ORIGINAL

IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO,

Plaintiff-Appellant,

-vs-

GHASSAN MOHAMMAD,

Defendant-Appellee

Case No. 15-0774

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

Court of Appeals Case No. 14AP-662

MEMORANDUM OF PLAINTIFF-APPELLANT STATE OF OHIO SUPPORTING JURISDICTION

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: staylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR APPELLANT STATE OF OHIO

DAVID H. THOMAS 0071492
511 South High Street
Columbus, Ohio 43215
Phone: 614-228-4141

COUNSEL FOR DEFENDANT-APPELLEE

FILED
MAY 15 2015
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION 1

STATEMENT OF FACTS 7

ARGUMENT 8

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. 8

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. 10

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. 14

CERTIFICATE OF SERVICE 16

APPENDIX

3-31-15 Decision A-1

4-1-15 Judgment A-5

EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

This case should be considered a companion to *State v. Smith*, Sup.Ct. No. 15-406, which presents the same three propositions of law. The panel's decision below follows in the footsteps of *Smith* but heightens even more the need for review.

The panel below introduced a new "unworkability" argument into the analysis based on its unsourced claim that "bath salts" are merely Epsom salts someone bathes in. In fact, the term "bath salts" is street slang used by analog dealers referring to a family of powerful synthetic cathinones. As stated by the National Institute on Drug Abuse:

> The term "bath salts" refers to an emerging family of drugs containing one or more synthetic chemicals related to cathinone, an amphetamine-like stimulant found naturally in the khat plant.
>
> Reports of severe intoxication and dangerous health effects associated with use of bath salts have made these drugs a serious and growing public health and safety issue. The synthetic cathinones in bath salts can produce euphoria and increased sociability and sex drive, but some users experience paranoia, agitation, and hallucinatory delirium; some even display psychotic and violent behavior, and deaths have been reported in several instances.
>
> * * *
>
> Bath salts have been linked to an alarming surge in visits to emergency departments and poison control centers across the country. Common reactions reported for people who have needed medical attention after using bath salts include cardiac symptoms (such as racing heart, high blood pressure, and chest pains) and psychiatric symptoms including paranoia, hallucinations, and panic attacks.

Drug Facts: Synthetic Cathinones ("Bath Salts"), at www.drugabuse.gov/publications/drugfacts/synthetic-cathinones-bath-salts (last updated Nov. 2012; last viewed 5-12-15).

These substances are *not* Epsom salts.

The synthetic cathinone products marketed as "bath

> salts" to evade detection by authorities should not be confused with products such as Epsom salts that are sold to improve the experience of bathing. The latter have no psychoactive (drug-like) properties.

Id. As NIDA further states, "[t]he manmade cathinone products sold as 'bath salts' should not be confused with Epsom salts (the original bath salts), which are made of a mineral mixture of magnesium and sulfate and are added to bathwater to help ease stress and relax muscles." What are Bath Salts?, at teens.drugabuse.gov/drug-facts/bath-salts (last updated May 2015; last viewed 5-12-15).

The State informed the panel below at oral argument that "bath salts" are synthetic cathinones, but the panel still proceeded to make this egregious error.

Instead of attempting to regulate Epsom salts, Sub.H.B. 64 was enacted by the General Assembly effective 10-17-11, in an effort to combat actual designer drugs having a substantially similar chemical structure and effect as drugs already listed in Schedule I or II. The *Columbus Dispatch* reported the next day that medical professionals gladly welcomed H.B. 64's banning of "bath salts":

> Ohio's ban on synthetic marijuana and "bath salts" went into effect yesterday, to the relief of physicians who say the fallout from using the designer drugs has become a daily event in some local emergency departments.
>
> Sold under brand names such as Spice and Vanilla Sky as "incense" or "bath salts," the substances have little in common with legitimate products meant to perfume a room or enhance a warm bath.
>
> Physicians say the worst of the reactions tend to come from the bath salts, which are smoked, snorted or injected. The drug can increase blood pressure and heart rate and trigger confusion, paranoia and hallucinations.
>
> Dr. Paul Gabriel, director of emergency medicine at Grant Medical Center, likened the explosive reactions to

> those that doctors saw from angel dust 40 years ago.
>
> "These guys are just out of their minds," he said.
>
> The ban in Ohio on the sale and possession of the substances comes ahead of a similar action being sought by the U.S. Drug Enforcement Administration.
>
> * * *
>
> At Grant, the cases tend to come in bunches of patients who tried the drug together, Gabriel said.
>
> "Without question, we have seen a large uptick," he said. "It's really become pretty endemic here in Columbus in the last six months or so."

