

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 Nos. 14AP-662

**MEMORANDUM OF *AMICUS CURIAE* OHIO ATTORNEY GENERAL
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INTRODUCTION

House Bill 64, which became effective in October 2011, was passed by the General Assembly as part of a statewide effort to fight the rise in synthetic drugs—compounds that closely resemble controlled substances and mimic their effects, but whose molecular structures are modified to skirt drug laws. The bill defined “controlled substance analogs” (certain synthetic drugs that are not specifically scheduled) and stated that they “shall be treated for purposes of any provision of the Revised Code as a controlled substance in Schedule I.” Thus, whenever the Revised Code criminalized an activity related to a Schedule I controlled substance, it also criminalized that activity with respect to controlled substance analogs (“analog”).

Yet for the second time in a matter of months, the Tenth District has ignored this plain language to uphold the dismissal of an indictment against a distributor of synthetic drugs whose offenses are alleged to have occurred while Sub. H.B. 64 governed. The decision below adopts the Tenth District’s 2014 ruling in *State v. Smith*, 2014-Ohio-5303, which applied various rules of statutory construction to find that Sub. H.B. 64 did not criminalize analogs. A jurisdictional appeal from *Smith* is currently pending in this Court, *see State v. Smith*, No. 2015-0406, and this case compounds the need for review of that decision. Because a ruling in *Smith* would control this case, this Court should accept *Smith* for review and hold this case for decision in that case. Or, if the Court has declined to review *Smith*, it should exercise jurisdiction over this case.

Review is appropriate because the consequences of both this case and *Smith* are significant for Ohio. Both decisions 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. The decisions jeopardize important prosecutions in Franklin County while creating incongruity with other jurisdictions that have entered convictions or accepted guilty pleas for analog offenses that occurred before the December 2012 passage of Sub. H.B. 334, another bill

that addressed synthetic drugs and analogs. The Tenth District's reasoning also creates lingering consequences even after Sub. H.B. 334, as that bill did not amend various drug offenses in the Revised Code that apply to controlled substances. *Smith's* reasoning suggests that these offenses do not apply to analogs even today. And finally, the decisions here and in *Smith* could expose the State to wrongful-imprisonment litigation from defendants convicted of analog offenses based on conduct that occurred prior to the passage of Sub. H.B. 334. This Court's review is necessary to prevent these harms.

STATEMENT OF AMICUS INTEREST

As Ohio's chief law officer, the Attorney General is concerned with prosecuting crime and maintaining public safety. The Attorney General's interest here is especially strong because he led the efforts to combat the proliferation of synthetic drugs by supporting the passage of Sub. H.B. 64 in 2011 and Sub. H.B. 334 in 2012. *See* Office of the Ohio Attorney General Mike DeWine, Synthetic Drugs News Conference (Nov. 14, 2012), <http://tinyurl.com/n8tuapp>.

The Attorney General, whose office includes the Bureau of Criminal Investigations, has attacked synthetic drugs on several fronts. His office has assisted in the criminal prosecution of several analog cases, and has also helped local law enforcement and prosecutors to bring civil lawsuits against distributors of synthetic drugs under theories of public nuisance and fraudulent advertising and labeling. *See* Office of the Ohio Attorney General Mike DeWine, Rid Your Community of Synthetic Drugs, <http://tinyurl.com/l7uethx>; *see also* *State ex rel. DeWine v. Shadyside Party Ctr.*, No. 13BE26, 2014-Ohio-2357 (7th Dist.). The Attorney General takes an interest in any development that will hinder the State's ability to confront this public scourge.

STATEMENT OF THE CASE AND FACTS

A. Synthetic drugs represent an evolving threat to public health and safety.

A discussion of synthetic drugs and their harmful effects is set forth in the Memorandum in Support of Jurisdiction filed by *amicus curiae* in *State v. Smith*. No. 2015-0406, Mem. *Amicus Curiae* Supp. Jur. 3-4. One point bears repeating here: The synthetic drugs known as “bath salts” and “spice” should not be confused with ordinary household products. They are *not* one of the legitimate yet potentially intoxicative products—like highlighters or glue—found around a typical home. They are potent drugs created and manufactured for the exclusive purpose of getting high.

Synthetic cathinones, commonly referred to as “bath salts,” have nothing in common with the therapeutic or fragrant crystals that are added to bathwater. “Chemically, [synthetic cathinones] are similar to amphetamines (such as methamphetamine) as well as to MDMA (ecstasy).” Nat’l Inst. on Drug Abuse, *Drug Facts: Synthetic Cathinones (“Bath Salts”)*, <http://tinyurl.com/ct72jk4>. The terms “bath salts,” “plant food,” “jewelry cleaner,” or “phone screen cleaner” are names used by drug manufacturers to mask the nature of their product and deceive law enforcement. Similarly, synthetic cannabinoids, sometimes referred to as “potpourri” or “spice,” bear no relation to the substances found in sock drawers or spice racks.

