

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2015-0774
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
GHASSAN MOHAMMAD,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case No. 14AP-662

**MEMORANDUM OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
MICHAEL DEWINE IN SUPPORT OF RECONSIDERATION**

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MEMORANDUM IN SUPPORT OF RECONSIDERATION

Under Rule 18.02(C) of the Supreme Court Rules of Practice, *amicus curiae* Ohio Attorney General Michael DeWine urges the Court to reconsider its November 10, 2015 decision declining jurisdiction in this case. The Court should grant review of the State's appeal because the decision below has been certified to be in conflict with a recent decision of the Twelfth District Court of Appeals. This conflict highlights the unjust and inconsistent outcomes created by the Tenth District's decision in this case and others. For the following reasons, the Court should reconsider its decision and grant review.

1. The decision below is at odds with the Twelfth District's decision in *State v. Shalash*, which has been certified as a conflict to this Court.

This Court should grant review because the decision below has been certified to be in conflict with the decision of another appellate district. Disagreeing with the Tenth District's resolution of this case and two others, the Twelfth District has certified the question of "whether 'controlled substance analogs' were criminalized as of . . . the effective date of House Bill 64." See *State v. Hamza Shalash*, S. Ct. No. 2015-1782, Order Certifying Conflict at 2. Given that this Court is likely to resolve the question posed by the Twelfth District, it would be wise for the Court to grant review of (or at least hold) the other half of the conflict.

In *State v. Hamza Shalash*, 2015-Ohio-3836 (12th Dist.), the Twelfth District affirmed defendant Hamza Shalash's conviction and eleven-year prison sentence for multiple counts of aggravated trafficking of controlled substance analogs under the same statute that governs this case. See *Shalash*, 2015-Ohio-3836 ¶ 1. The *Shalash* court rejected the Tenth District's conclusion in *State v. Smith*, 2014-Ohio-5303, that H.B. 64 did not criminalize the possession or sale of controlled substance analogs. See *id.* ¶¶ 20-28 & n.3. The Twelfth District subsequently certified the conflict, and the Certified Conflict Case has been added to this Court's docket. See

State v. Shalash, No. 2015-1782, Order Certifying Conflict at 2 (“Upon consideration, the court finds that its decision is in conflict with the Tenth District’s decisions in *Smith*, *Mohammad*, and *Mobarek* [sic].”). The Twelfth District has also issued a companion decision in *State v. Haitham Shalash*, 2015-Ohio-4237, in which it reiterated its rejection of *Smith* and affirmed the denial of a defendant’s motion to withdraw his guilty plea. *See id.* ¶¶ 17-19.

The Court’s role in resolving conflicts is perhaps at an apex when the conflicting cases involve crime and personal liberty. This appeal embodies that idea: applying the same law to similar facts and allegations, Mohammad is skipping free while two Warren County defendants face years behind bars. The fact that this Court recently declined jurisdiction in *State v. Smith*, S. Ct. No. 2015-0406, should not be a barrier to granting review in this case. *See* 10/28/2015 *Case Announcements*, 2015-Ohio-4468 (denying motion for reconsideration). Even if the Court declines review here, at least two Warren County defendants will sit in jail for five and eleven years, respectively—and for good reason. But surely they will wonder why several men from Franklin County walked free for engaging in the same conduct at the same time under the same law. Thus, even after *Smith*, disparate outcomes will pile up by letting another Franklin County defendant escape the consequences of his actions. This Court should grant review so that it has the final say in these cases.

Jurisdiction is especially warranted here because the *Shalash* decision rests on sound legal principles, whereas the decision below is premised on a mix-up of basic facts. *See* Mem. *Amicus Curiae* Supp. Jur. 11-13 (discussing the *Mohammad* court’s misconception that synthetic cathinone products are the same as therapeutic bath salts). The Twelfth District determined that “[t]he plain and clear language of R.C. 3719.013 incorporated controlled substance analogs into every other chapter of the Revised Code, including R.C. Chapter 2925.” *See Shalash*, 2015-

Ohio-3836 ¶¶ 24-25. This obviated the need to resort to the rule of lenity or canons of statutory construction like the Tenth District did in this case and in *Smith*. *Id.* The Twelfth District’s unanimous and well-reasoned opinion shows how far afield the court below strayed, and how easily it could be corrected.

2. Declining jurisdiction in this case will affect many pending and future cases.

The legal question presented by this appeal matters for many present and future cases. This Court’s docket is already becoming cluttered with controlled substance analog cases from the relevant time period. But the issue will not disappear with time. Granting review now would settle this appeal, dispense with pending cases, and end percolating legal questions.

In addition to this case, two similar jurisdictional appeals and one certified conflict are now pending in this Court: *State v. Mobarak*, S. Ct. No. 2015-1259 (seven-count conviction and 35-year prison sentence overturned as plain error by the Tenth District); *State v. Hamza Shalash*, S. Ct. No. 2015-1782 (11-year prison sentence affirmed by the Twelfth District); and *State v. Haitham Shalash*, S. Ct. No. 2015-1752 (Twelfth District upheld denial of motion to withdraw guilty plea from defendant serving five-year prison sentence). At least four more cases are pending in the courts below. The State’s appeals from the dismissal of the indictments in the consolidated cases *State v. Mustafa*, Nos. 15AP-465 & 15AP-466, are currently pending in the Tenth District. Two other cases are pending in the Franklin County Court of Common Pleas. *See State v. Hasan Mobarak*, No. 12CR-5583 (motion to withdraw guilty plea pending); *State v. Ahmad Mobarak*, No. 13CR-532 (motion to dismiss indictment pending). And no doubt future cases stemming from the same legal question will crop up, with defendants arguing that “the General Assembly has not yet chosen to create offenses such as corrupting another with controlled substance analogs” because it never added analog-specific language to other drug offenses in Title 29. *See* Def’s Opp. Jur. at 2; *but see* Mem. *Amicus Curiae* Supp. Jur. 7-8.

Allowing the decision below to stand will set a dangerous precedent not just for other drug crimes in Title 29, *see id.*, but also for any defendant who wishes to evade plain statutory language by making creative arguments about the location of a provision in the Revised Code. This Court's review will make a difference in preventing the development of a misguided line of cases.

CONCLUSION

For the foregoing reasons, the Court should grant the State's Motion for Reconsideration, accept jurisdiction over this case, and reverse.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of *Amicus Curiae* Ohio Attorney General Michael DeWine in Support of Reconsideration was served on November 19, 2015, by U.S. mail on the following:

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