Decker, Docs Glad 'Bath Salts' are Banned, *Columbus Dispatch* (Oct. 18, 2011).

H.B. 64 banned the substances by defining what is deemed to be a "controlled substance analog" and by requiring that such analogs must be treated as Schedule I controlled substances for purposes of any provision in the Revised Code.

> 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.

The panel below erred in quoting a later version that took effect 12-20-12.

Given the "shall be treated" provision in H.B. 64, the legislative intent to penalize the trafficking and possession of a controlled substance analog was crystal clear as of 10-17-11. The General Assembly was providing a specific definition for analogs and was specifying that, for the purposes of *any* provision in the *Revised Code*, an analog *shall* be treated "as a controlled substance in Schedule I." Any provision in the Revised Code referring to "controlled substances" in "Schedule I" would be treated as a matter of law as including analogs within its reach.

When R.C. 2925.03 and R.C. 2925.11 prohibited and penalized the trafficking and possession of "controlled substances" in "Schedule I," those statutes necessarily included analogs, which "shall be treated" as Schedule I controlled substances. The "shall be treated" provision operated hand-in-glove with the "Schedule I" provisions in R.C. 2925.03 and R.C. 2925.11, thereby allowing prosecution for trafficking and possession.

But the Tenth District has constructed artificial barriers to defeat the plain, broad language of H.B. 64. It has noted that the analog definition was set forth R.C. 3719.01(HH) and that the "shall be treated" provision was only set forth in R.C. 3719.013. The chief complaint is that the "shall be treated" language of R.C. 3719.013 is only contained in R.C. Chapter 3719, rather than in R.C. Chapter 2925. The panel below contended that H.B. 64 only acted "in the context of Title 37." Decision, ¶ 9.

This ostrich-like approach amounted to judicial nullification of the General Assembly's plainly-stated intent. On the question of whether the analog concept applied beyond R.C. Chapter 3719, R.C. 3719.013 could not have been more clear. Analogs *shall* be treated as Schedule I controlled substances for purposes of *any* provision in the *Revised Code*. The phrase "any provision" could not get any broader and therefore included the provisions in the trafficking and possession statutes. And it is beyond dispute that the trafficking and possession statutes fell within the "Revised Code." R.C. 1.01 ("Revised Code" is all permanent statutes). The Tenth District *nineteen* times in *Smith* used the "R.C." reference for *R.C.* 2925.03 and *R.C.* 2925.11, thereby conceding that those provisions are in the "Revised Code." The panel below conceded that these drug offenses are part of "Title 29 *of the Ohio Revised Code*." Decision, ¶ 9 (emphasis added). So R.C. 3719.013 was clear in applying the analog concept to the entire Revised

Code, including R.C. 2925.03 and R.C. 2925.11. There is no other way to "interpret" R.C. 3719.013, and the Tenth District has never tried to construe that broad language.

The panel below reiterated the *Smith* panel's complaint that the "shall be treated" requirement was not explicitly included within R.C. Chapter 2925. See *Smith*, ¶¶ 13, 14, 15 ("did not amend R.C. 2925.03 or 2925.11 to expressly prohibit" analogs; "did not amend any part of Chapter 2925"; "no cross-references * * * in Chapter 2925").

All of this was true but insignificant. The General Assembly *did* incorporate analogs into Chapter 2925 by adopting R.C. 3719.013, which provided overarching definitional language indicating that analogs shall be treated as controlled substances in Schedule I for purposes of *any* provision in the *Revised Code*. There was no need to adopt a redundant "cross-reference" within Chapter 2925.

The Tenth District is disregarding the broad reach of R.C. 3719.013 by applying its own preferences as to how the General Assembly should have set up the statutory scheme. The *Smith* panel thought that it would have been better if the General Assembly had included a cross-reference in Chapter 2925 and thought it was better that Congress included the federal definition of "analog" in "the same portion of federal law." But these are organizational and stylistic complaints, not real doubts about the General Assembly's intent in R.C. 3719.013 to treat analogs as controlled substances in Schedule I for purposes of *any* provision of the entire Revised Code. The Tenth District is disregarding R.C. 3719.013 merely because it disagrees with its location in the Revised Code.

