

In the  
**Supreme Court of Ohio**

STATE OF OHIO,	:	Case No. 2015-1259
	:	
Plaintiff-Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
SOLEIMAN MOBARAK,	:	
	:	Court of Appeals
Defendant-Appellee.	:	Case Nos. 14AP-517

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

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## INTRODUCTION

For the third time in months, the Tenth District has ignored the plain text of Ohio’s analog drug statute—this time to reverse a conviction for dealing in these dangerous substances. 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 conclude that H.B. 64 did not criminalize analogs. The State appealed the *Smith* decision, *see State v. Smith*, No. 2015-0406, but this Court recently declined jurisdiction, with Chief Justice O’Connor and Justices French and Kennedy dissenting from the decision not to review the State’s Second Proposition of Law. *See 08/26/2015 Case Announcements*, 2015-Ohio-3427. The State has moved for reconsideration of that decision. The State has also appealed the Tenth District’s decision in a follow-on case, *State v. Mohammad*, No. 2015-0774. Because a ruling in *Smith* or *Mohammad* would control this case, this Court should accept *Smith* or *Mohammad* for review and hold this case for a decision in either of those cases. Or, if the Court has declined to review *Smith* or *Mohammad*, it should exercise jurisdiction here.

The General Assembly passed House Bill 64, effective in October 2011, 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 specified 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 (“analogs”).

Attorney General DeWine has filed memoranda in support of jurisdiction in both *Smith* and *Mohammad* as amicus curiae, as well as an amicus memorandum in support of the State’s

Motion for Reconsideration in *Smith*; he incorporates those arguments here. The steady drip of cases such as this one compounds the need for this Court's review. The decision below is surely not the last one this Court will see. Two similar cases are now pending before the Tenth District. *See State v. Mohammad Mustafa*, No. 15AP-466 (10th Dist.); *State v. Edreese Mustafa*, No. 15AP-465 (10th Dist.). Others remain in the trial court, including one where a defendant has moved to withdraw his guilty plea. *See State v. Ahmad Mobarak*, No. 13CR-532 (Franklin Cnty. Cmn. Pleas); *State v. Hasan Mobarak*, No. 12CR-5583 (Franklin Cnty. Cmn. Pleas). An appeal now pending in the Twelfth District asks that court to reverse another defendant's convictions because of *Smith*. *See State v. Shalash*, No. 2014-12-146 (12th Dist.). Regardless of whether the Twelfth District's decision will create a conflict or exacerbate the problems created by *Smith*, this Court should resolve the questions presented here.

#### **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 H.B. 64 in 2011 and 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 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/oh4afvc>; *see also State ex rel. DeWine v.*

*Shadyside Party Ctr.*, 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 that Attorney General DeWine filed in *State v. Smith*. No. 2015-0406, Mem. *Amicus Curiae* Supp. Jur. 3-4. In brief, starting around 2011, authorities identified substances whose chemical structures had been altered to evade state and federal drug schedules. These “designer” or “emerging” drugs, such as synthetic cathinones (“bath salts”) and synthetic cannabinoids (“spice”), have unpredictable and alarming physiological effects on the human body. They are hazardous to users, their families, and responding medical personnel and law enforcement.

As General DeWine noted in his brief in *State v. Mohammad*, the synthetic drugs informally known as “bath salts” and “spice” should not be confused with ordinary household products. See No. 2015-0774, Mem. *Amicus Curiae* Supp. Jur. 3, 11-13. They are *not* one of the legitimate yet potentially intoxicative products—like highlighters or glue—found around a typical home. Nor do bath salts have anything in common with the therapeutic or fragrant crystals that are added to bathwater. Nat’l Inst. on Drug Abuse, *Drug Facts: Synthetic Cathinones (“Bath Salts”)*, <http://tinyurl.com/ct72jk4>. They are potent drugs created and manufactured for the exclusive purpose of getting high.

**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 (“H.B. 64”) in 2011 in response to the emerging synthetic drug crisis. A discussion of that bill, as well as Sub. H.B. 334 (“H.B. 334”),

can be found in the amicus brief the Attorney General filed in *Smith and Mohammad*. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 4-6; *Mohammad*, Mem. *Amicus Curiae* Supp. Jur. 4-5.