The phrase “not for human consumption” included on synthetic drug packaging is likewise a deception. This label is affixed by drug makers “to mask their intended purpose and avoid Food and Drug Administration (FDA) regulatory oversight of the manufacturing process.” Office of Nat’l Drug Control Policy, Exec. Office of the President, *Synthetic Drugs (a.k.a. K2, Spice, Bath Salts, etc.)*, <http://tinyurl.com/d8dmw5y>. It should be disregarded as easily as could a label on a bag of cocaine that reads “Baking Soda.”

B. H.B. 64, which became effective in October 2011, criminalized the possession and sale of controlled substance analogs.

The General Assembly passed Sub. H.B. 64 in 2011 in response to the emerging synthetic drug crisis. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 4-6. At that time, unknown synthetic drugs whose chemical structures had been modified to evade state and federal drug schedules were soaring in popularity. These substances, sometimes called “designer drugs,” can cause (and were causing) violent hallucinations, agitation, paranoia, and death. *See Synthetic Drugs*. To keep pace with this devastating trend, Sub. H.B. 64 created a tool that would allow law enforcement to prosecute certain drugs whose chemical structures and hallucinogenic effects were similar to those of schedule I controlled substances.

As relevant here, Sub. H.B. 64 defined controlled substance analogs (hereinafter referred to as “analog”), *see* R.C. 3719.01(HH), and provided that they should be treated as Schedule I controlled substances “for purposes of any provision of the Revised Code,” R.C. 3719.013. Under Sub. H.B. 64, then, any provision of the Code that criminalized the possession and sale of a controlled substance also criminalized the possession and sale of an analog. The bill also scheduled certain synthetic drug compounds that were known to law enforcement in 2011. *See* R.C. 3719.41(35)-(45) (eff. Oct. 17, 2011).

Sub. H.B. 334, passed in December 2012, built on and improved the tools created by Sub. H.B. 64. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 6-7. These amendments were prompted by the emergence of new synthetic drugs that were so substantially altered that they could not be considered analogs to existing controlled substances. In relevant part, then, Sub. H.B. 334 removed the individual synthetic drug compounds that had been added to the controlled substance schedules by Sub. H.B. 64 and replaced them with *classes* of compounds. *See* R.C. 3719.41(C)(67), (E)(7) (eff. Dec. 20, 2012). These classes, as opposed to rigid compounds,

provided law enforcement with greater flexibility to bring new synthetic drug cases against criminals.

The bill also amended R.C. 2925.03 and R.C. 2925.11 to create the offenses of trafficking in and possession of analogs. *See* R.C. 2925.03(C)(8) (eff. Dec. 20, 2012); R.C. 2925.11(C)(8) (eff. Dec. 20, 2012). Whereas under Sub. H.B. 64 analogs had been treated as controlled substances for the purposes of trafficking and possession, *see* R.C. 3719.013, they would now be treated and penalized differently with respect to these activities. *See* Ohio B. An., 2012 H.B. 334 (“Specifies that . . . analogs must *continue* to be treated for purposes of any provision of Ohio law as Schedule I controlled substances *except* as specified in the bill’s provisions governing the offenses of trafficking in and possession of . . . analogs.”) (emphases added).

C. The trial court dismissed the indictment against Mohammad, ruling that Sub. H.B. 64 did not criminalize the possession or sale of analogs, and the Tenth District affirmed.

A grand jury indicted Mohammad on charges of possession of drugs, trafficking in drugs, and tampering with evidence. The drug in question was alleged to be a-PVP, commonly known as “bath salts,” a controlled substance analog as defined by R.C. 3719.01. Mohammad moved to dismiss the drug counts, arguing that Ohio had not criminalized the possession or sale of analogs in August 2012, the time of his alleged offense. The trial court granted the motion, concluding that analogs were not criminalized until H.B. 334 became effective on December 20, 2012. *See State v. Mohammad*, No. 2013-CR-592 (Franklin Cty. C.P. Aug. 21, 2014).

