

**IN THE SUPREME COURT OF OHIO  
2015**

STATE OF OHIO,

Case No. 15-1259

Plaintiff-Appellant,

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

-vs-

SOLEIMAN MOBARAK,

Court of Appeals  
Case No. 15AP-517

Defendant-Appellee.

**MEMORANDUM OF PLAINTIFF-APPELLANT STATE OF OHIO  
SUPPORTING JURISDICTION**

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## **EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION**

This case should be considered a companion to *State v. Smith*, Sup.Ct. No. 15-406, and *State v. Mohammad*, Sup.Ct. No. 15-774, both of which present the same propositions of law, and both of which are now aided substantially by *McFadden v. United States*, 135 S.Ct. 2298 (June 18, 2015), which is discussed herein.

Although this Court declined review of *Smith* in a 4-3 ruling on August 26, 2015, a motion for reconsideration is pending in that case.

Sub.H.B. 64 was enacted by the General Assembly effective 10-17-11 in an effort to combat designer drugs having a substantially similar chemical structure and effect as drugs already listed in Schedule I or II. H.B. 64 banned the substances by defining what is deemed to be a “controlled substance analog” and by requiring such analogs to be treated as “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.

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. Any provision in the entire Revised Code referring to “controlled substances” would be treated as a matter of law as including analogs within its reach. Thus, the “shall be treated” provision operated hand-in-glove with the “controlled substance” provisions in R.C. 2925.03 and 2925.11, thereby allowing prosecution for trafficking and possession.

But the Tenth District has used a “strict construction” analysis to erect artificial barriers to defeat the plain, broad language of H.B. 64. Its arguments boil down to the

contention that the analog definition and “shall be treated” provision were only set forth in R.C. 3719.01(HH) and R.C. 3719.013, respectively, and that nothing within R.C. Chapter 2925 formally incorporated analogs into the latter chapter.

These locational observations amount to nullification of the General Assembly’s plainly-stated intent. Under R.C. 3719.013, 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 used the same “R.C.” reference *seven* times. 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.

Thus, 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 State raises three propositions of law. First, the Tenth District continues to misapply the doctrine of strict construction by making no real effort to construe what the General Assembly expressed in R.C. 3719.013. Second, the language of R.C. 3719.013 plainly incorporated analogs into the possession and trafficking statutes. Third,

the lower courts are violating the separation of powers by failing to give effect to the General Assembly's plain intent.

The State's arguments are substantially aided by the United States Supreme Court's recent decision in *McFadden*. *McFadden* addressed 21 U.S.C. 813, which is nearly identical to former R.C. 3719.013. Language in *McFadden* shows that the nearly-identical federal law provisions regarding controlled substance analogs operate in exactly the same fashion as the State contends former R.C. 3719.013 should apply.

The Tenth District wrongly brushed off *McFadden* by contending that the Court in that case "merely assumed" that the controlled substance analog was included as a controlled substance. Decision, ¶ 10. *McFadden* did not just "assume" that a controlled substance analog must be treated as a controlled substance. Rather, the Court specifically discussed the interplay between 21 U.S.C. 813 and the other federal drug statutes, and it repeatedly referred to 21 U.S.C. 813 as mandating that controlled substance analogs be treated as controlled substances for purposes of federal law. The operation of Sec. 813 represented the central ratio decidendi of the *McFadden* decision. It was a holding, not an assumption. And, contrary to the panel below, the *McFadden* Court *was* directly asked to interpret and apply Sec. 813 in the manner shown in the opinion. Petitioner's 3-2-15 Brief in *McFadden v. U.S.*, 2015 WL 881768, at 6-7, 16, 21, 24, 25, 40-41.

H.B. 64 was patterned after the federal law discussed in *McFadden*, and so *McFadden*'s discussion of 21 U.S.C. 813 should carry great weight in addressing the nearly-identical language in former R.C. 3719.013. See, e.g., *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, ¶¶ 8, 13; *In re Morgan's Estate*, 65 Ohio St.2d 101, 103-104 (1981).

