

IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO,

Case No. 15-774

Plaintiff-Appellant,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

GHASSAN MOHAMMAD,

Defendant-Appellee

Court of Appeals
Case No. 14AP-662

**MOTION FOR RECONSIDERATION
OF PLAINTIFF-APPELLANT STATE OF OHIO**

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**MOTION FOR RECONSIDERATION
OF PLAINTIFF-APPELLANT STATE OF OHIO**

Pursuant to S.Ct.Prac.R. 18.02(B)(1) & (2), and for the reasons stated in the attached memorandum in support, plaintiff-appellant State of Ohio respectfully requests that this Court reconsider its November 10, 2015, ruling that declined to accept jurisdiction pursuant to S.Ct.Prac.R. 7.08(B)(4).

Respectfully submitted,

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MEMORANDUM IN SUPPORT

This appeal arises from the Tenth District's decision concluding that it was legal to traffic and possess "controlled substance analogs" at the time of defendant Mohammad's acts in trafficking and possessing analogs on August 13, 2012.

In the State's May 15, 2015, memorandum supporting jurisdiction, the State raised three propositions of law for this Court's review.

Proposition of Law No. 1: The concept of "strict construction," also known as the rule of lenity, comes into operation at the end of the process of construing what the legislative body has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. Courts must exhaust all available means of construction before arriving at the conclusion that the statutory text is so grievously ambiguous as to require strict construction.

Proposition of Law No. 2: As effective October 17, 2011, R.C. 3719.013 mandated that "controlled

substance analogs” shall be treated as Schedule I controlled substances for purposes of any provision in the Revised Code. The trafficking and possession statutes were part of the Revised Code and therefore were subject to this broad incorporation of analogs into the Revised Code.

Proposition of Law No. 3: In applying a statute, the judicial branch has a duty under the doctrine of separation of powers to apply the clearly-expressed legislative intent of the General Assembly regardless of the judicial branch’s own preferences regarding organization or manner of expression. It violates the separation of powers for the judicial branch to disregard the broad reach of R.C. 3719.013 making controlled substance analogs applicable to any provision in the Revised Code.

In a decision announced on November 10, 2015, this Court (6-1) declined review of the present case. This followed the earlier August 26, 2015, decision in *State v. Thomas Smith*, No. 15-406, in which this Court (4-3) declined review of the same propositions of law in that case.

The State respectfully requests that this Court grant reconsideration in the present *Mohammad* case and thereupon accept review.

Although the decision to decline review was announced on November 10, 2015, this Court very well may have conferenced thereon two or more weeks before such announcement, which very well could have meant that this Court voted on whether to accept the present *Mohammad* case during the week of October 26th.

Events subsequent to that time have added to the need to grant review of these analog cases, including the present *Mohammad* case. On November 4, 2015, a Warren County defendant, Hamza Shalash, lodged his certified-conflict appeal in this

Court under Sup.Ct. No. 15-1782. The certified conflict is based on the direct conflict between the Twelfth District's decision in *State v. Shalash*, 12th Dist. No. CA2014-12-146, 2015-Ohio-3836, and the trilogy of decisions by the Tenth District in *Smith, Mohammad, and Mobarak*. See *State v. Shalash*, No. 15-1782, 11-4-15 Notice of Certified Conflict. The Twelfth District in *Shalash* expressly rejected the Tenth District's analysis and held that analogs *were* illegal under the trafficking and possession statutes in the time period from October 17, 2011, to December 19, 2012. There is no doubt about the existence of a certifiable conflict between the two districts, and therefore it should be only a matter of time before this Court will formally accept the certified-conflict appeal in *Shalash*.

Given that *Shalash* should be accepted based on the conflict with *Smith, Mohammad, and Mobarak*, there are strong reasons to accept review of the present *Mohammad* case, as well as the State's appeal in the *Mobarak* case (Sup.Ct. No. 15-1259). It would be highly incongruous to accept the defense appeal in the *Shalash* case based on a conflict with the Tenth District's decisions while not accepting review of the State's appeals from two of those very same Tenth District decisions that create the very same conflict.

Also, there are two cases pending in the Tenth District that will be certifiable as in conflict with *Shalash* when the Tenth District decides to adhere to its earlier *Smith-Mohammad-Mobarak* trilogy. See *State v. Mustafa*, 10th Dist. Nos. 15AP-465 & -466. Those cases will be subject to review here on discretionary and certified-conflict review.