The Tenth District affirmed the trial court’s dismissal of the drug counts. *See State v. Mohammad*, 2015-Ohio-1234 ¶ 13 (10th Dist.) (hereinafter “App. Op.”). It adopted the Tenth District’s earlier decision in *State v. Smith*, 2014-Ohio-5303, where the “panel noted that the statutory definition of controlled substance in R.C. 2925.01 did not include or expressly

incorporate the definition of . . . analog created in Sub. H.B. No. 64 and therefore the panel found possession of . . . analogs had not yet been criminalized.” *Id.*

The court of appeals also thought it identified some confusion in R.C. 3719.013, which under Sub. H.B. 64 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.” (The Tenth District actually quoted R.C. 3719.013 as modified by Sub. H.B. 334, *see* App. Op. ¶ 10, but the differences are immaterial to this analysis.) The court found the phrase “to the extent intended for human consumption” to be puzzling:

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?

Id. ¶ 11. The Tenth District concluded that H.B. 64 was “unworkable” and that H.B. 334 was enacted to clarify these issues. *Id.* ¶ 12. The State now appeals from that decision.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A. If the Court has accepted *Smith* for review, then it should grant review of this case and hold for a decision in *Smith*.

It is possible that, by the time the Court considers the State’s Memorandum in Support of Jurisdiction in this case, the Court will have decided to grant review in *State v. Smith*, No. 2015-0406. This case and *Smith* present an identical question for this Court’s review on similar facts: whether, during the period between October 17, 2011 and December 19, 2012, portions of the Revised Code that criminalized the possession and sale of Schedule I controlled substances also criminalized the possession and sale of analogs. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 10. As the court below expressly relied on the Tenth District’s *Smith* opinion, a decision in that case

would control the legal questions presented here. This Court should therefore grant review in *Smith* and hold this case for a decision in *Smith*.

B. If the Court declines to accept *Smith* for review, then it should grant review in this case because the Tenth District’s decision undercuts the State’s fight against synthetic drugs, creates incongruous results throughout Ohio, and exposes the State to wrongful-imprisonment liability.

If the Court has declined to review *Smith*, it should accept this case for review because the Tenth District’s decision will have severe consequences for Ohio. Sub. H.B. 64 was one of several aggressive measures Ohio has taken to fight synthetic drugs. The Tenth District’s decision here, like *Smith* before it, sets these efforts back in several key ways. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 8-10.

First, the decision below erroneously dismisses yet another indictment of a distributor of synthetic drugs. The Tenth District has already affirmed the dismissal of the indictment in *Smith*. Motions to dismiss are pending or have been granted in additional analog cases brought pursuant to Sub. H.B. 64 in the Franklin County Court of Common Pleas, while a convicted felon serving a 35-year prison sentence has filed a Motion for Post-Conviction Relief with the trial court. *See id.* at 8-9. As the prosecution of an analog case entails significant expert testimony beyond what is required in an ordinary controlled-substance case, these early cases brought under Sub. H.B. 64 largely targeted the most significant offenders. And now they could all be dismissed or overturned.

Second, the Tenth District’s reasoning jeopardizes other provisions of Title 29 that were not amended by Sub. H.B. 334. The *Smith* decision, which the Tenth District adopted here, reasoned that Sub. H.B. 64 did not criminalize the possession of or trafficking in analogs because it had not added analog-specific language to Title 29’s trafficking and possession offenses. *See Smith*, 2014-Ohio-5303 ¶¶ 12-15. Such language has *never* been added to the provisions

governing corrupting another with drugs (R.C. 2925.02), illegal manufacture (R.C. 2925.04), illegal assembly (2925.041), and illegal funding (R.C. 2925.05). Although that language was not added because it would be redundant to do so, *see* R.C. 3917.013, the lower court’s decision joins *Smith* in imperiling analog prosecutions brought under these provisions.

Third, the Tenth District’s decision exacerbates the inconsistency in outcomes between Franklin County and the rest of Ohio. At least two significant Franklin County defendants have wrongly escaped prosecution for analog offenses pursuant to Sub. H.B. 64, while others throughout Ohio have been convicted following guilty pleas or trials. This Court should intervene to ensure that like cases are treated alike.

Finally, this Court should exercise jurisdiction over this case to protect the State from exposure to wrongful-imprisonment liability under R.C. 2743.48(A). The invalidation of the possession and trafficking offenses as they apply to analogs could lead to wrongful-imprisonment lawsuits from those who are currently serving prison sentences for analog offenses. *See Chessman v. State*, 2013-Ohio-2757 ¶¶ 20-22 (2d Dist.) (concluding that a defendant was eligible for wrongful-imprisonment relief where the “charged offense” was not a valid crime under Ohio law).

ARGUMENT

Amicus Curiae’s Proposition of Law:

During the period of October 17, 2011 to December 19, 2012, provisions of the Revised Code that criminalized possession of and trafficking in Schedule I controlled substances also criminalized possession of and trafficking in controlled substance analogs.