The State raises three propositions of law. First, the Tenth District misapplied the doctrine of strict construction by making no real effort to construe what the General Assembly had expressed in R.C. 3719.013. More is required in construing a statute.

The State's second proposition of law arises from the plain language of R.C. 3719.013, indicating that analogs shall be treated as Schedule I controlled substances.

The State's third proposition of law sets forth the lower courts' violation of separation of powers by failing to give effect to the General Assembly's plain intent.

Defendant might argue that review should not be granted because the issue potentially affects only offenses occurring from October 17, 2011 to December 19, 2012. Effective on December 20, 2012, the General Assembly amended R.C. 2925.03 and R.C. 2925.11 to include express references therein to analogs. The Tenth District's locational criticisms do not affect the current scheme as to trafficking and possession. But the Tenth District's flawed analysis still warrants review for several reasons.

First, the Tenth District has done grave injury to separation of powers by disregarding the General Assembly's intent and by misapplying the rule of lenity.

Second, this defendant faced second-degree felonies. Other cases in Franklin County and in other counties will be affected as well. The stakes are high, even if the problem were limited to a specific 14-month time frame.

In any event, the Tenth District's errors will continue beyond December 2012 by affecting the operation of other drug statutes in R.C. Chapter 2925. While the December 2012 amendments expressly inserted "analog" language into the trafficking and possession statutes, the General Assembly did not do so as to other drug statutes like R.C. 2925.02 (corruption of another or minor with drugs), R.C. 2925.04 (illegal manufacture), and R.C. 2925.041 (illegal assembly of precursors). The General Assembly was still counting on R.C. 3719.013 to incorporate the analog concept into those statutes. The Tenth District's analysis will continue to affect the operation of those statutes, hindering

the operation of the statutory scheme in one of Ohio's most-populous counties.

For example, under the Tenth District's flawed analysis, an analog trafficker can provide analogs to *children* and escape the heightened mandatory sentence for a second-degree felony that would otherwise apply to such offenses under R.C. 2925.02(C)(1).

This felony case presents a substantial constitutional question and presents questions of public and great general interest that warrant granting leave to appeal.

STATEMENT OF FACTS

The grand jury indicted defendant on counts of aggravated possession of drugs, trafficking in drugs, and tampering with evidence, alleging the offenses occurred on August 13, 2012. The substance involved in the drug offenses was "a controlled substance included in Schedule I, to wit: a-PVP, which is a controlled substance analog as defined in section 3719.01 * * *, common known as Bath Salts * * *." The drug counts were second-degree felonies because the amounts exceeded five times bulk.

The defense filed a motion to dismiss the drug counts, contending that those counts failed to charge an offense because it had not yet been made a crime to traffic or possess controlled substance analogs at the time. The State filed a memorandum opposing the motion and relying on R.C. 3719.013.

The court eventually issued its decision and entry on August 21, 2014, dismissing the drug counts in Counts One and Two. The State timely appealed from the dismissal. The tampering count remained pending in the trial court.

While the State's first appeal was pending, the trial court mistakenly dismissed the tampering count as well. The State filed a second appeal in that regard.

The appeals were consolidated, and the Tenth District affirmed as to the drug

counts but reversed as to the tampering count and reinstated that count.

ARGUMENT

> 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.

The Tenth District in *Smith* relied heavily on the concept of "strict construction." Claiming "ambiguity," the *Smith* panel concluded that the statutes were not "clear" and therefore the charges were properly dismissed. But the mere existence of real or possible "ambiguity" does not mean that the defendant prevails. A court does not merely conclude there is an "ambiguity" and end the analysis there. Even if the statutory language is "ambiguous," which the State does not concede here, the statutory law still must be *fully* analyzed to attempt to determine its meaning.

Strict construction is not necessary "merely because it [is] possible to articulate a construction more narrow than that urged by the Government." *Moskal v. United States*, 498 U.S. 103, 108 (1990). "[T]he mere possibility of clearer phrasing cannot defeat the most natural reading of a statute * * *." *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 132 S.Ct. 1670, 1682 (2012).