The *McFadden* Court saw no difficulty in applying the analog concept to crimes like distribution of “controlled substances”. In fact, it directly relied on the “shall be treated” requirement to hold that the knowledge requirement applied to analogs in the same way that it applied to “controlled substances” generally. The “shall be treated” requirement mandated that courts treat analogs like “controlled substances” and the *McFadden* Court determined that courts must follow this “statutory command.”

*McFadden* shows that the “shall be treated” requirement applies by operation of law. It plugs analogs into other statutes and as a result extends those statutes to include analogs. This is how the *McFadden* Court reached the conclusion that the knowledge requirement for distribution of “controlled substances” in § 841 applied to analogs.

In contrast to the clarity in *McFadden*, the Tenth District’s reasoning has become a moving target. In *Smith*, the Tenth District touted the federal statutes as clearly indicating that analogs must be treated as controlled substances because “the requirement that such analogues be treated as controlled substances were placed into the same portion of federal law that contained the prohibitions on possession and sale of controlled substances \* \* \*.” *Smith*, ¶ 15. *Smith* conceded that the purpose of the federal analog provision was to make analogs “subject to the restrictions imposed on controlled substances.” *Smith*, ¶ 6. But now, with *McFadden* repeatedly relying on the federal provision to equate analogs with “controlled substances,” the Tenth District expresses doubts about whether the federal analog provision accomplished anything, contending that the *McFadden* Court “merely assumed that the analog was included as a controlled substance”. *Mobarak*, ¶ 10. In fact, *McFadden* did not “merely assume” it; it recognized that very point, which the Tenth District itself had already recognized in *Smith* as to federal law.

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, including the seriousness of the charges and the injury done to separation of powers.

Most importantly, though, 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 these parts of the statutory scheme. The Tenth District's analysis will hamstring the operation of those statutes in a county having 1.2 million people.

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 State incorporates by reference the procedural and factual history discussed

in paragraphs one through four of the Tenth District decision. The State adds the following.

The defense motion to dismiss in the trial court was based solely on a claim that the analog definition was unconstitutionally vague. The defense conceded that analogs were incorporated into R.C. 2925.03 and R.C. 2925.11, contending that “R.C. § 3719.013 treats a CSA as a Schedule I drug for the purpose of sale and possession under R.C. § 2925.11 and R.C. § 2925.03.” 2-1-13 Motion, at 1.

Testimony at trial revealed defendant’s lucrative role in the analog-trafficking business and confirmed defendant’s knowledge of their illegality, even including felony levels. A witness testified that he bought bath salts from S & K – defendant’s store – both for personal use and to sell to others in Pike County. (T. 745-46) Defendant once bragged about making “almost a million dollars” selling bath salts. (T. 753) When the witness approached defendant about buying bath salts in greater quantities, defendant responded that he only sells bath salts “in individual packets” because “it was a different felony degree if he sold it in bulk.” (T. 754) According to this witness, bath salts are like cocaine, methamphetamines, and ecstasy “all rolled into one.” (T. 755) Bath salts are “10 times better than cocaine because you get higher on it.” (T. 758)

Another witness testified that defendant gave her a package of “Heavenly Soak” and nodded yes when she asked him if “the salts would get [her] fucked up”. (T. 88, 97) Defendant “advised” her to use a false name “hookah cleaner” for the product. (T. 88)

Other evidence showed that, between May 2012 and August 2012, police executed several search warrants at S & K and recovered numerous brands of a-PVP, as well as various items of paraphernalia associated with ingesting bath salts. (T. 98-114,

127-31, 139-41, 381-82) Defendant was arrested during a search on July 25, 2012. (T. 121) On that date, a UPS truck arrived to deliver a package that police later discovered contained packages of a-PVP; a false name was listed as the recipient, but defendant's cell phone number was on the shipping label. (T. 123-24, 138)

## 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. The *Mobarak* panel likewise insisted that the rule of lenity “requires the court to construe ambiguity in criminal statutes so as to apply only to conduct that is clearly proscribed \* \* \*.” *Mobarak*, ¶ 7.

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 text is “ambiguous,” 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; *State v. Sway*, 15 Ohio St.3d 112, 116 (1984). 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.

