

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 15-0774
Plaintiff-Appellant,	:	On Appeal From the
v.	:	Franklin County Court of
G Hassan Mohammad,	:	Appeals, Tenth Appellate
Defendant-Appellee.	:	District
	:	C.A. Case No. 14AP-662

**DEFENDANT-APPELLEE GHASSAN MOHAMMAD'S
MEMORANDUM IN OPPOSITION OF JURISDICTION**

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**DEFENDANT-APPELLEE GHASSAN MOHAMMAD'S
MEMORANDUM IN OPPOSITION OF JURISDICTION**

For the reasons set forth by the lower courts, the companion defendant in *State v. Smith*, Sup.Ct. No. 15-406, and in this Memorandum, Defendant-Appellee Ghassan Mohammad (hereinafter "Defendant"), through undersigned counsel, respectfully requests this Court deny jurisdiction over this matter.

EXPLANATION OF WHY THIS COURT SHOULD NOT ACCEPT JURISDICTION

This case does not involve a substantial constitutional question, is not of public or great general interest, and does not involve a felony. Instead, Plaintiff-Appellant (hereinafter "State") is requesting this Court to accept jurisdiction to determine whether "the Tenth District has done grave injury to separation of powers" and because "this defendant faced second-degree felonies." (State's Memorandum, pg. 6). However, there has been no injury to the separation of powers, as the powers of the judiciary include determining whether a law is unconstitutional and how laws should be applied and interpreted. Further, Defendant is not currently facing any criminal charges, let alone felonies. The lower courts have unanimously held that even if the allegations of the State are all true, the conduct of Defendant alleged by the State does not amount to any crime.

One reason this case is not of public or great general interest is because the General Assembly has since created criminal offenses regarding controlled substance analogs. The General Assembly amended the statutes at issue to "create the offenses of trafficking in and possession of controlled substance analogs" on December 20, 2012. Preamble, 129 Sub. H.B. 334, available at http://archives.legislature.state.oh.us/bills.cfm?ID=129_HB_334. Defendant's alleged conduct took place in August 2012. The lower courts have held the conduct alleged, even if true, was not criminal at the time, however, these offenses were created later in 2012. Consequently, a determination in this case would have little, if any, implication for future cases, as now the criminal offenses have

been created.

The State's counter-arguments to this point are flawed, as this Court does not have the power to create the new criminal offenses the State seeks, nor should this Court apply the new laws ex post facto. The State warns that while the General Assembly has created the offenses of trafficking and possession of controlled substance analogs, it has not yet created the offenses of corrupting a minor with controlled substance analogs, illegally manufacturing controlled substance analogs, or illegally assembling precursors to controlled substance analogs. (State's Memorandum, pg. 5). The State is apparently arguing this Court should disregard the General Assembly creation of new offenses in December 2012, and instead hold that the offenses were created prior to that date. The reasoning for this is because the State then wants this Court to expand that holding to create new criminal offenses, such as corrupting another with controlled substance analogs. The State blames the Tenth District's analysis for the lack of certain offenses regarding controlled substance analogs. (State's Memorandum, pg. 6). However, the "blame" is not on the Tenth District; the Tenth District cannot create new criminal offenses, nor can it add words to existing criminal offenses, and the General Assembly has not yet chosen to create offenses such as corrupting another with controlled substance analogs.

Finally, the State considers this case a companion to *State v. Smith*, Sup.Ct. No. 15-406 and has submitted an almost identical brief in this matter as in *Smith*. Defendant concurs with the arguments of the lower courts in both cases, as well as the Memorandum of Defendant-Appellee Opposing Jurisdiction in *Smith*. For the reasons set forth by the lower courts, the companion defendant, and in the following Memorandum, it is respectfully submitted this Court should not accept jurisdiction.

PROPOSITION OF LAW NO. I: Strict construction, or the rule of lenity, was appropriately applied in this case, as well as in *State v. Smith*, Sup.Ct. No. 15-406, as there was no prohibition of the alleged conduct for which the defendants were criminally charged at the time of the conduct.