The rule of strict construction, otherwise known as the rule of lenity, "is not applicable unless there is a grievous ambiguity or uncertainty in the language and structure of the Act, such that even after a court has seized every thing from which aid can be derived, it is still left with an ambiguous statute. The rule of lenity comes into operation at the end of the process of construing what [the legislature] has expressed, not

at the beginning as an overriding consideration of being lenient to wrongdoers." *Chapman v. United States*, 500 U.S. 453, 463 (1991) (quote marks and brackets omitted).

"[T]he rule of lenity only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what [the legislature] intended." *Marachich v. Spears*, 133 S.Ct. 2191, 2209 (2013) (quoting another case). "Only where the language or history of [the statute] is uncertain after looking to the particular statutory language, the design of the statute as a whole and to its object and policy, does the rule of lenity serve to give further guidance." Id. at 2209 (quoting in part another case).

Ohio follows the federal precedents in this area. See, e.g., *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, ¶ 40 (same); *State v. Sway*, 15 Ohio St.3d 112, 116 (1984). As this Court has recognized, the rule of lenity "comes into operation at the end of the process of construing what [the legislature] has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers". *Elmore*, ¶ 40 (quoting another case). The mere existence of an "ambiguity" at the start of the process does not dictate strict construction; rather, it calls for an analysis of the statutory text, other statutory indicators, and the application of various canons to resolve the "ambiguity," and only then would strict construction apply if the language cannot be sufficiently resolved.

As this Court has stated, "The canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose. The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly." *Sway*, 15 Ohio St.3d at 116. "[A]lthough criminal statutes are strictly construed against the state, they should not be

given an artificially narrow interpretation that would defeat the apparent legislative intent." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶ 20 (citation omitted); *In re Clemons*, 168 Ohio St. 83, 87-88 (1958) ("strict construction is subordinate to the rule of reasonable, sensible and fair construction according to the expressed legislative intent, having due regard to the plain, ordinary and natural meaning.").

The Tenth District did not exhaust all of the textual clues in the statutory scheme and did not apply all pertinent canons of statutory construction. The court therefore never reached the proper point where it could apply the rule of lenity. The State's first proposition of law warrants review.

> 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.

While the Tenth District in *Smith* asserted that there was "ambiguity" as to whether the "shall be treated" requirement in R.C. 3719.013 extended beyond R.C. Chapter 3719, the language itself answered this question. R.C. 3719.013 provided that the "shall be treated" requirement applied to "*any* provision of the *Revised Code*."

The State had pointed out the broad reach of the phase "any provision." "Any" means "all", i.e., "without limitation." *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40 (1948). The State also noted that the phrase "Revised Code" is defined in R.C. 1.01 to include *all* titles, chapters, and sections in the Revised Code as a whole, including the Criminal Code in R.C. Title 29. This definition of "Revised Code" plainly supports the State's position that the "shall be

treated" requirement in R.C. 3719.013 extended to "all statutes," including the trafficking and possession statutes. But the Tenth District did not parse the words "Revised Code" and did not acknowledge R.C. 1.01. In short, the text in R.C. 3719.013 was the key to the case, and yet the Tenth District has failed to parse "any" or "Revised Code."

The State has also invoked various canons of statutory construction, including the canons that every part of a statute is presumed to have effect and that courts cannot insert or delete words. See, e.g., *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health*, 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26; *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.*, 20 Ohio St.2d 125, 127 (1969); *State ex rel. Bohan v. Indus. Comm.*, 147 Ohio St. 249, 251 (1946). But the Tenth District never mentioned these canons and never sought to apply them. The phrase "any provision of the Revised Code" in R.C. 3719.013 was unqualified. It was unlimited. It readily reached into the Criminal Code. The Tenth District violated these canons by superimposing limitations on the statute's broad reach.

The only canon referenced by the Tenth District in *Smith* was "expressio unius est exclusio alterius," but, even then, the court still failed to fully resolve it, saying only that the canon "arguably" applied. *Smith*, ¶ 12. As the State pointed out, this canon is merely a rule of statutory construction that *sometimes* creates an inference that a listing of items excludes other items not listed. The inference is drawn only when it is sensible to do so, and the maxim cannot be used to defeat apparent legislative intent or unambiguous text. *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, ¶¶ 35-36; *Proctor v. Kardassilaris*, 115 Ohio St.3d 71, 2007-Ohio-4838, ¶ 12; *Baltimore Ravens, Inc. v. Self-Insuring Emp. Evaluation Bd.*, 94 Ohio St.3d 449, 455 (2002).