“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 *Mobarak* panel also disregarded the important discussion in *McFadden* of the federal analog provision.

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 phrase “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. 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” for purposes of *any* provision in the *Revised Code*. There was no need for R.C. 2925.01 to incorporate the analog definition 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. In fact, the preamble favored the State’s position because 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 that addressed that issue, R.C. 3719.013. The inquiry into legislative intent cuts across *all* statutes, and so courts cannot cordon off entire chapters from review. *Johnson’s Markets, Inc. v. New Carlisle Dept. of Health*, 58 Ohio St.3d 28, 35 (1991). And cross-references are unnecessary when construing statutes in *pari materia*. *State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463 (1956).

The *Smith* panel contended that the “shall be treated” requirement was “confusing” and created a “seeming[] contradict[ion]” because analogs are not “controlled substances” under R.C. 3719.01(HH) and yet R.C. 3719.013 requires that they be treated as “controlled substances” for purposes of other statutes. But there is no real confusion or contradiction. Yes, analogs are knock-offs of “controlled substances” listed in schedule I or II, and such analogs are not themselves already listed in any schedule. But, legally, R.C. 3719.013 operates to treat them as “controlled substances” listed in “schedule I” as a matter of law.

The *McFadden* Court recognized this exact point under the nearly-identical federal “shall be treated” requirement. It recognized that the federal drug prohibitions apply to “controlled substances” and that analogs are “treated as such by operation of the Analogue Act” and are “treated as listed by operation of the Analogue Act”. *McFadden*, 135 S.Ct. at 2305-2306. The federal provision “instructs courts to treat those analogues \* \* \* as controlled substances” and thereby “extends the framework of the CSA to analogous substances”. *Id.* at 2302, 2304. By operation of law, analogs are “controlled substances” just as much as drugs listed in the schedules.

There is no contradiction. Federal law prohibits distribution of “controlled substances” and also prohibits distribution of analogs, which are treated as “controlled substances” by operation of law. The *McFadden* Court treats the two as interchangeable.

The *Smith-Mohammad-Mobarak* panels have also lodged various locational criticisms because the “shall be treated” requirement was put in R.C. 3719.013 instead of in R.C. Chapter 2925. They also assert that the federal statutes have a different structure.

In light of *McFadden*, however, the notion of an “ambiguity” based on “structure” no longer stands. *McFadden* holds that the federal “shall be treated” requirement is unambiguous. The same “unambiguous” conclusion would apply here to R.C. 3719.013.

*McFadden* shows that the issue does not turn on the formalism of location in the Code. *McFadden* recognized that the “shall be treated” language required that it “must turn first to the statute that addresses controlled substances, the CSA.” *McFadden*, 135 S.Ct. at 2303. Thus, the controlling consideration was not “subchapters” or “parts,” but, rather, whether the other statute “addresses controlled substances”. The Court also held that the term “controlled substance” includes “those drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act.” *Id.* at 2305, 2306. As confirmed by *McFadden*, the “shall be treated” requirement extends the analog concept to any statute addressing “controlled substances” – wherever it might be found – because analogs are “controlled substances” by operation of law. This makes perfect sense in *McFadden* since the federal requirement applies for purposes of *any* federal law.

The same approach leads to the rejection of the *Smith* panel’s locational contentions here. Under Ohio law, both R.C. Chapters 2925 and 3719 address controlled substances. And under R.C. 3719.013, the analog concept extends by operation of law to *any* provision in the entire *Revised Code*. The analog concept therefore easily reached the trafficking and possession statutes in R.C. 2925.03 and R.C. 2925.11, both of which addressed “controlled substances”.

The *Smith* panel’s locational and “structure” contrasts between federal and Ohio law are ultimately self-defeating. The General Assembly had already deviated from the “structure” of federal law by setting up the prohibition and regulation of controlled

substances in at least two chapters, R.C. Chapter 2925 and R.C. Chapter 3719. By copying the federal “shall be treated” requirement into R.C. 3719.013 and by expressly indicating that this applied to *any* provision of the *Revised Code*, the General Assembly was signaling that the different “structuring” of Ohio law should make no difference.

