

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

HAMZA SHALASH,

Appellant.

Case No. 2015-1782

**On Appeal from the Warren
County Court of Appeals,
Twelfth Appellate District**

**Court of Appeals No.
CA2014-12-146**

BRIEF OF APPELLEE, STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

In the fall of 2011, Ohio's 129th General Assembly enacted legislation that (1) defined 'controlled substance analog,' and (2) treated controlled substance analogs as schedule I substances. See H.B. 64 (2011). On May 21, 2012, Hamza Shalash (Appellant) was indicted in Warren County, Ohio with nine felony counts, all related to his involvement in trafficking various controlled substance analogs. T.d. 1, Indictment.

The facts surrounding the offenses committed by Appellant are not in dispute. T.p., 12/8/14, pp. 10-11. Appellant was the co-owner of a Marathon station located in Lebanon, Ohio, and he sold designer drugs from the gas station in January and February 2012. T.p., 3/19/13, pp. 12, 60. A designer drug is a substance that is altered to allude the legal definition of what an illegal drug is. *Id.* at 178. They are created, not by the Food and Drug Administration or the pharmaceutical industry, but rather in clandestine laboratories for unregulated or recreational use. *Id.* at 250.

The substances Appellant sold were primarily referred to by the street names spice and bath salts, but they were labeled with a variety of brand names, including Kush, Planet Red, Xtreme, Rast Exotic, Voodoo, Kalifornia Kronic, Illini Kronic, Energy Soak, Heavenly Soak, Diesel, Jungle Juice, Fire Triple X, Bull Dog, Red Dot, Mr. Krush, Cloud, Pandora, and Ohini *Id.* at 12, 14, 18-19, 29, 41, 48, 49-53, 75, 113, 127, 207. Spice is an example of a designer drug that has hallucinogenic properties and is prepared in a plant-like form for smoking. *Id.* at 178-9. Spice is in the class of synthetic cannabinoids, referred to as JWH. *Id.* at 256. Bath salts are also designer drugs, which have stimulant effects, and are typically found in powder form for snorting or injecting. *Id.* at 179-80. They are in the substituted cathinone class, or AM2201 or Alpha PVP. *Id.* at 256.

Appellant's case proceeded to a jury trial in March 2013, and he was found guilty of all nine counts in the indictment. T.p., 3/19/13, p. 379-80. Brooke Ehlers, forensic chemist at the Miami Valley Regional Crime Lab, testified as an expert witness at Appellant's trial. *Id.* at 168. She performed the drug analysis for the State in his case. *Id.* at 168. She testified, generally, that once a substance is sent to the lab, she identifies the substance as either a scheduled substance or a controlled substance analog, meaning, pursuant to the statutory definition, the substance is substantially structurally similar to a scheduled controlled substance. *Id.* at 174-5; see also R.C. 3719.01(HH)(1). She does this by visually comparing the core structure of the subject substance with the core structure of a scheduled substance, and she then examines the functional groups, i.e., molecules, atoms, and bonds attached to the core structure. *Id.* at 176. She can tell by the location of functional groups whether the subject substance is substantially structurally similar to a scheduled substance, meaning the majority of the structures are matching and have components in common. *Id.* at 176, 187. She then verifies her findings with other analysts at the lab. *Id.* at 176.

The substances analyzed from Appellant's store contained compounds JWH250, JWH122, JWH210, and AM2201, which are not scheduled controlled substances. *Id.* at 182, 187. Ms. Ehlers compared those structures to JWH018, which is the structural compound of a known and scheduled controlled substance. *Id.* at 183. She found that JWH250 and JWH122 were substantially structurally similar to JWH018. *Id.*¹ Additionally, Ms. Ehlers found that

¹ The only structural difference between the JWH250 and JWH018 was that the latter had two benzene rings coming off the core, while the former had one ring with an oxygen coming off of it. *Id.* at 184. Between JWH122 and JWH018, the only difference was that the former had a methyl group coming off the structure, when the latter did not. *Id.* at 185.