A. During the relevant time, the Revised Code stated that analogs should be treated as controlled substances in Schedule I for any purpose of the Revised Code, including criminal offenses.

Sub. H.B. 64 criminalized the possession and sale of analogs. Where, as here, “the meaning of a statute is unambiguous and definite, then it must be applied as written and no

further interpretation is appropriate.” *State ex rel. Herman v. Klopffleisch*, 72 Ohio St. 3d 581, 584 (1995). Sub. H.B. 64, which governs this case, defined analogs and provided that they “shall be treated for purposes of *any provision of the Revised Code* as a controlled substance in Schedule I.” R.C. 3719.013 (emphasis added). Without qualification, the statute says that analogs are to be treated as Schedule I controlled substances for *any* provision of Ohio law. This necessarily includes criminal provisions. Thus, when the Revised Code banned the possession and sale of Schedule I controlled substances, *see* R.C. 2925.03 and R.C. 2925.11, after Sub. H.B. 64 it likewise banned the possession and sale of analogs.

The plain statutory language is reinforced by the General Assembly’s purpose in passing Sub. H.B. 64. When construing a statute, courts may consider “‘the purpose to be accomplished.’” *State ex rel. Solomon v. Bd. of Trustees of Police & Fireman’s Disability & Pension Fund*, 72 Ohio St. 3d 62, 65 (1995) (citation omitted). At the time Sub. H.B. 64 was passed, new and unknown synthetic drugs were creating devastating effects yet escaping prosecution because they did not conform to the precise definitions listed in Schedule I. The analog provisions of Sub. H.B. 64 were intended to respond to this evolving threat. Thus, “[w]orking with Attorney General DeWine, the [Ohio Senate Criminal Justice Committee] crafted a drug protocol that will enable the state to prohibit the use of future creative hallucinogenic substances without the need to pass further legislation.” *See* Press Release, Sen. Tim Grendell, Ohio Senate Criminal Justice Committee, Busy First Half of 2011 (July 22, 2011), <http://hannah.com/ShowDocument.aspx?PressReleaseID=447>.

B. The Tenth District’s decision repeats *Smith*’s errors, and demonstrates a new—and misplaced—confusion.

The lower court followed *Smith* to hold that the possession of an analog was not criminalized at the time of Mohammad’s alleged offenses; both decisions therefore fail together.

Like the *Smith* panel, the court below abandoned a plain reading of the statute in favor of using tools of statutory construction to thwart, not interpret, the text. The weakness of the lower court’s reasoning is further exposed by its cursory—and misguided—invocation of vagueness concepts. *See* App. Op. ¶¶ 10-12. For the reasons that follow and for the reasons urged by the *amicus* in *Smith*, this Court should accept jurisdiction and reverse.

First, the Tenth District’s holding is contrary to the plain language of Sub. H.B. 64. The decision below adopted *Smith* without much analysis beyond noting that the analog provisions in Sub. H.B. 64 are located in Chapter 3719, which covers Controlled Substances, and not in Title 29, where drug offenses are defined. *See id.* ¶¶ 8, 13. The appellate court agreed with *Smith* that by failing to “expressly incorporate the definition of controlled substance analog” in R.C. 2925.01, the General Assembly had not criminalized the possession of analogs. *Id.* ¶ 13. This appears to be an implicit application of the *expressio unius* canon discussed in *Smith*.

This invocation of *Smith* in general and the *expressio unius* canon in particular was error. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 12-15. As an initial matter, resorting to tools of statutory construction is improper where, as here, a statute is unambiguous. *See Morgan v. Ohio Adult Parole Auth.*, 68 Ohio St. 3d 344, 347 (1994). Sub. H.B. 64’s command that analogs be treated as Schedule I controlled substances for *any* provision of Ohio law necessarily encompasses the relevant drug offenses defined in Title 29. Given this sweeping language, the Tenth District’s analysis should have started and ended with the text.

The use of the *expressio unius* canon was improper in light of both the plain language of the text and the nature of the terms incorporated into Title 29. In *Smith*, the court examined the terms from Chapter 3719 that had been incorporated into the definitions listed in R.C. 2925.01. *See Smith*, 2014-Ohio-5303 ¶ 12. These terms included the verbs “administer,” “dispense,” and

“distribute,” among others. *See, e.g.*, R.C. 2925.01(A). The *Smith* panel reasoned that, because the General Assembly had not defined “controlled substance analog” in Chapter 2925, it had *excluded* analogs from applying in the context of the criminal drug offense statutes. *Smith*, 2014-Ohio-5303 ¶ 12. But “[t]he canon of *expressio unius est exclusio alterius* does not apply to every statutory listing or grouping; it has force only when the items expressed are members of an ‘associated group or series,’ justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence.” *Summerville v. Forest Park*, 128 Ohio St. 3d 221, 2010-Ohio-6280 ¶ 35 (citation omitted). The terms from Chapter 3719 that are incorporated into R.C. 2925.01 are not logically or categorically connected except insofar as they relate to drugs. Because they are not an “associated group or series,” it is wrong to infer that analogs were excluded from applying to the drug offenses in Title 29.