It has been this Court's practice to accept a lead case and then accept and hold cases presenting the same question(s) while the lead case is being decided. This Court has also granted reconsideration in order to accept and hold a case in which it had earlier declined review. See, e.g., *State v. Allen*, 138 Ohio St.3d 1472, 2014-Ohio-1674, 6 N.E.3d 1206; *Ford Motor Credit Co. v. Agrawal*, 132 Ohio St.3d 1486, 2012-Ohio-3334, 971 N.E.2d 963. Such reconsiderations represent an acknowledgment that this Court's review should not depend on the happenstance of timing when, by granting reconsideration, this Court can accept and hold a case that presents the same issue(s) as a later-accepted case.

If this Court accepts the *Shalash* case as the lead case, this Court could grant reconsideration in the present case, accept it for review, and hold it pending the outcome of *Shalash*. Or this Court could grant reconsideration and accept this case and make this case the lead case and then hold *Shalash* pending the outcome of the present case. Either approach would be appropriate. It would be unfortunate, however, if the present case were not accepted given that review will soon be in the offing in *Shalash*. The people of Franklin County should not have the bad "luck" of having Mohammad and Mobarak avoid very serious criminal charges based on mere timing when there is a very real chance that, in the end, this Court will agree with the Twelfth District and thereby reject the Tenth District's flawed approach to statutory construction in these analog cases.

Also pending in this Court is the pro se discretionary appeal of *Shalash's* co-defendant, Haitham *Shalash*, in Sup.Ct. No. 15-1752, in which the defendant is

raising the same analog issues in an appeal from the Twelfth District, which had affirmed an order denying his motion to withdraw plea.

Finally, recent cases from this Court have provided even more support for the State's appeal here. *State v. South*, ___ Ohio St.3d ___, 2015-Ohio-3930, ¶ 8; *Risner v. Ohio Dept. of Natural Resources*, ___ Ohio St.3d ___, 2015-Ohio-3731, ¶¶ 12, 15, 16, 17, 18.

This Court recognized in *South* that, “[w]hen we construe statutes relating to the same subject matter, we consider them together to determine the General Assembly’s intent – even when the various provisions were enacted separately and make no reference to each other.” *South*, ¶ 8. “This requires us to harmonize provisions unless they irreconcilably conflict.” *Id.* “In doing so, ‘we must arrive at a reasonable construction giving the proper force and effect, if possible, to each statute.’” *Id.* The Tenth District violated each of these principles by insisting on the need for a “cross-reference” between R.C. 3719.013 and R.C. Chapter 2925 and by insisting that such cross-reference must be located in R.C. Chapter 2925. As *South* shows, there need not be any “cross-reference.” Indeed, R.C. 3719.013 itself constituted a clear “cross-reference” incorporating analogs into other parts of the Revised Code.

This Court in *Risner* also recognized several points that aid the State’s appeal. Most importantly, the *Risner* Court recognized that, in the phrase “any other section of the Revised Code,” the word “[a]ny” means “all” and that such “broad, sweeping language” must be accorded “broad sweeping application.” *Risner*, ¶ 18. The Tenth District violated the various principles stated in *Risner* by not according broad,

sweeping application to the language of R.C. 3719.013, which incorporated analogs into “any other provision of the Revised Code”.

These various matters are not a mere reargument of the State’s appeal. The matters discussed herein all post-dated the filing of the State’s May 15th memorandum supporting jurisdiction, and therefore the State necessarily could not have provided any argument in regard to these matters. This Court’s rules strictly barred the State from providing any supplemental argument. S.Ct.Prac.R. 7.04(A)(1). Although the State provided supplemental authority citing the *Shalash* decision in late September, the State could not provide any discussion or argument when it filed that supplemental authority. S.Ct.Prac.R. 7.04(A)(2).

The State also provided supplemental authority on November 2, 2015, citing the Twelfth District’s entry certifying a conflict in *Shalash*. But, again, the State could not provide any supplemental argument. In addition, this Court might have already conferenced and voted on the present *Mohammad* case during the previous week or sooner, and therefore it may not have taken the State’s November 2nd supplemental authority into account.

It is also unlikely that this Court took into account the November 4th filing of the certified-conflict appeal by the defense in the *Shalash* case.

For the foregoing reasons, the State respectfully requests that this Court reconsider and accept review of the State’s appeal in the present *Mohammad* case.

Respectfully submitted,

/s Steven L. Taylor
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by e-mail on November 19, 2015, to David H. Thomas, dthomas@taftlaw.com, Taft Stettinius & Hollister LLP, 65 East State Street, Suite 1000, Columbus, OH 43215-4213, counsel for defendant, and to Eric E. Murphy, State Solicitor, eric.murphy@ohioattorneygeneral.gov, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, counsel for amicus curiae Ohio Attorney General Michael DeWine.

/s Steven L. Taylor
STEVEN L. TAYLOR