JWH210 and AM2201 were substantially structurally similar to JWH018. *Id.* at 187.² Ms. Ehlers also analyzed a bath salt sample from Appellant's store labeled Heavenly Soak Blissful Bath Salts. *Id.* at 191. She found that the substance contained Alpha PVP, which is substantially structurally similar to a substance called MDPV, a scheduled controlled substance. *Id.* at 192.³

Lorraine Marinetti, chief forensic toxicologist for the Montgomery County Coroner and the Miami Valley Regional Crime Lab, provided expert testimony on behalf of the State regarding the physiological effects various designer drugs have on a person who uses them. *Id.* at 246. Synthetic cannabinoids like JWH250, JWH210, JWH122, AM2201, and JWH018 affect the heart rate, blood pressure, and brain, and cause hallucinations, paranoia, aggression, and possible seizures or death, similar to marijuana, but enhanced. *Id.* at 257. Substituted cathinones, or bath salts, such as Alpha PVP and MDPV, are stimulants, increasing energy and euphoria. *Id.* at 258. They have the same types of dangerous effects as the synthetic cannabinoids on the heart and brain. *Id.* See also T.p. *Daubert* Hearing, 10/15/14, pp. 147-8.

Following his conviction, Appellant appealed to the Twelfth District Court of Appeals, arguing, among other challenges, that the trial court erred when it did not hold a *Daubert* hearing on Appellant's motion *in limine* regarding the State's expert's testimony. See *State v. Shalash*, 12th Dist. Warren No. CA2013-06-052, 2014-Ohio-2584 (*Shalash I*). The court of appeals agreed, reversed Appellant's conviction, and remanded the matter for further proceedings.

On remand, the trial court held a *Daubert* hearing. See T.p. 10/15/14. Following the *Daubert* hearing, the trial court issued a decision allowing the expert testimony of the State's

² The JWH210 structure has an extra ethyl group which the JWH018 does not have. *Id.* The only difference between the JWH18 and the AM2201 is that the AM2201 has a fluorine in the place where the JWH018 has a hydrogen. *Id.*

³ The only difference was a methylenedioxy group on the core structure of the MDPV that was not present on the structure of the Alpha PVP. *Id.* at 192.

witnesses. T.d. 92, Decision and Entry. The court found that the methods employed by the Miami Valley Regional Crime Lab experts in this case were widely accepted in the forensic science community; the procedures were objectively verifiable and validly derived from widely accepted principles of forensic chemistry; and the procedures were reliably implemented and conducted in a way that would yield an accurate result. T.d. 92, Decision and Entry, p. 2. Likewise, the court found that the testimony on pharmacology was rooted in traditional science readily accepted in the scientific community. *Id.*

Appellant filed a motion to dismiss following the *Daubert* hearing, arguing for the first time that sale of controlled substance analogs was not criminalized until December 20, 2012 with the passage of H.B. 344. T.d. 89, Motion to Dismiss. Appellant noted the then-recently-decided Tenth District decision in *State v. Smith*, 10th Dist. Franklin Nos. 14AP-154, 14AP-155, 2014-Ohio-5303. The trial court denied the motion. T.d. 96, Decision and Entry Overruling Motion to Dismiss.

On December 8, 2014, Appellant pled no contest, and the court found him guilty of all nine counts of the indictment. T.p., 12/8/14, p. 11-12. Appellant again appealed to the Twelfth District Court of Appeals, this time challenging the legality of the conviction in addition to the *Daubert* hearing ruling. See *State v. Shalash*, 12th Dist. No. CA2014-12-146, 2015-Ohio-3836 (*Shalash II*). The Twelfth District declined to follow *Smith*, and upheld Appellant's conviction. *Id.*

Noting a conflict between the Twelfth District's decision and the *Smith* decision on the issue of the criminality of controlled substance analogs between November 2011 and December 2012, Appellant sought to certify that conflict to this Court.

ARGUMENT

Certified-Conflict Question:

Whether ‘controlled substance analogs’ were criminalized as of October 17, 2011, the effective date of House Bill 64.