Briefly, H.B. 64 defined controlled substance analogs (“analog”) as those substances that share a “substantially similar” structure with a controlled substance in schedule I or II, and that either have or are represented to have a “substantially similar” effect on the central nervous system as that of a controlled substance. *See* R.C. 3719.01(HH). The bill commanded that analogs should be treated as Schedule I controlled substances “for purposes of any provision of the Revised Code.” R.C. 3719.013. Under 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 specific 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 (“H.B. 334”), passed in December 2012, built on and improved the tools created by H.B. 64. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 6-7. In relevant part, H.B. 334 removed the individual synthetic drug compounds that had been added to the controlled substance schedules by 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 specific compounds, provided law enforcement with greater flexibility to bring new synthetic-drug cases against criminals.

The bill also amended the trafficking and possession statutes in Title 29 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 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 Legis. Serv. Comm'n, Bill Analysis, Sub. 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). After H.B. 334, the offenses of trafficking and possession of analogs have a dedicated code section apart from the general trafficking and possession statutes.

**C. A jury convicted Mobarak of engaging in a pattern of corrupt activity, and multiple counts of aggravated possession and trafficking of drugs.**

Mobarak owns a convenience store in the Italian Village neighborhood of Columbus. See *State v. Mobarak*, No. 2015-Ohio-3007 ¶ 2 (10th Dist.) (“App. Op.”). From March to July 2012, undercover police officers purchased packaged substances from Mobarak’s store; the substances were later determined to be  $\alpha$ -Pyrrolidinopentiophenone (a-PVP), a common ingredient in bath salts. *Id.* ¶¶ 1-2. Mobarak was arrested in July 2012. *Id.* ¶ 2. In August and October 2012, he was charged with engaging in a pattern of corrupt activity in violation of R.C. 2923.32, and multiple counts of aggravated trafficking and possession of drugs, in violation of R.C. 2925.03 and R.C. 2925.11. *Id.* ¶ 1. The indictment alleged that a-PVP was a controlled substance analog. *Id.*

Mobarak moved to dismiss the indictment on grounds not at issue here. *Id.* ¶ 3. Notably, he did *not* argue that it was legal to possess or sell analogs at the time of his conduct. *Id.* ¶ 5. His motion in fact acknowledged that “[t]he intent of the legislature [in passing H.B. 64] was to outlaw the chemical substances contained in what is commonly referred to as ‘bath salts.’” *State v. Mobarak*, No. 12-CR-5582 (Franklin Cnty. Cmn. Pleas Feb. 1, 2013), Def. Mot. Dismiss at 3. The trial court orally denied the motion. App. Op. ¶ 3.

After an eight-day trial, a jury convicted Mobarak of engaging in a pattern of corrupt activity, three counts of aggravated trafficking in drugs, and three counts of aggravated possession of drugs. *Id.* ¶ 1. The jury’s verdict included specific findings that a-PVP was a controlled substance analog. *Id.* The trial court sentenced Mobarak to 35 years of mandatory confinement without parole, and entered a fine of \$75,000. *Id.* ¶ 4.

**D. Mobarak appealed his conviction, arguing for the first time that it was an ex-post-facto violation, and the Tenth District reversed.**

Mobarak appealed his conviction, raising four assignments of error. *Id.* ¶ 4. He first contended that because his offenses took place prior to the passage of H.B. 334 in December 2012, “[i]t was plain error for the trial court to fail to dismiss all charges against Mr. Mobarak sua sponte, and allowing and his conviction [sic] and imprisonment for innocent acts is an ex post facto violation that is prohibited by the Ohio and United States Constitutions.” *Id.* Relying on its earlier decision in *Smith*, the Tenth District reversed. *Id.* ¶ 9.

In overturning Mobarak’s convictions under R.C. 2925.11 and R.C. 2925.03, the lower court recited the reasoning of *Smith*. *Id.* ¶¶ 6-7. Because Mobarak’s conviction for engaging in a pattern of corrupt activity was predicated on his analog convictions, the Tenth District reversed the trial court’s judgment on that count, as well. *Id.* ¶ 9. In light of this reversal, the appellate court determined that Mobarak’s remaining assignments of error were rendered moot. *Id.* ¶ 11.

The State filed a motion to stay execution of the judgment in the Tenth District and in this Court; both motions were denied. *See State v. Mobarak*, No. 14AP-517, Journal Entry (10th Dist. July 31, 2015); *08/11/2015 Case Announcements #2*, 2015-Ohio-3211. The State now appeals the Tenth District’s reversal of Mobarak’s convictions.

**THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

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

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 reconsidered its decision to decline review in *State v. Smith*, No. 2015-0406, or will have granted review in *State v. Mohammad*, No. 2015-0774. All three cases present an identical question for this Court's review on similar facts: whether, during the relevant time, 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. Because the court below expressly relied on the Tenth District's *Smith* opinion, which was also relied on by the *Mohammad* panel, a decision in either *Smith* or *Mohammad* would control the legal questions presented here. This Court should therefore grant review in *Smith* or *Mohammad* and hold this case for a decision in those cases.

**B. If the Court declines to accept *Smith* or *Mohammad* for review, it should grant review in this case.**

If the Court has declined to review *Smith* or *Mohammad*, it should accept this case for review. Review here is particularly appropriate because the reversal in this case was based on a theory of plain error, as Mobarak did not argue at trial that H.B. 64 had not criminalized analogs. Furthermore, the Tenth District's decision will have severe consequences for Ohio. H.B. 64 was one of several measures Ohio has taken to fight synthetic drugs. The Tenth District's decision here, like *Smith* and *Mohammad* before it, sets these efforts back in several key ways. These reasons are set forth in the memoranda the Attorney General filed in *Smith* and *Mohammad*. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 8-10; *Mohammad*, Mem. *Amicus Curiae* Supp. Jur. 7-8. Two points bear emphasis here.

*First*, the decision below erroneously reverses the multi-count conviction of a major distributor of synthetic drugs—a distributor who, according to a trial witness, boasted of making “almost a million dollars” from selling bath salts to Ohioans. Tr. 753. This reversal follows the Tenth District’s affirmance of the dismissal of the indictments in *Smith* and *Mohammad*. 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 H.B. 64 largely targeted the most significant offenders. And now three have been dismissed or overturned. More are in the pipeline. *See State v. Mohamed Mustafa*, No. 15AP-466 (10th Dist.) (indictment dismissed based on *Smith* and appeal now pending); *State v. Edreese Mustafa*, No. 15AP-465 (10th Dist.) (same); *State v. Hasan Mobarak*, No. 12CR-5583 (Franklin Cnty. Cmn. Pleas) (motion to withdraw guilty plea filed); *State v. Ahmad Mobarak*, No. 13CR-532 (Franklin Cnty. Cmn. Pleas) (motion to dismiss indictment pending).

*Second*, the Tenth District’s decision exacerbates the inconsistency in outcomes between Franklin County and the rest of Ohio. Three significant Franklin County defendants have wrongly escaped prosecution or punishment for analog offenses pursuant to H.B. 64, while others throughout Ohio have been convicted following guilty pleas or trials.

The logic of the *Smith* decision is being considered by at least one other appellate district. A defendant convicted of analog offenses in Warren County has asked the Twelfth District to reverse his convictions pursuant to *Smith*. *See State v. Shalash*, No. 2014-12-146 (12th Dist.). Regardless of how that appeal is resolved, this Court should review the issue now rather than later. If the Twelfth District rejects *Smith*, creating a conflict with the Tenth, it is likely that this Court will eventually resolve the split. It would be better to do so before final judgments have been entered in three serious Franklin County cases. Even if the Twelfth District embraces

*Smith's* errors, it would only amplify the need for review here as it would confirm that the question in this appeal has wide ramifications. If the Twelfth District agrees with *Smith*, yet another major distributor of drugs will have been freed, frustrating the General Assembly's efforts to protect Ohio communities from synthetic drugs.

## 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.**

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. Klopfleisch*, 72 Ohio St. 3d 581, 584 (1995). 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 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 H.B. 64. When construing a statute, courts may consider “the purpose to be accomplished.” *Dodd v. Croskey*, \_\_ Ohio St. 3d \_\_, 2015-Ohio-2362 ¶ 24. At the time 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 H.B. 64 responded to this evolving threat. Thus, “[w]orking with Attorney General DeWine, the [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 decision below adopts *Smith* and thus repeats its errors.**

The lower court followed *Smith* to hold that the possession of an analog was not criminalized at the time of Mobarak’s 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. This time, however, the Court did not just dismiss a pending indictment; it overturned a jury verdict and a 35-year prison sentence. For the reasons urged by the Attorney General in *Smith* and *Mohammad*, this Court should accept jurisdiction and reverse. *See Smith*, Mem. *Amicus Curiae* Supp. Jur. 10-15; *Mohammad*, Mem. *Amicus Curiae* Supp. Jur. 8-14.

**CONCLUSION**

For the foregoing reasons, the Court should 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 Jurisdiction was served on September 10, 2015, by U.S. mail on the following:

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