

**IN THE
SUPREME COURT OF OHIO**

STATE OF OHIO

CASE NO 2013-1619

Plaintiff-Appellant

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

v.

MATTHEW T. MOLE

COURT OF APPEALS CASE NO. 98900

Defendant-Appellee

APPELLANT-STATE OF OHIO'S MOTION FOR RECONSIDERATION

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MOTION TO RECONSIDER

Introduction

Pursuant to S.Ct.Prac.R. 18.02, the State of Ohio moves to reconsider a decision on the merits. Specifically, the State urges this Court to reconsider its decision in *State v. Mole*, Slip Opinion No. 2016-Ohio-5124 and to either reconsider its holding that Ohio's Equal Protection Clause provides greater protection than that of the United States Constitution or in the alternative to order further briefing on the issue in order to permit the parties and any other interested amicus curiae to fully develop its arguments and contribute to the debate as to whether Article 1 Section 2 of the Ohio Constitution provides greater equal protection right than those afforded under the Fourteenth Amendment of the United States Constitution.

The State fully acknowledges that the Ohio Constitution is a document of independent force but that fact alone cannot be dispositive that the Ohio Constitution will always provide greater protection than that afforded under the federal constitution. The State submits to this Court that it is far from clear that what has been described as the Equal Protection Clause of Article I, Section 2 of the Ohio Constitution provides greater protection afforded under the Fourteenth Amendment of the United States Constitution. Textual and historical information available to the undersigned suggests that the Article I, Section 2 was not meant to provide greater protection than that available under the Equal Protection Clause of the United States Constitution. Therefore, reconsideration should be granted or at a minimum the matter reconsidered subject to additional briefing on the issue of whether the Ohio Constitution does in fact provide additional Equal Protection rights than those afforded under the United States Constitution.

The Issue of Whether Article 1, Section 2 of the Ohio Constitution provides greater protection than the Fourteenth Amendment of the United States Constitution was unbriefed

The decision in *Mole* which declared that the Equal Protection Clause of the Ohio Constitution as one of independent force that can provide greater protection independent than that of the United States Constitution was unexpected, given that the issue was neither argued nor briefed. Both parties operated under an analysis that the Equal Protection Clause of the Ohio Constitution and United States Constitution were identical. Most recently, this Court in *State v. Klembus*, 146 Ohio St.3d 84, 2016-Ohio-1092 held that the standards for assessing equal-protection claims are essential the same under the state and federal constitution. *Klembus*, ¶8. The State notes that in that case *Klembus* specifically advocated that the Ohio Constitution provided greater protection under the Equal Protection Clause than that of the federal constitution and the State asserted that *Klembus* did not offer any compelling argument as far as how or why the Ohio Constitution provides greater protection than that of the United States Constitution on the issue of equal protection. See Appellant's Reply Brief, pg. 5, *State v. Klembus*, Case No. 2014-Ohio-1557, filed July 20, 2015 (available at http://supremecourt.ohio.gov/pdf_viewer/pdf_viewer.aspx?pdf=772153.pdf).

In this case, it was not suggested that Ohio's Equal Protection Clause should provide greater protection and independently than that of the federal constitution. The State notes that the Eighth District reached its decision that R.C. 2907.03(A)(13) was facially invalid was based upon its determination that the Ohio Constitution and United States Constitution were co-extensive and identical. *State v. Mole*, 8th Dist. Cuyahoga No. 98900, 2013-Ohio-3131, ¶8. Appellee conceded that the provisions of the Ohio Constitution and the United States Constitution were functionally equivalent and were to be construed and analyzed identically. See Appellee's brief, pg. 4. No

specific argument was offered by Appellee as to whether the Ohio Constitution should provide greater protection than the Fourteenth Amendment of the United States Constitution.

Textual and Historical Information Do Not Suggest the Framers of the Ohio Constitution Intended to Provide Greater Protection Than That Afforded Under the Federal Constitution

There is no textual or historical evidence, from the undersigned's research, to suggest that Article I, Section 2 of the 1851 Ohio Constitution was meant to provide greater protection than the Section 1 of the Fourteenth Amendment of the United States Constitution.

Any holding that the 1851 Ohio Constitution contained the phrase "for their equal protection and benefit" to provide greater protection than the Equal Protection Clause of the United States Constitution must conclude that the intent of that provision was to provide protections to all citizens, and was included to end any type of racial or gender discrimination. But such a conclusion cannot be deemed consistent with the intent of the framers, as there lacks any evidence that this was the case. Some historical evidence casts doubt to the claim that the 1851 Ohio Constitution was meant to serve as the ceiling and the Fourteenth Amendment of the United States Constitution as the floor. For example, part of Ohio's history includes its ratification and subsequent withdrawal of its ratification of Fourteenth Amendment to the United States Constitution. Although Ohio ratified the Fourteenth Amendment on January 4, 1867 it rescinded its ratification on January 15, 1868. *Ratifying the Fourteenth Amendment in Ohio*, Gabriel Chin, Volume 28, Issue 2 (2005-2006) Western Law Review, available at <http://digitalcommons.law.wne.edu/cgi/viewcontent.cgi?article=1097&context=lawreview>, last accessed August 8, 2016.