Such legislative intent is easily shown by R.C. 3719.013, which provided

overarching definitional language indicating that a "controlled substance analog" shall be treated as a controlled substance in Schedule I for purposes of *any* provision in the *Revised Code*. There was no need to include "controlled substance analog" in the definitions incorporated into R.C. 2925.01 because the General Assembly had already accomplished such incorporation via R.C. 3719.013.

Another incomplete aspect of the Tenth District's analysis arises from its selective quotation of the preamble to H.B. 64. The *Smith* panel quoted a part of the preamble as being "suggest[ive]" of a narrow construction. But the quotation was substantially misleading because it did not quote the other parts of the preamble favoring the State. In fact, the preamble *also* stated that the purpose of the Act was "to enact section 3719.013" and "to treat controlled substance analogs as Schedule I controlled substances * * *."

The *Smith* panel's emphasis on a lack of cross-references in Chapter 2925 also violated the standard for construing statutes in pari materia. While claiming there was ambiguity about whether the analog definition applied to R.C. Chapter 2925, the Tenth District avoided parsing the very provision in the Revised Code that addressed that issue, R.C. 3719.013. As this Court has recognized, the inquiry into legislative intent cuts across *all* statutes, and so courts cannot cordon off entire chapters and sections from that inquiry. *Johnson's Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35 (1991). And cross-references are unnecessary. "Statutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent." *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463 (1956).

The *Smith* panel also mentioned a supposed lack of "notice" that R.C. 3719.013

required that analogs would be treated as controlled substances in Schedule I. But the enactment of R.C. 3719.013 gave sufficient notice. "[A]ll are conclusively presumed to know the law." *State v. Pinkney*, 36 Ohio St.3d 190, 198 (1988).

Also flawed was the *Smith* panel's effort to draw a distinction between the "civil" regulation in R.C. Chapter 3719 and the "criminal" enforcement in R.C. Chapter 2925. The *Smith* panel cited R.C. 3719.02, 3719.05, and 3719.06 as examples of this "civil regulation" aspect. But, actually, in R.C. 3719.99, R.C. Chapter 3719 sets forth *criminal* penalties for violations of eleven statutes in that chapter, including R.C. 3719.05 and .06. So even these statutes are reflective of "criminal enforcement." And while R.C. 3719.99 does not set forth a criminal penalty for violating R.C. 3719.02, compliance with the manufacturer-licensing requirements in R.C. 3719.02 serves as an exemption from criminal liability for trafficking and possession under Chapter 2925. See R.C. 2925.03(B)(1); R.C. 2925.11(B)(1).

There is an obvious and frequent interplay between the provisions in R.C. Chapter 3719 and R.C. Chapter 2925 so that both chapters are part of an integrated statutory scheme regulating the manufacture, possession, and sale of controlled substances and controlled substance analogs. Calling Chapter 3719 "civil" is inaccurate and does not counter the language in R.C. 3719.013 incorporating the analog concept into Chapter 2925. Even "civil" definitions will carry over to the Criminal Code when the General Assembly so provides, as it did here. *State v. Dickinson*, 28 Ohio St.2d 65 (1971).

Indeed, even if R.C. 3719.013 had been expressly limited to R.C. Chapter 3719, it *still* would have entered into the definition of "Schedule I" via R.C. 3719.01 and R.C. 3719.41, both of which must be treated as including analogs whenever they refer to

"Schedule I." When R.C. 3719.41 mentioned "Schedule I," and when R.C. 3719.01 referred to "Schedule I," the provisions therein were required to be treated as including analogs as well. Thus, when R.C. 2925.01(A) incorporated the definition of "Schedule I" from R.C. 3719.01, it was necessarily incorporating analogs into that definition as well.

As to trafficking and possession, the General Assembly changed its approach as to analogs effective on December 20, 2012 under Sub. H.B. 334. Instead of analogs being lumped in with other Schedule I substances, H.B. 334 split them out for separate prohibition and punishment based on gram weight instead of bulk amount as before.