The lower courts did not err in determining that there was no criminal prohibition of the acts for which Defendant and the defendant in *Smith* were arrested, nor did the courts err in applying the rule of lenity. “[A]ll conduct is innocent unless there is a statute that criminalizes it.” (Citation omitted.) *State v. Johnson*, 128 Ohio St. 3d 107, 2010-Ohio-6301, 942 N.E.2d 347, 350. Revised Code 2901.03 further sets forth:

- (A) No conduct constitutes a criminal offense against the state unless it is defined as an offense in the Revised Code.
- (B) An offense is defined when one or more sections of the Revised Code state a positive prohibition or enjoin a specific duty, and provide a penalty for violation of such prohibition or failure to meet such duty.

R.C. 2901.03. In this case, the lower courts have unanimously found that the conduct for which the defendants were arrested was not a crime at the time their conduct allegedly occurred.

Count One of the indictment charged Defendant with aggravated possession of drugs as a violation of R.C. 2925.11 and stated Defendant, “did knowingly obtain, possess or use a controlled substance *included* in Schedule I, to wit: a-PVP which is a controlled substance analog as defined in section 3719.01 of the Ohio Revised Code . . .” (Indictment, pg. 1) (emphasis added). Count Two of the indictment charged Defendant with aggravated trafficking in drugs as a violation of R.C. 2925.03 and stated Defendant, “did knowingly prepare for shipment, ship, transport, deliver, prepare for distribution or distribute a controlled substance analog as defined in section 3719.01 . . .” (Indictment, pgs. 1-2). During the time of the alleged offense, and up until December 20, 2012, Ohio criminalized the possession and trafficking of only “controlled substances”. *See*, R.C. 2925.03 and 2925.11 (2011).

A-PVP, the drug which Appellee was allegedly possessing and trafficking, was not a controlled substance and the State has never refuted this. If someone were to consult the list of controlled substances in order to determine whether a substance was controlled or not, they would not find “controlled substance analogs” or A-PVP on the list. Thus, by the plain language of the statute, Appellee did not violate any provision of the Ohio Revised Code at the time of his conduct.

The legislature later decided to add the offenses of possession and distribution of controlled substance analogs. The General Assembly in 129 H.B. 344, which became effective on December 20, 2012, adopted the definition of “controlled substance analog” from R.C. 3719.01. 129 H.B. 344. The legislature also added the language “or controlled substance analog” to R.C. 2925.03 and R.C. 2925.11. The legislature stated that the purpose of these changes was, “to *create* the offenses of trafficking in and possession of controlled substance analogs”. *Id.* (Emphasis added). Thus, prior to the enactment of 129 H.B. 344 that became effective on December 20, 2012, there was no statute that prohibited the possession or distribution of controlled substance analogs.

The State’s argument that the General Assembly was merely creating “additional tools” for law enforcement is contrary to the General Assembly’s statement that it was “creat[ing] the offenses of trafficking in and possession of controlled substance analogs.” (State’s Memorandum, pg. 14). “Create” is defined as, “[t]o bring into being; to cause to exist”. *Black’s Law Dictionary*, 440 (4th Ed.1968). “To *create* a charter or a corporation is to make one which never existed before, while to *renew* one is to give vitality to one which has been forfeited or has expired; and to *extend* one is to give an existing charter more time than originally limited.” (Citation omitted.) *Id.* When the General Assembly created the new offenses of possession and trafficking of controlled substance analogs, it was creating a criminal law that had not existed before.

Further, the lower courts did not err in applying the rule of lenity. “A court owes no deference to the prosecution’s interpretation of a criminal law. Criminal statutes “are for the courts, not for the Government, to construe.”” *Whitman v. United States*, 2014 U.S. LEXIS 7431, 135 S. Ct. 352, 190 L. Ed. 2d 381, 382 (2014) (Scalia, J., statement respecting denial of certiorari). Permitting the State’s interpretation to rule, “would turn [their] normal construction . . . upside-down, replacing the doctrine of lenity with a doctrine of severity.” *Crandon v. United States*, 494 U.S. 152, 178, 110 S. Ct. 997, 108 L. Ed. 2d 132 (1990) (Scalia, J., concurring in judgment).