Recent reports from the Ohio Constitutional Modernization Commission did not find any historical evidence to suggest that the 1850-1851 constitutional convention contemplated the

phrase to end racial discrimination. As indicated by the Report and Recommendations of the Ohio Constitutional Modernization Commission:

Adopted as part of the 1851 Constitution, the “Equal Protection Clause” in Article I, Section 2 provides that “government is instituted for [the people’s] equal protection and benefit.” That phrase predates, yet corresponds to, the Fourteenth Amendment of the U.S. Constitution with its prohibition against states denying any person the “equal protection of the laws.” Although federal equal protection analysis has focused on issues of race, gender, or other immutable characteristics, “there is no indication from the little discussion of the equal protection clause at the 1850-51 convention that it was understood to end or ameliorate racial or gender discrimination *** .”

Report and Recommendation Article I, Section 2 of the Ohio Constitution, Ohio Constitutional Modernization Commission (June 11, 2015) available at: <http://ocmc.ohio.gov/ocmc/reports> (last accessed August 8, 2016).

Similarly, recommendations from the Ohio Constitutional Revision Committee in 1976 indicated that, “The section contains the ‘equal protection’ clause of the Ohio Constitution, although tis language is not identical to the parallel clause of the United States Constitution [...] The major portion of Article I, section 2, however, is derived from the Declaration of Independence and has no federal constitutional parallel.” Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, dated April 15, 1976 available at <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf> (last accessed August 8, 2016). As observed by one legal scholar, the guarantee of equality contained in the Ohio Constitution drew upon the natural rights principles embodied in the declaration of independence but that the, “the racial restriction on suffrage would be continued in the 1851 constitution...” and that suffrage was limited to “whites even as both documents forbade slavery.” Professor Entin also noted the retreat from “Buckeye equality” in his article. Jonathan L. Entin, *An Ohio Dilemma: Race, Equal Protection, and the Unfulfilled Promise of a State Bill of Rights*,

The debates of the 1850-1851 constitutional convention are available and it appears that Equal Rights for African-Americans and suffrage for all was a debated issue. Reports of the debates and proceedings of the Convention for the revision of the constitution of the state of Ohio. 1850-1851. (<http://quod.lib.umich.edu/m/moa/ae0639.0001.001/901?view=image&size=100>, last accessed August 8, 2016).

There is compelling evidence to suggest that the Ohio Constitution does not provide greater protection than that under the Fourteenth Amendment of the United States Constitution and that the two provisions remain co-extensive or at least worthy of debate. The Ohio Constitution is a document of independent force, but there is no significance to the phrase, “government is instituted for [the people’s] equal protection and benefit...” nor any identifiable historical evidence that would suggest that Article 1, Section 2 was contemplated to provide greater protection than that of the Fourteenth Amendment. Indeed the important doctrine of Equal Protection as guaranteed under the Fourteenth Amendment to the United States Constitution has resulted in landmark decisions such as *Brown v. Board of Education*, 347 U.S. 483 (1954), *Loving v. Virginia*, 388 U.S. 1 (1967), *Obergefell v. Hodges*, 576 U.S. ____ (2015) and continues to evolve. Any perceived failures of the federal Equal Protection Clause can be addressed by a future state constitutional convention or amendment; however, at this time it is far from clear that the current Equal Protection Clause under the Ohio Constitution does indeed provide greater protection than that guaranteed under the Fourteenth Amendment to the United States Constitution.

¹<http://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=1319&context=clevstlrev>, last accessed August 8, 2016).

CONCLUSION

The State respectfully asks this Court to reconsider its decision in *State v. Mole*, Slip Opinion No. 2016-Ohio-5124 or in the alternative at the very least to order additional briefing on the issue of whether the Equal Protection Clause of Article 1, Section 2 of the Ohio Constitution provides greater protection than the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Additional briefing is required to provide the necessary debate that this issue requires. The State maintains its position that R.C. 2907.03(A)(13) does not violate the Equal Protection Clause of the United States Constitution or the Ohio Constitution on its face for the reasons articulated in the State’s briefing and as analyzed by the dissent. Mole did not raise an as-applied challenge, and he has failed to demonstrate that R.C. 2907.03(A)(13) is irrational under every conceivable basis.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing has been sent this 9th day of August, 2016 to the following via U.S. Mail:

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