When the General Assembly indicated in the preamble to H.B. 334 that it was "creat[ing] the offenses of trafficking in and possession of controlled substance analogs", it was merely acknowledging that these statutes were now directly referring to analogs in terms of prohibition and punishment. The General Assembly's change in approach did not disavow the prior treatment of analogs as Schedule I substances. Indeed, the General Assembly *kept* the language in R.C. 3719.013 treating analogs as Schedule I controlled substances for all other purposes. Section 5 of H.B. 334 shows that the General Assembly was creating "additional tools" for law enforcement in combatting synthetic drugs. It was not saying that there had been no prohibitions or penalties before.

The State's second proposition of law warrants review.

> 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.

The Tenth District's disregard for R.C. 3719.013 was so violative of legislative

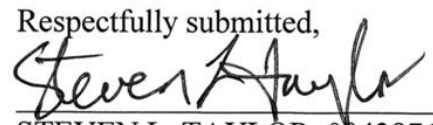
intent as to violate the separation of powers. The Tenth District never addressed the State's separation-of-powers objection to this outcome.

Courts must honor the General Assembly's intent because the General Assembly has plenary law-making authority to pass *any* law unless specifically prohibited by the federal or state constitutions. *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶¶ 10-11. Accordingly, the General Assembly had the plenary power and prerogative to choose to express its legislative intent as it saw fit, including in R.C. 3719.013 rather than in a "cross reference" in Chapter 2925. A court cannot use an artificial stylistic rule to defeat this manner of expression.

The people "vested the legislative power of the state in the General Assembly," and courts "must respect the fact that the authority to legislate is for the General Assembly alone * * *." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶¶ 43, 48, 52. "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, * * *." Id. ¶ 44 (quoting another case).

The judiciary cannot disregard one manner of legislative expression merely because it believes that the General Assembly should have chosen a different manner of expression. Courts must honor the legislature's intent to treat analogs as "controlled substances" in "Schedule I" as of October 17, 2011, well before defendant's acts in 2012.

Respectfully submitted,



STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on May 15, 2015, to David H. Thomas, 511 South High Street, Columbus, Ohio 43215, counsel for defendant.

STEVEN L. TAYLOR

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Mar 31 12:46 PM-14AP000662

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ,	:	
Plaintiff-Appellant,	:	
v.	:	Nos. 14AP-662 and 14AP-871 (C.P.C. No. 13CR-592)
Ghassan Mohammad,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 31, 2015

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor*, for appellant.

Meeks and Thomas Co., LPA, David H. Thomas and *Kathryn S. Wallrabenstein*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶ 1} The State of Ohio is appealing the dismissal of charges against Ghassan Mohammad. Two separate appeals are pending because the trial court judge assigned to the case initially ordered that two of the three charges were to be dismissed initially and then followed that ruling with a judgment entry which dismissed the case entirely.

{¶ 2} The assignments of error set forth in the two different briefs filed by the State are:

{¶ 3} In 14AP-662:

> THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS WHEN THE STATUTORY SCHEME IN EXISTENCE AT THE TIME OF THE OFFENSES PROHIBITIED TRAFFICKING AND POSSESSION OF SCHEDULE I SUBSTANCES THAT WERE CONTROLLED SUBSTANCE ANALOGS.

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Mar 31 12:46 PM-14AP000662

{¶ 4} In 14AP-871:

> THE TRIAL COURT ERRED IN FILING THE "ENTRY TERMINATING CASE" WHEN THE COURT HAD ONLY DISMISSED TWO OF THE THREE COUNTS, WHEN THE STATE'S APPEAL THEREFROM REMAINED PENDING, AND WHEN THE THIRD CHARGE FOR TAMPERING WITH EVIDENCE REMAINED PENDING.

{¶ 5} Addressing the assigned error in 14AP-662, the trial court dismissed two charges because the trial found that the legislature had not criminalized the possession of a controlled substance analog at the time alleged in the indictment of Ghassan Mohammad. The trial court further found that subsequent amendment of the pertinent statutes and pursuit of Ghassan Mohammad was barred by the ex post facto clauses of the United States Constitution and the Ohio Constitution.

{¶ 6} The state of Ohio, as indicated by its assignment of error, argues that possession of controlled substance analogs was illegal before the Ohio Legislature passed a law in December 2012 which purported to "create" an offense of possession of a controlled substance analog.

{¶ 7} The specific substance mentioned in the indictment is a-PVP, commonly known as bath salts. The legislature made statutory changes which were effective in December 2012. However, Ghassan Mohammad apparently possessed bath salts in August 2012.