Proposition of Law:

Controlled substance analogs were criminalized when they were defined and incorporated into controlled substance law with the enactment of House Bill 64 and codification of Ohio Revised Code §§ 3719.01(HH) and 3719.013 on October 17, 2011.

Because trafficking in controlled substance analogs was a crime at the time Appellant committed the offenses in January and February 2012, this Court should affirm the holding of the Twelfth District Court of Appeals, and overturn the decision of the Tenth District Court of Appeals in *State v. Smith*.

A. The Ohio General Assembly clearly intended House Bill 64 to define ‘controlled substance analogs’ for purposes of Chapter 29 of the Ohio Revised Code.

With the passage of H.B. 64 in October 2011, the Ohio General Assembly amended R.C. 3719.01 to add subsection (HH), which defines ‘controlled substance analog’ as follows:

- (1) ‘Controlled substance analog’ means, except as provided in division (HH)(2) of this section, a substance to which both of the following apply:
 - (a) The chemical structure of the substance is substantially similar to the structure of a controlled substance in schedule I or II.
 - (b) On of the following applies regarding the substance:
 - (i) The substance has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.
 - (ii) With respect to a particular person, that person represents or intends the substance to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.
- (2) ‘Controlled substance analog’ does not include any of the following:
 - (a) A controlled substance;

- (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.

House Bill 64 also added R.C. 3719.013, which provides, “[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.” (Emphasis added).

Nothing about R.C. 3719.013 is ambiguous. The statute specifically incorporates the concept of controlled substance analogs, as defined in R.C. 3719.01(HH), into every part of the Ohio Revised Code, including Chapter 29. As the Twelfth District Court of Appeals pointed out in the decision below, “‘any’ means ‘all’ or ‘without limitation.’” *Shalash II* at ¶23, citing *Wachendorf v. Shaver*, 149 Ohio St. 231, 239-40, 78 N.E.2d 370 (1948); *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (“Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’ Webster’s Third New International Dictionary 97 (1976)”). Chapter 29 is part of the Ohio Revised Code. Chapter 29 criminalizes unauthorized possession and sale of scheduled controlled substances. See R.C. §§ 2925.03; 2925.11. In treating controlled substance analogs as schedule I substances, codification of R.C. 3719.013 thereby criminalized possession and trafficking of controlled substance analogs.

The preamble to H.B. 64 also clearly states the legislative intent:

* * * to add synthetic cannabinoids commonly known as K2 or Spice to the list of Schedule I controlled substances, to prohibit the possession of Spice, to prohibit trafficking in Spice, to provide that if Spice is the drug involved in a violation of the offense of corrupting another with drugs the penalty for the violation will be the same as if marihuana was the drug involved in the offense, to add six synthetic

derivatives of cathinone that have been found in bath salts to the list of Schedule I controlled substances, *to define a 'controlled substance analog' for purposes of the Controlled Substances Law, and to treat controlled substance analogs as Schedule I controlled substances * * **.

(Emphasis added). It is significant that at the same time the legislature scheduled all synthetic cannabinoids, it also scheduled six newly-discovered synthetic *derivatives* of cathinone. At the same time, the legislature defined controlled substance analogs for the first time, and treated them as scheduled controlled substances as well. It is reasonable to infer from the stated legislative intent that lawmakers were beginning to recognize the derivative nature of synthetic designer drugs. In recognizing that newly-discovered compounds were emerging from the clandestine labs where they were synthesized, H.B. 64 was an attempt to criminalize those substances that act like scheduled substances, but which have a slightly different chemical makeup and therefore allude the drug schedules. There is no other purpose that can be read from the legislature's clearly articulated broad intentions to treat controlled substance analogs like scheduled controlled substances, including their criminalization.