Here, the lower courts did not just find ambiguity in a criminal statute purporting to make controlled substance analogs illegal to possess or sell; the lower courts also found that there was no statute whatsoever that criminalized the conduct. (State’s A-003). The General Assembly later added the language “controlled substance analog” to the trafficking and possession statutes “to create the offenses of trafficking in and possession of controlled substance analogs”. 129 H.B. 344. This further evidences the lower courts were correct in their interpretation of the statute: the crimes of trafficking in and possession of controlled substance analogs were not created until December 20, 2012.

Finally, the State’s argument that the General Assembly has not inserted “controlled substance analog” language into other criminal statutes is an argument not properly directed to this Court. In fact, the argument, if accepted, would violate the separation of powers doctrine which the State has previously been so vigorously asserting. The General Assembly has not inserted “analog” language into other criminal statutes. As the legislature has not criminalized that conduct, it would be a violation of the separation of powers doctrine for this Court to create new criminal offenses.

PROPOSITION OF LAW NO. II: As effective October 17, 2011, R.C. 3719.013 mandated that “controlled substance analogs” be treated as Schedule I controlled substances for purposes of the Revised Code. However, this mandate did not make controlled substance analogs Schedule I controlled substances, nor did it prohibit the possession or sale of controlled substance analogs.

On October 17, 2011, R.C. 3719.013 mandated “controlled substance analogs” be treated as Schedule I controlled substances for purposes of the Revised Code; it did not, however, make controlled substance analogs Schedule I controlled substances or outlaw the possession or sale of analogs. The State has alleged that whenever the Revised Code mentions “Schedule I,” it necessarily includes “controlled substance analogs.” The State’s analysis is based on flawed logic. The language at issue read, “[a] controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in Schedule I.” Sub. H.B. 64. For the purposes of this argument, the relevant language thus reads, “[a] controlled substance analog . . . shall be treated . . . as a controlled substance in Schedule I.” *Id.*

It is important to distinguish between what this language actually says, and what the State has alleged it says. The language does not say controlled substance analogs *are* Schedule I drugs. The language says controlled substance analogs are to *be treated as* Schedule I drugs. Thus, wherever the Revised Code stated, “controlled substance analog”, it could also be read as, “controlled substance analog, which is to be treated as a controlled substance in Schedule I.” The reverse logic, however, is not true. The General Assembly did not pass any legislation saying that “controlled substances” or “Schedule I drugs” included controlled substance analogs. In fact, if one consulted the list of controlled substances, controlled substance analogs would not be listed under any Schedule.

An analogy that would shed more light on the matter would be the difference between a

square and a rectangle. All squares are rectangles, but not all rectangles are squares¹. It is appropriate to refer to a square as a square or rectangle; referring to a square as a square is simply more descriptive. It is not appropriate, however, to refer to a rectangle as a square.

The State has, unfortunately, confused a rectangle as being a square and proceeded to write a brief based on a legal falsity equivalent to a young mathematician mistaking all rectangles for being squares. Cocaine is a Schedule I drug. Not all Schedule I drugs are cocaine. When the Revised Code refers to Schedule I drugs or controlled substance, the Revised Code is referring to a list of drugs that have been deemed controlled substances and placed in five categories. R.C. 3719.41. Controlled substance analogs are not on the list of Schedule I drugs, or even on the list of controlled substances. Just as it is incorrect to insert the word “square” for “rectangle”, it is incorrect to insert the word “controlled substance analog” for “Schedule I” or “controlled substance”.

PROPOSITION OF LAW NO. III: The judiciary branch interprets and applies law and also has the ability to determine if a law is unconstitutional. There was no violation of the separation of powers in this case, as the judiciary interpreted and applied the law and refused to apply the law in the unconstitutional manner that the State requested.

