, a witness shall be allowed to testify in the form of an
16 opinion or otherwise solely on the issue of impairment, but not on
17 the issue of specific alcohol concentration level, relating to the
18 following:

19 1. The results of any standardized field sobriety test
20 including, but not limited to, the horizontal gaze nystagmus (HGN)
21 test administered by a person who has completed training in
22 standardized field sobriety testing; or

23 2. Whether a person was under the influence of one or more
24 impairing substances and the category of such impairing substance or

1 substances. A witness who has received training and holds a current
2 certification as a drug recognition expert shall be qualified to
3 give the testimony in any case in which such testimony may be
4 relevant.

5 SECTION 4. This act shall become effective November 1, 2011.

6 Passed the House of Representatives the 17th day of March, 2011.

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9 _____
10 Presiding Officer of the House of
Representatives

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11 Passed the Senate the ____ day of _____, 2011.

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14 _____
Presiding Officer of the Senate

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