

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO :
Plaintiff/Appellant, : CASE No. 15-1259
-v- : 10TH DIST. CASE No. 14 AP 517
SOLEIMAN MOBARAK :
Defendant/Appellee. :

APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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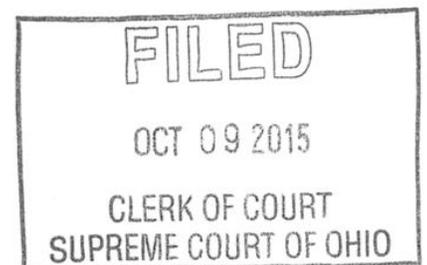


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WHY THIS COURT SHOULD DECLINE JURISDICTION

On August 26, 2015, this Court declined to accept jurisdiction in *State v. Smith*, Supreme Court Case No. 2015-0406, on appeal from the Tenth District Court of Appeals—the same appellate district involved in this case. This Court has declined to accept jurisdiction on identical propositions of law involving the same portions of the Revised Code, the same basis for prosecution, and the same flawed arguments at the appellate level. This Court should also decline jurisdiction here.¹

There is no constitutional question or great public interest to be addressed in this case. The State's sole constitutional argument is a separation of powers claim that fails on its face and belies a fundamental misunderstanding of that doctrine. And there is no compelling need for the Court to address the State's "interpretation of law" questions—the law in question has been changed and the number of cases directly affected by the statute prior to the change is in the single digits. Mr. Mobarak is not aware of, and the State has not cited, more than a handful of pending cases that deal with similar issues, most (if not all) of which are already resolved at the trial or appellate level.

The State itself concedes that the Tenth District's unanimous rejection of the State's position "do(es) not affect the current scheme as to trafficking and possession."² As to the State's other arguments (regarding provisions of the criminal drug code that do not expressly include analogs), if the General Assembly is displeased with those laws, it has the power to change them. "Courts 'must respect

¹ The state apparently agrees—the introduction to their Memorandum is captioned "Explanation of Why This Court Should Decline Jurisdiction."

² State's Mem.Supp., at p.5

the fact that the authority to legislate is for the General Assembly alone.’³ Jurisdiction should be declined.

Mr. Mobarak is aware that a single panel of the Twelfth District Court of Appeals has reached a different conclusion than the Tenth District consistently has.⁴ The *Shalash* court does not appear to have been aware of this Court’s decision to decline to exercise jurisdiction, as it is not referenced in the decision. In any case, a motion to certify a conflict is pending in the Twelfth District, and, depending on the outcome, a motion for reconsideration based on the Court’s decision here and/or in *State v. Mohammad*⁵ may follow. The Court should not consider *Shalash* until that decision has some finality.

Statement of the Facts

Mr. Mobarak has no objection to the statement of facts as presented by the State (other than preserving on the record all objections made in the lower courts), as the only fact necessary for this Court to make any decision—the dates of his indictments—is not in dispute.

Law and Argument

I. The Tenth District properly applied the rule of lenity—the statute as it was first drafted is seriously ambiguous, and the subsequent change in the law reflects that.

The Tenth District correctly recognized that, prior to December of 2012, the Revised Code did not expressly prohibit the sale and possession of controlled substance analogs. The State continues to imply that no ambiguity existed in the

³ *Id.*, at p.15, quoting *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424.

⁴ *State v. Shalash*, 12th Dist. Warren No. CA2014-12-146, 2015-Ohio-3836.

⁵ 10th Dist. Franklin No. 14AP-662, 2015-Ohio-1234.

trafficking and possession statutes. Three panels and eight separate judges of the Tenth District have now disagreed.

This Court is familiar with the Tenth District's reasoning in *State v. Smith* and its progeny. In brief, the statutory setup as it existed before December of 2012 was ambiguous because, at minimum: 1) R.C. 2925.01 did not define "controlled substance analogs" or incorporate the definition from R.C. 3719.01, even though 2925.01 incorporated other definitions from that section; 2) the preamble to the previous statute suggests that one of the purposes of the new law was "to define a 'controlled substance analog' for purposes of the **Controlled Substances Law**," and not for purposes of "any provision" of the Revised Code; 3) the law that created the CSA statute also criminalized the sale and possession of "spice" (and specifically added "spice" to the schedule of controlled substances) but not CSAs; 4) the generally "civil" nature of Chapter 3719 in contrast to Chapter 2925; 5) the placement of the analog definition in a totally different Chapter of the Revised Code, in contrast to the uniform federal analog act; and, 6) the confusing provision that a controlled substance analog does not mean a controlled substance.

Mr. Mobarak agrees that the General Assembly's intent in enacting a law is, of course, the chief consideration in interpretation. That is why it is critical to recognize that the legislature did not intend to create the offenses of trafficking in and possession of analog drugs when it first enacted the CSA Act in 2011. Rather, it intended to criminalize those acts only when House Bill 334 was passed roughly a year later. The General Assembly stated that its intent in passing House Bill 334

was “to **create** the offenses of trafficking in and possession of” controlled substance analogs.⁶”

If Ohio’s law were as clear as the State claims—that is, if the offenses Mr. Mobarak was charged with already existed—then HB 334 would have been enacted for no sound reason. And, as the State agrees, the General Assembly “is not presumed to do a vain or useless thing * * * when language is inserted in a statute, it is inserted to accomplish some definite purpose.”⁷”

The State argues that the Court should apply the rule of lenity only in the cases of “grievous” ambiguity. The ambiguity in the statute is the most grievous one that a criminal statute can contain—it could mean the difference between incarceration and freedom. At best, the statutory scheme in effect at the time of the charged offenses in this case created an ambiguity that, in accordance with the rule of lenity, must be interpreted in Mr. Mobarak’s favor. The eight different appellate judges who decided *Smith, Mohammad*, and this case properly recognized that, and properly applied the rule of lenity. This Court should uphold their decision, and decline jurisdiction.