{¶ 8} The state of Ohio has consistently contended that R.C. 3719.013 made possession of bath salts and other controlled substance analogs illegal before the legislature claimed it enacted the offense. The problem for the state of Ohio is that R.C. 3719.013 was not part of the definition of a drug of abuse under Title 29 of the Ohio Revised Code, the title which defines criminal drug offenses.

{¶ 9} The legislature addressed some issues in Sub.H.B. No. 64, which was effective in October 2011, but did so in the context of Title 37. The legislature defined controlled substance analog in R.C. 3719.01(HH)(1).

{¶ 10} The legislature enacted a new R.C. 3719.013 at the same time. R.C. 3719.013 provided:

> Except as otherwise provided in section 2925.03 or 2925.11 of the Revised Code, 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.

{¶ 11} This presented practical problems. Bath salts which were to be used as bath salts were perfectly legal. Bath salts "intended for human consumption" were illegal to possess. The statute is silent as to the issue of intended by whom. The manufacturer? The merchant selling the bath salts? The purchaser who wants to use them in bath water? A teenage member of the purchaser's family who has heard they can be used to get high? What happens if that teenager later decides to use the bath salts in the bath water instead?

{¶ 12} Sub.H.B. No. 64 was unworkable and needed the subsequent clarifications which were effective in December 2012.

{¶ 13} A panel of this court addressed the primary issue in this case in *State v. Smith*, case No. 14AP-154 and 14AP-155, decided November 28, 2014. The panel noted that the statutory definition of controlled substance in R.C. 2925.01 did not include or expressly incorporate the definition of controlled substance analog created in Sub.H.B. No. 64 and therefore the panel found possession of controlled substance analogs had not yet been criminalized. We follow the *Smith* case today.

{¶ 14} The assignment of error in case No. 14AP-662 is overruled.

{¶ 15} The assignment of error in case No. 14AP-871 addresses the question of whether the whole case should have been dismissed, or only the counts pertaining to the possession of bath salts. Appellate counsel for Ghassan Mohammad has not separately briefed this issue. Counsel for the state of Ohio has acknowledged that the third charge, one of tampering with evidence, alleges that Ghassan Mohammad altered, destroyed, concealed or removed bath salts with a purpose to impair its value or availability as evidence in a proceeding or investigation.

{¶ 16} The merits of the dismissal of the tampering with evidence charge were not fully developed in the trial court and were not considered or addressed by the trial court. Accordingly, we sustain the assignment of error in 14AP-871.

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Mar 31 12:46 PM-14AP000662

{¶ 17} As a result, we affirm the trial court's ruling as to possession of bath salts under 14AP-662. We reverse the trial court's ruling dismissing the tampering with evidence charge as questioned in 14AP-871 and remand the case for further proceedings with respect to the tampering with evidence charge.

Judgment affirmed in part and reversed in part; remanded for further proceedings.

BROWN, P.J., and SADLER, J., concur.

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Mar 31 12:46 PM-14AP000662

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Apr 01 11:21 AM-14AP000662

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ,	:	
Plaintiff-Appellant,	:	
v.	:	Nos. 14AP-662 and 14AP-871 (C.P.C. No. 13CR-592)
Ghassan Mohammad,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 31, 2015, appellant's assignment of error in case No. 14AP-662 is affirmed as to possession of bath salts. We reverse the trial court's ruling dismissing the tampering with evidence charge as questioned in case No. 14AP-871. Therefore, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part and remanded for further appropriate proceedings in accordance with law with respect to the tampering with evidence. Costs shall be assessed equally between the parties.

TYACK, J., BROWN, P.J., & SADLER, J.

/S/JUDGE
Judge G. Gary Tyack

Franklin County Ohio Court of Appeals Clerk of Courts- 2015 Apr 01 11:21 AM-14AP000662

Tenth District Court of Appeals

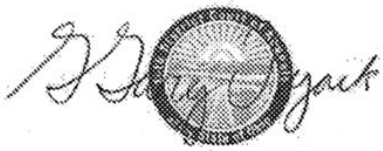
Date: 04-01-2015

Case Title: STATE OF OHIO -VS- GHASSAN MOHAMMAD

Case Number: 14AP000662

Type: JEJ - JUDGMENT ENTRY

So Ordered



/s/ Judge G. Gary Tyack

Electronically signed on 2015-Apr-01 page 2 of 2