Appellant's case illustrates exactly the type of conduct the General Assembly intended to prohibit when it enacted H.B. 64. The issues in Appellant's case involving the testimony of the State's experts and the disputed methodology used to identify controlled substance analogs are practical examples that support the legislative intent to criminalize a broad range of substances not listed in the drug schedules in Chapter 37 of the Ohio Revised Code. It is reasonable to conclude that in light of emerging cases like Appellant's, the legislature recognized a need to criminalize drugs that might not yet be created or identified. It did so by creating a definition of an analog, or derivative, of a dangerous substance already known to exist, i.e. any given controlled substance. It then specifically incorporated such substances into all provisions of the

Revised Code, including the criminal provisions, by creating a statute that would treat all controlled substance analogs as scheduled substances.

Therefore, read together, the amendments to the Revised Code enacted in October 2011 were clearly intended to criminalize, and did criminalize, controlled substance analogs.

B. Because the 2011 statutes were unambiguous, no statutory interpretation is necessary.

The primary goal of statutory construction is to determine the General Assembly's intent. *State v. Kormos*, 12th Dist. Clermont No. CA2011-08-059, 2012-Ohio-3128, ¶14. The first step in determining legislative intent is to look at the language of the statute. *Id.* If the statute's meaning is clear and definite, then the statute must be applied as written. *Id.* But, if the statute's language is ambiguous and subject to more than one interpretation, then further interpretation is needed. *Id.*; see also *In re I.A.*, 140 Ohio St.3d 203, 2014-Ohio-3155, 16 N.E.3d 653, ¶12, citing *Estate of Heintzelman v. Air Experts, Inc.*, 126 Ohio St.3d 138, 2010-Ohio-3264, 931 N.E.2d 548, ¶15("Our first duty in statutory interpretation is to determine whether the statute is clear and unambiguous"), also citing *State v. Kreisler*, 109 Ohio St.3d 391, 2006-Ohio-2706, 848 N.E.2d 496 ("We examine the words used by the General Assembly in the statute, 'and when the General Assembly has plainly and unambiguously conveyed its legislative intent, there is nothing for a court to interpret or construe, and therefore, the court applies the law as written"). The clearest evidence of the legislative intent that the definition apply to Chapter 29 is the enactment of R.C. 3719.013, mentioned above, which unambiguously states that controlled substance analogs *shall* be treated for purposes of *any* provision of the Revised Code as scheduled substances.

Appellant relies on the conflict case of *State v. Smith* from the Tenth District Court of Appeals. However, the Tenth District in *Smith* should have recognized the plain and clear

language of R.C. 3719.013 and found that the statute intended to criminalize possession and sale of controlled substance analogs. Notably, the *Smith* court also found that no ambiguity exists in R.C. 3719.013. *Smith* at ¶14. Nevertheless, the *Smith* court created an ambiguity by reasoning that the placement of the definition of controlled substance analog within chapter 37 instead of Chapter 29 was confusing. Construing an ambiguity for that reason, the *Smith* court applied the rule of lenity at the outset of its analysis.

The *Smith* court's application of rules of statutory construction was thereby misplaced. The rule of lenity only applies where a statute is ambiguous, and it should only be used at the end of statutory analysis. *State v. Elmore*, 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶40. In applying the rule of lenity where there was no ambiguity, the Tenth District effectively decriminalized the sale and possession of controlled substance analogs from October 2011 to December 2012, where there had previously been a clear intention to criminalize such conduct.

Appellant and the Tenth District likewise misapply the maxim *expression unius est exclusio alterius* (the expression of one thing is the exclusion of the other) in arguing that the placement of the definition of controlled substance analog within Chapter 37 of the Ohio Revised Code should necessarily exclude application of that definition in Chapter 29 of the Ohio Revised Code. According to the maxim, a statute that has specified one exception to a general rule is assumed to have excluded all other exceptions. *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶34. The rule does not apply to every statutory list or group; it only has force when the items expressed in the list or group are members of an associated group or series justifying inferences that the items not mentioned were excluded by the legislature's deliberate choice, not oversight. *Id.* at ¶35.

