

**IN THE SUPREME COURT OF OHIO  
2016**

STATE OF OHIO,

Case No. 2014-1557

Plaintiff-Appellant,

-vs-

On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth Appellate District

Court of Appeals  
Case No. 100068

DEAN KLEMBUS,

Defendant-Appellee.

**MEMORANDUM OF AMICI CURIAE OHIO PROSECUTING ATTORNEYS  
ASSOCIATION AND FRANKLIN COUNTY PROSECUTOR RON O'BRIEN  
IN RESPONSE TO APPELLEE'S MOTION FOR RECONSIDERATION**

Pursuant to S.Ct.Prac.R. 18.03(B), and for the reasons stated in the attached memorandum in support, Amici Curiae Ohio Prosecuting Attorneys Association and Franklin County Prosecutor Ron O'Brien respectfully request that this Court deny defendant-appellee's motion to reconsider the March 22, 2016 decision that reversed the decision of the Eighth District.

Respectfully submitted,

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Prosecuting Attorney

/s/ M. Walton  
MICHAEL P. WALTON 0087265  
(Counsel of Record)  
Assistant Prosecuting Attorney  
Counsel for Amici Curiae Ohio  
Prosecuting Attorneys Association and  
Franklin County Prosecutor Ron  
O'Brien

## MEMORANDUM IN SUPPORT

The test generally used in ruling on a motion for reconsideration is “whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been.” *Columbus v. Hodge*, 37 Ohio App.3d 68, 68, 523 N.E.2d 515 (10th Dist.1988).

Here, appellee’s argument in support of reconsideration is unclear. Indeed, without citation to any authority, in noting two hypothetical defendants, appellee merely asserts that “there has to be a reason why Smith can only go to prison 30 months and Jones can go for three times as long.” Motion for Reconsideration, p. 2. Appellee further asserts that, because these two different outcomes are possible, the General Assembly’s sentencing scheme for OVI offenders with multiple previous convictions cannot be compatible with the Equal Protection Clause.

As noted in undersigned counsel’s reply brief in support of the State of Ohio’s propositions of law, appellee abandoned any argument related to an Equal Protection claim based upon an allegation of selective prosecution. See Appellee Brief, p. 5 (“[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.”) A necessary component of his present argument is an allegation that he was discriminated against or singled out for the enhanced statutorily-authorized punishment. Therefore, at best, appellee is attempting to assert an argument that he previously abandoned.

An abandoned argument cannot be asserted as grounds for reconsideration. *See E. Liverpool v. Columbiana Cty. Budget Comm.*, 116 Ohio St. 3d 1201, 2007-Ohio-5505, 876 N.E.2d 575 (argument that was not asserted in briefing and only raised during reconsideration was “deemed to be abandoned.”) quoting *Household Fin. Corp. v. Porterfield*, 24 Ohio St.2d 39, 46, 263 N.E.2d 243 (1970).

Even if appellee had not abandoned a critical component of his argument, the argument as a whole lacks merit anyway. The mere possibility that two defendants may receive different punishment based upon the choice of a prosecutor in seeking an indictment against those defendants does not offend Equal Protection. *See United States v. LaBonte*, 520 U.S. 751, 762, 117 S.Ct. 1673, 137 L.Ed.2d 1001 (1997) (“Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against a criminal suspect. *Such discretion is an integral feature of the criminal justice system, and is appropriate*, so long as it is not based upon improper factors.”) (emphasis added, citation omitted).

Quite simply, appellee failed to meet the “heavy burden” of establishing a claim of selective prosecution. *United States v. Berrios*, 501 F.2d 1207, 1211 (2nd Cir. 1974). He failed to present any evidence to support his claim. Therefore, his argument – even if it had not been abandoned – necessarily fails.

Based upon the foregoing, Amici Curiae respectfully request that the Court deny appellee's motion for reconsideration.

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was sent by electronic mail, this day, April 11, 2016, to John Martin, Assistant Public Defender at jmartin@cuyahogacounty.us; Counsel for Defendant-Appellee, Daniel T. Van, Assistant Prosecuting Attorney, at dvan@prosecutor.cuyahogacounty.us; Counsel for Plaintiff-Appellant; and Eric E. Murphy, State Solicitor, at eric.murphy@ohioattorneygeneral.gov; Counsel for Amicus Curiae Ohio Attorney General Mike DeWine.

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