Second, the lower court’s decision is premised on a misunderstanding of synthetic drugs that corrupted its analysis. The Tenth District appears to have misread Sub. H.B. 64 as criminalizing the abuse of therapeutic bath salts (i.e., the legal salts added to bathwater). *See* App. Op. ¶ 11. In this context, it found the phrase “to the extent intended for human consumption” in R.C. 3719.013 to present “practical problems.” *Id.* ¶¶ 10-11. Without engaging in an actual vagueness analysis, the court reasoned:

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?

Id. ¶ 11. This view appears to have confirmed the Tenth District’s conclusion that Sub. H.B. 334 was passed in part to address legislative defects in Sub. H.B. 64. *See id.* ¶ 12 (“Sub. H.B. 64 was

unworkable and needed the subsequent clarifications which were effective in December 2012.”). This is simply not the case.

The “bath salts” at issue in this case were intended for one unmistakable purpose: human consumption. “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.” *Drug Facts: Synthetic Cathinones (“Bath Salts”)*. The bath salts that Mohammad is alleged to have possessed and trafficked are α -pyrrolidinopentiophenone, commonly known as a-PVP. *See* App. Op. ¶ 7. A-PVP is an analog of 3,4-methylenedioxypropylone, or MDPV. *See* John F. Casale and Patrick A. Hays, *The Characterization of α -Pyrrolidinopentiophenone*, 9 *Microgram J.* No. 1 (2012), available at <http://tinyurl.com/pybsbhh>. These synthetic cathinones are not similar in structure or effect to legal Epsom salts.

Furthermore, it is unlikely that anyone would actually confuse Epsom salts with the synthetic drug masquerading as a personal care product. A three-pound bag of Epsom Salt currently retails for \$11.10 on Amazon, whereas illegal bath salts are reported to fetch between \$25 and \$50 for a 50 milligram packet. *See* Onondaga County Health Department, *Bath Salts: Synthetic Stimulants*, <http://tinyurl.com/myoptho>. No one is fooled by the drug packagers’ labels that their products are “not for human consumption.” Sub. H.B. 64 was *not* addressing a legitimate product that could be abused when placed in the wrong hands. The “practical problems” identified by the Tenth District are therefore not problems at all.

A complete analysis of Sub. H.B. 64 supports this conclusion. The phrase “to the extent intended for human consumption” is meant to limit the application of criminal drug offense

statutes to those users who intend to ingest analogs to get high. For example, R.C. 3719.01(HH)(2) states in relevant part that analogs do *not* include:

- (b) Any substance for which there is an approved new drug application;
- (c) With respect to a particular person, any substance if an exemption is in effect for investigational use for that person pursuant to federal law to the extent that conduct with respect to that substance is pursuant to that exemption;
- (d) Any substance to the extent it is not intended for human consumption before the exemption described in division (HH)(2)(b) of this section takes effect with respect to that substance.

In other words, the phrase “intended for human consumption” *exempts* individuals, such as scientists, who possess analogs for legitimate and approved purposes. This context makes clear that the Tenth District’s detection of vagueness was misplaced.

An accurate understanding of synthetic drugs also undermines the appellate court’s assumption that Sub. H.B. 334 was passed in 2012 to correct vagueness problems in Sub. H.B. 64. Sub. H.B. 334 did no such thing. As relevant to this case, the 2012 bill switched from a rigid compound-based scheduling of synthetic drugs to a more flexible class-based system. *See, e.g.,* R.C. 3719.41(C)(67), (E)(7) (eff. Dec. 20, 2012). It also began treating analogs differently from controlled substances for the limited purposes of possession and trafficking offenses. These changes did not undermine the fact that a-PVP is an analog to MDPV, which was a schedule I controlled substance at the time of Mohammad’s alleged offenses. *See* R.C. 3719.41(C)(41) (eff. Oct. 17, 2011). The Tenth District did not understand the law it invalidated, and a dangerous defendant could walk free as a result.

CONCLUSION

For the foregoing reasons, the Court should accept jurisdiction over this case and reverse.

Respectfully submitted,

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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 Jurisdiction was served on May 15, 2015, by U.S. mail on the following:

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