As *McFadden* recognizes, sections 813 and 841 were operating in tandem to prohibit the distribution and possession of analogs. As *Smith* conceded at ¶ 6, the purpose of the federal analog provision was to make analogs “subject to the restrictions imposed on controlled substances.” The General Assembly was adopting that same approach by copying federal law on this point.

It is counterintuitive to think that the General Assembly intended to deviate from federal law. If anything, the General Assembly’s copying of federal law was indicating that it wanted exactly what federal law had, i.e., a broad provision extending the “controlled substance” prohibitions to analogs, thereby subjecting analogs to all such similar prohibitions under Ohio law.

Space limitations prevent a further discussion of the errors in the *Smith-Mohammad-Mobarak* trilogy, including the flawed list of “ambiguities” that are itemized in paragraph 7 of the *Mobarak* decision. In the end, none of these claimed “ambiguities” address the unqualified, overarching language of R.C. 3719.013 extending the analog concept to every statute in the Revised Code that addresses “controlled substances.”

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.

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 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 crimes.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was served on September 11, 2015, to Robert Behal via regular U.S. Mail to Robert Behal, The Behal Law Group LLC 501 South High Street, Columbus, Ohio 43215, counsel for defendant, and Eric E. Murphy, State Solicitor, 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215, counsel for amicus Ohio Attorney General.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	No. 14AP-517
	:	(C.P.C. No. 12CR-5582)
v.	:	
	:	(REGULAR CALENDAR)
Soleiman Mobarak,	:	
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on July 28, 2015

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*Ron O'Brien*, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

*The Behal Law Group LLC*, *Robert J. Behal*, *John M. Gonzales*, and *Gilbert J. Gradisar*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

BROWN, P.J.

{¶ 1} Soleiman Mobarak, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, in which the court found him guilty, pursuant to a jury verdict, of engaging in a pattern of corrupt activity, in violation of R.C. 2923.32, a first-degree felony (with a specific factual finding that one or more instances of corrupt activity involved a felony of the first degree; and, separately, that one or more instances of corrupt activity involved a felony of the second or third degree); aggravated trafficking in drugs, in violation of R.C. 2925.03, a second-degree felony (with a specific factual finding that a-Pyrrolidinopentiophenone ("A-PVP") was a controlled substance analog); aggravated possession of drugs, in violation of R.C. 2925.03, a fourth-degree felony (with

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a specific factual finding that A-PVP was a controlled substance analog); aggravated trafficking in drugs, in violation of R.C. 2925.03, a second-degree felony (with a specific factual finding that A-PVP was a controlled substance analog); aggravated possession of drugs, in violation of R.C. 2925.11, a second-degree felony (with a specific factual finding that A-PVP was a controlled substance analog); aggravated trafficking in drugs, in violation of R.C. 2925.03, a first-degree felony (with a specific factual finding that A-PVP was a controlled substance analog); and aggravated possession of drugs, in violation of R.C. 2925.11, a first-degree felony (with a specific factual finding that A-PVP was a controlled substance analog). The jury also made findings as to the bulk amount issues on the drug counts.

{¶ 2} Appellant owns a convenience store. From March to July 2012, undercover police officers purchased packages of a substance commonly referred to as "bath salts" from appellant's store. Appellant was arrested on July 25, 2012. In August and October 2012, appellant was charged with various drug trafficking and possession counts, as well as engaging in a pattern of corrupt activity. The State of Ohio, plaintiff-appellee, alleged the bath salts were "controlled substance analogs," as defined by R.C. 3719.01(HH)(1).

{¶ 3} Appellant sought to have the charges dismissed. The trial court denied the motion orally but never filed an entry. Appellant also filed a motion in limine to exclude the testimony of the state's expert witness, arguing that he did not meet the requirements of Evid.R. 702. The trial court held a hearing and denied the motion.