Neither R.C. 3719.01(HH) nor R.C. 3719.013 set forth any statutory exception or list that calls for application of *expression unius est exclusion alterius*. A court cannot apply the adage in the face of clear legislative intent in order to defeat that intent. *Murphy v. Murphy*, 471 A.2d 619, 622 (R.I. 1984); *Mid-Century Ins. Co. v. Kidd*, 997 S.W.2d 265, 274 (Tex. 1999) (The maxim, *expression unius est exclusion alterius* is an aid to determine legislative intent, not an absolute rule, and should not be mechanically applied to compel an unreasonable interpretation); *Degollado v. Gallegos*, 917 P.2d 823, 826 (Kan. 1996) (The maxim may assist in determining legislative intent that is not manifest, but should not be used to override or defeat a clearly contrary legislative intent).

Therefore, Appellant attempts to support his proposition of law with forced statutory interpretation using inapplicable rules of construction. Because the legislative intent and the plain language of the statutes enacted by H.B. 64 do not contain ambiguity, they only require a plain and holistic reading to conclude that the bill criminalizes controlled substance analogs.

C. Even if there was an ambiguity, applicable rules of statutory interpretation clarify the legislative intent to criminalize controlled substance analogs.

Even if it could be said that some ambiguity or doubt existed in H.B. 64, application of the rule *in pari materia* would have been more appropriate than application of *expression unius est exclusion alterius*. *State ex rel. Herman v. Klopffleisch*, 72 Ohio St.3d 581, 585, 651 N.E.2d 995 (1995). “It is a ‘well-settled rule of statutory interpretation that statutory provisions be construed together and the Revised Code be read as an interrelated body of law.’” *State ex rel. Stewart v. Russo*, 2016-Ohio-421, 2016 Ohio LEXIS 260, ¶14, citing *State v. Moaning*, 76 Ohio St.3d 126, 128, 1996-Ohio-413, 666 N.E.2d 1115 (1996). Thus, pursuant to *in pari materia*, a court must read all statutes relating to the same general topic as one, whether or not they reference each other. *Klopffleisch* at 585. In construing statutes *in pari materia*, the court must

give those statutes a reasonable interpretation that will give proper force and effect to each and all of the statutes. *Id.*

In other words, various chapters of the Revised Code are not meant to be read in isolation. Chapter 29 of the Ohio Revised Code contains sections criminalizing scheduled controlled substances. Chapter 37 contains the schedules. Section 3719.013 requires controlled substance analogs to be treated as scheduled substances. Application of *in pari materia* logically leads to the criminalization of controlled substance analogs as of the date R.C. 3719.013 came into effect. Merely because H.B. 64 added no reference to the definition of ‘controlled substance analog’ within Chapter 29 does not mean that the definition was not intended to apply to that chapter. As the *Smith* court recognized, and as the Twelfth District Court of Appeals pointed out in *Shalash II*, “there is frequent interplay and integration for purposes of implementation between Chapters 3719 and 2925 as schedule I is mentioned in various places in Chapter 3719.” *Shalash II* at ¶25. Likewise, “Chapter 2925 defines certain terms by incorporating the definitions contained in R.C. Chapter 3719.” *Id.*, citing *Smith* at ¶12. By misapplying *expression unius est exclusio alterius* and ignoring *in pari materia*, the Tenth District rendered H.B. 64 meaningless as it related to controlled substance analogs. Such does not comport with the rules of statutory construction. Nor is that a reasonable interpretation that gives proper force and effect to the statutes enacted in 2011, particularly where such interpretation renders them meaningless.

CONCLUSION

For all of the foregoing reasons, the State respectfully requests that this Court hold that ‘controlled substance analogs’ were criminalized as of October 17, 2011, the effective date of House Bill 64. The State further requests that this Court affirm the decision of the Twelfth

District Court of Appeals, and overturn the *Smith* decision from the Tenth District Court of Appeals.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was sent via regular U.S. mail to Terrence K. Scott, Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215; Steven L. Taylor, Assistant Prosecuting Attorney, Franklin County Prosecutor's Office, 373 South High Street, 13th Floor, Columbus, Ohio 43215; and Eric E. Murphy, State Solicitor, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, on this the 24th day of May 2016.



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