The separation of powers doctrine is not violated when the judiciary exercises the ability to interpret and apply the law, and refuses to apply the law in an unconstitutional manner. “[T]he legislative branch plays an important and meaningful role in the criminal law by defining offenses and assigning punishment, while the judicial branch has its equally important role in interpreting

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A square is defined as “a four-sided shape that is made up of four straight sides that are the same length and that has four right angles” whereas a rectangle is defined as “a four-sided shape that is made up of two pairs of parallel lines and that has four right angles”. *See, e.g.*, Merriam-Webster, <http://www.merriam-webster.com/dictionary/rectangle> and <http://www.merriam-webster.com/dictionary/square> (accessed June 13, 2015).

those laws.” *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753, 764. Further, “while we must respect the fact that the authority to legislate is for the General Assembly alone, we must also ensure that its legislative prerogative is not unbridled. The General Assembly cannot require the courts “to treat as valid laws those which are unconstitutional.”” *Id.* at 765, quoting *Bartlett v. State*, 73 Ohio St. 54, 58, 75 N.E. 939, 3 Ohio L. Rep. 412 (1905).

The judiciary branch validly exercised its powers in this case by determining that the legislative branch had not made certain conduct illegal at the time of Defendant’s conduct. The judiciary branch did not make new law and thereby violate the separation of powers. In fact, the lower courts in this case refused to do what the State was asking the lower courts to do, and now what the State is asking this Court to do: criminalize conduct that was not criminal at the time of Defendant’s alleged actions.

Tellingly, the legislature’s own comments on legislation passed after Defendant’s alleged conduct and arrest show that the offenses of trafficking and possession of controlled substance analogs were not created until after the conduct in this case. The General Assembly later added the language “controlled substance analog” to the trafficking and possession statutes “to *create* the offenses of trafficking in and possession of controlled substance analogs”. 129 H.B. 344.

PROPOSITION OF LAW NO. IV: The policy arguments set forth in the Amicus Curiae Memorandum by Ohio Attorney General Michael DeWine are not appropriate arguments on which to base an appellate decision.

The Ohio Attorney General’s Memorandum sets forth policy arguments that are not valid grounds for which to base an appellate decision. First, the Attorney General alleges the decisions by the lower courts “undercut Ohio’s efforts to fight synthetic drugs, which are a serious hazard to users (who are often young), their families, law enforcement, and medical personnel.” (Amicus Memorandum, pg. 1). The General Assembly outlawed the possession and trafficking of controlled

substance analogs in December 2012, and the decisions of the lower courts do not effect those new prohibitions. Thus, the lower courts are not doing anything to hinder the General Assembly's prohibitions.

Second, the Attorney General's Memorandum asks this Court to exercise jurisdiction due to conflicts with other Ohio convictions, however, the Memorandum fails to cite a single conviction in support of this allegation. This appeal was not brought as a certified-conflict case pursuant to Supreme Court Rules of Practice 5.03 and 8.01. Further, no conflicts have been identified; the Attorney General's Memorandum is void of any support for the allegation that there is a conflict. (Amicus Memorandum, pg. 8). As no such conflict is known to exist, this is not an appropriate grounds for review.

Third, the Attorney General's Memorandum requests this Court overturn the lower court decisions to "protect the State from exposure to wrongful-imprisonment liability". (Amicus Memorandum, pg. 8). The Attorney General is asking this Court to overturn the lower courts' decisions that no criminal offense existed when the defendants were arrested and charged so that the State can avoid liability for its own illegal actions. This reasoning is concerning. The State is aware that based on the court decisions to date, the State is wrongfully imprisoning individuals, yet, instead of remedying the problem, it is asking this Court to overturn decisions so that the State does not have to pay individuals that it wrongfully imprisoned. It is respectfully submitted that reversing a lower court's decision in order to help the State avoid liability for illegal actions by the State is not an appropriate grounds for review or reversal.

CONCLUSION

For the reasons discussed above, as well as in the companion defendant's memorandum and the lower court decisions, this case does not involve matters of public and great general interest or a substantial constitutional question. Further, the lower courts have unanimously held that even if the allegations are all true, they do not constitute a criminal offense. Thus, this is not a felony matter. The lower court decisions were correct and the General Assembly has enacted new legislation creating the offenses of trafficking and possession of controlled substance analogs. It would not be an efficient use of this Court's limited resources to accept review at this time. This Court should decline jurisdiction.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was duly served upon Mr. Steven Taylor, at the Franklin County Prosecuting Attorney's Office, 373 S. High St., 14th Floor, Columbus, Ohio 43215, on June 15, 2015 by regular U.S. post.

/s/ David H. Thomas
DAVID H. THOMAS