{¶ 4} A jury trial commenced May 27, 2014 and concluded June 5, 2014. The trial court found appellant guilty on numerous counts, as outlined above. The trial court held a sentencing hearing June 6, 2014 and sentenced appellant to consecutive terms of incarceration totaling 35 years of mandatory confinement without parole. The trial court also fined appellant \$75,000. The trial court entered a judgment entry on June 6, 2014. Appellant appeals the judgment, asserting the following assignments of error:

I. It 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.

II. The "controlled substance analog" statute under which Mr. Mobarak was convicted was unconstitutionally vague on its

face and in its application, and his conviction was a fundamental error that violated his constitutional right to due process of law.

III. Because the state's expert testimony on the substances at issue was insufficient under both the state and federal standards, the trial court erred and abused its discretion in denying Mr. Mobarak's motion in limine to exclude this subjective evidence.

IV. The trial judge erred to Mr. Mobarak's prejudice because an order imposing consecutive sentences in this case is not supported by the facts.

{¶ 5} Appellant argues in his first assignment of error that, although he never raised any claim of error at trial, it was plain error for the trial court to fail to dismiss all charges against him sua sponte, and his conviction and imprisonment for innocent acts is an ex post facto violation that is prohibited by the Ohio and United States Constitutions. "Ordinarily, a failure to bring an error to the attention of the trial court at a time when the court could correct that error constitutes a waiver of all but plain error." *State v. Johnson*, 164 Ohio App.3d 792, 2005-Ohio-6826, ¶ 22 (2d Dist.), citing *State v. Wickline*, 50 Ohio St.3d 114, 120 (1990). Plain error exists when the error is plain or obvious and when the error affects substantial rights. Crim.R. 52(B). The error affects substantial rights when, but for the error, the outcome of the proceeding would have been different. *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 57. Courts ordinarily should take notice of plain error "with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶ 78.

{¶ 6} In the present case, appellant contends that this court recently recognized in *State v. Smith*, 10th Dist. No. 14AP-154, 2014-Ohio-5303, that selling and possessing controlled substance analogs was not a crime until December 20, 2012, but he committed his offenses prior to that date. In *Smith*, we addressed whether Ohio law defined the possession or sale of a controlled substance analog as a criminal offense during the period from February through July 2012 when the defendant was alleged to have possessed and sold A-PVP, which is the same substance at issue in the present case. We first summarized the history of 2011 Am.Sub.H.B. No. 64 ("H.B. No. 64") and R.C. 3719.01(HH)(1). Under

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H.B. No. 64, the General Assembly created a definition of "controlled substance analog" in R.C. 3719.01(HH). The legislation provided that "[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." H.B. No. 64. The amendments and new statutes enacted under H.B. No. 64 became effective October 17, 2011. The General Assembly subsequently passed additional legislation in 2012 amending many of the sections of law relevant to *Smith*, and those amendments became effective December 20, 2012. 2012 Am.Sub.H.B. No. 334. Therefore, at the time of the alleged acts giving rise to the charges in *Smith*, as well as those in the present case, the law as amended by H.B. No. 64 controlled.

{¶ 7} The issue in *Smith* was whether, at the times relative to the appeal, the law contained a positive prohibition on the possession or sale of "controlled substance analogs" and provided a penalty for violating that prohibition. We noted the following ambiguities existed in the criminal statutes: (1) by failing to incorporate the definition of "controlled substance analog" in R.C. 3719.01(HH) into R.C. 2925.01, while specifically incorporating other definitions of terms from R.C. Chapter 3719, the General Assembly excluded that definition from applying in the context of the criminal drug offense statutes; (2) R.C. 3719.01 expressly limits the definitions contained therein, including the definition of "controlled substance analog" under R.C. 3719.01(HH), to "[a]s used in this chapter"—i.e., Chapter 3719 of the Revised Code; (3) the preamble to H.B. No. 64 indicated that one of its purposes was "to define a 'controlled substance analog' for purposes of the Controlled Substances Law," suggesting that the definition created in the legislation was limited to that portion of the Revised Code and did not extend to the criminal drug offense statutes. H.B. No. 64; (4) R.C. Chapter 3719 generally relates to the civil regulation of controlled substances, not to criminal enforcement, and there were no cross-references or any other indicators in R.C. Chapter 2925 to provide notice that the treatment of controlled substance analogs under R.C. Chapter 3719 also applied to R.C. 2925; (5) R.C. 3719.01(HH)(2)(a) states that "controlled substance analog" does not include "[a] controlled substance," which seemingly contradicts R.C. 3719.013; and (6) unlike the federal Controlled Substance Analogue Enforcement Act of 1986, in which all of the relevant provisions were placed into the same portion of federal law that contained the