II. The “shall be treated” provision did not incorporate CSAs into the trafficking and possession statutes.

A. *McFadden* involves the interpretation of a federal statute and a different question than the one before the Court.

The State sees *McFadden v. United States*⁸ as the silver bullet to save the flawed statutory scheme. But *McFadden* did not directly address the interpretation

⁶ Preamble to 129 Sub. H.B. 334, emphasis added

⁷ *Celebrezze v. Hughes*, 18 Ohio St.3d 71, 74 (1985)

⁸ 135 S.Ct. 2298 (2015)

of the federal “shall be treated” provision. It addressed the culpability necessary for conviction under the federal analog statute. Indeed, the Supreme Court’s docket reveals that the “shall be treated” language in the federal analog statute was not discussed at any point during oral argument or in any significant way during the briefing.

The *McFadden* Court did not interpret or analyze the “shall be treated” language of 21 U.S.C. §813 because it did not have to do so. Instead, it was asked to determine the mens rea requirements for possession and sale of analogs. The Court accordingly fashioned a knowledge requirement based on an interpretation of the language of §813 that neither party contested.

If the *McFadden* Court had been tasked with reviewing and interpreting the federal “shall be treated” language, perhaps the case would have had more bearing on Mr. Mobarak’s. As it stands, the Court merely took a position on that statute that all parties assumed to be correct, in much the same way that the Court assumed that the government could prove a substance was an analog by showing two elements.⁹

Chief Justice Roberts, in his concurrence, recognized that the “shall be treated” language was something of a false equivalency. Although he ultimately agreed that the government did not identify the correct mental state for conviction (and thus, agreed that the case should be remanded), his opinion reveals doubt that

⁹ *Cf. McFadden*, Note 2 (“The Government has accepted, for purposes of this case, that it must prove two elements to show that a substance is a controlled substance [analog] * * *. Because we need not decide in this case whether that interpretation is correct, we assume for the sake of argument that it is.”)

the “shall be treated” language of the federal Analogue Act created a clear interchangeability between scheduled controlled substances and their analogs. By painting with the broad “shall be treated” brush and criminalizing possession of all analogs even when the possessor has no idea of their makeup or even their names, the majority removed a critical element—that of knowledge—from the statutory scheme. Roberts cautioned that the majority’s statements on the issue “should therefore not be regarded as controlling if the issue arises in a future case.¹⁰”

McFadden does not have the precedential value in this matter that the State suggests. In fact, as it involves the interpretation of a different aspect of a different federal law, it is arguably of no precedential value to this case. The Tenth District rightly recognized that.

B. The logic of the “shall be treated” language does not make scheduled controlled substances and analogs interchangeable.

The State’s argument can be distilled as follows: because of the “shall be treated” language in R.C. 3719.013, every time in the Revised Code that the phrase “schedule I controlled substances” appears, the phrase “controlled substance analogs” may be used in its place. As the Tenth District recognized at oral argument, this is not what the plain language of the statute actually says, and the State’s interpretation defies the rules of logic.

R.C. 3719.013 states that an analog “shall be treated for purposes of any provision of the Ohio Revised Code as a controlled substance set forth in Schedule

¹⁰ *McFadden*, supra (ROBERTS, C.J., concurring).

I.” In other words, whenever the phrase “controlled substance analog” appears, the reader can freely substitute the phrase “schedule I controlled substance.”

By contrast, no provision of the Revised Code states that “schedule I controlled substance” means controlled substance analogs. In logic, the premise A = B (syllogistically, “all A are B”) does not mean that B = A. The State’s interpretation, then, does not withstand the scrutiny of a logical analysis of the plain statutory wording. The Tenth District acted appropriately in vacating his conviction, and there is no need for further review by this Court.

III. The Tenth District correctly interpreted the Revised Code, and the dictates of *Marbury v. Madison* persist.

As the State points out, “the General Assembly has plenary law-making authority to pass any law unless specifically prohibited by the federal or state constitutions.¹¹” Of course, “it is emphatically the province and duty of the judicial department to say what [that] law is.¹²” The General Assembly passed a law (R.C. 3719.013), and Mr. Mobarak asked the court of appeals to say what that law meant.

Whatever the legislature may have intended, the law says what it says. If it is to be revised, that is the province of the General Assembly, and if it is to be interpreted, that is the duty of the Court. The Tenth District’s reversal of Mr. Mobarak’s conviction is not a “violation” of the principal of separation of powers—it is an example of it. Jurisdiction should be declined.

¹¹ State’s Mem.Supp., at p. 15.

¹² *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Conclusion

This Court has declined to accept jurisdiction on identical propositions of law. It should decline jurisdiction here.

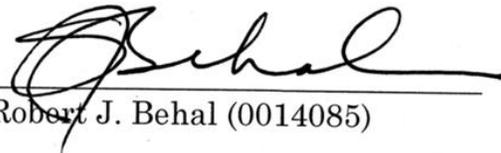
Respectfully submitted,



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CERTIFICATE OF SERVICE

On the 9 day of October, 2015, I served a copy of the foregoing on Plaintiff/Appellant's counsel via e-mail at sgilbert@franklincountyohio.gov.



Robert J. Behal (0014085)