prohibitions on possession and sale of controlled substances, H.B. No. 64 placed the controlled substance analog provisions in R.C. Chapter 3719, separate from the prohibitions and penalties set forth in R.C. Chapter 2925, and failed to incorporate any explicit cross-references in R.C. Chapter 2925 to the controlled substance analog provisions. Applying the rule of lenity, which requires the court to construe ambiguity in criminal statutes strictly so as to apply only to conduct that is clearly proscribed, we concluded in *Smith* that, during the period from February through July 2012 when the defendant was alleged to have possessed and sold A-PVP, R.C. 2925.03 and 2925.11 did not adequately state a positive prohibition and provide a penalty for violation of such prohibition on the sale or possession of controlled substance analogs. Therefore, we found the acts defendant was alleged to have committed in *Smith* were not clearly defined as criminal offenses under the law as it existed at the time.

{¶ 8} We recently followed *Smith* in *State v. Mohammad*, 10th Dist. No. 14AP-662, 2015-Ohio-1234, which also concerned A-PVP, to conclude 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 H.B. No. 64, and, thus, possession of controlled substance analogs had not yet been criminalized by that bill.

{¶ 9} Applying *Smith* to the present case, we find possession and trafficking of controlled substance analogs had not yet been criminalized as of the time of appellant's offenses. Thus, we find the trial court here erred when it found appellant guilty of aggravated possession of drugs and aggravated trafficking in drugs, and we sustain appellant's first assignment of error. Furthermore, a conviction for engaging in a pattern of corrupt activity is dependent upon the presence of predicate offenses. *See* R.C. 2923.31(E). The predicate offenses here were the aggravated possession of drugs and aggravated trafficking in drugs counts. Given our determination with regard to the predicate offenses, we must find the trial court erred when it found appellant guilty of engaging in a pattern of corrupt activity.

{¶ 10} We also note that, after oral arguments in this matter, the state was granted leave to file a supplemental brief to address a recent United States Supreme Court case, *McFadden v. United States*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2298 (2015). The state contends that

*McFadden* answers the issue before us concerning the "shall be treated" language in R.C. 3719.013. However, in its supplemental brief, the state presents many of the same arguments that this court rejected in *Smith*. Furthermore, the United States Supreme Court in *McFadden* was not asked to directly interpret the "shall be treated" language in the Controlled Substance Analogue Enforcement Act of 1986. The issue before the United States Supreme Court concerned the knowledge necessary for conviction under the Controlled Substances Act ("CSA") when the controlled substance at issue is an analog. The United States Supreme Court merely assumed that the analog was included as a controlled substance for purposes of interpreting the mens rea requirement in the CSA. Therefore, we do not find that *McFadden* demands a different result in the present case. For all the foregoing reasons, appellant's first assignment of error is sustained. In addition, given our above determinations, we need not address appellant's second, third, and fourth assignments of error.

{¶ 11} Accordingly, appellant's first assignment of error is sustained, his second, third, and fourth assignments of error are rendered moot, and the judgment of the Franklin County Court of Common Pleas is reversed.

*Judgment reversed.*

KLATT and HORTON, JJ., concur.

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Tenth District Court of Appeals

**Date:** 07-30-2015  
**Case Title:** STATE OF OHIO -VS- SOLEIMAN MOBARAK  
**Case Number:** 14AP000517  
**Type:** JEJ - JUDGMENT ENTRY

So Ordered

A handwritten signature in cursive script, appearing to read "Susan Brown", is written over a circular seal. The seal is partially obscured by the signature and contains some illegible text.

/s/ Judge Susan Brown, P.J.

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