ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2015-1782
Plaintiff-Appellee,	:	
	:	On Appeal from the
v.	:	Warren County Court of Appeals,
	:	Twelfth Appellate District
HAMZA SHALASH,	:	Case No. CA2014-12-146
	:	
Defendant-Appellant.	:	

REPLY BRIEF OF DEFENDANT-APPELLANT HAMZA SHALASH

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STATEMENT OF THE CASE AND FACTS

Hamza Shalash relies upon the Statement of the Case and Facts contained in his merit brief.

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:

Because R.C. 2925.03(A), effective October 17, 2011, criminalized only the sale of controlled substances and had not created the offense of trafficking in "controlled substance analogs" until December 20, 2012, a person could not be charged for those offenses prior to that date.

A. Trafficking in "controlled substance analogs" was not defined as an offense until the General Assembly enacted 2011 Am.Sub.H.B. No. 334.

The State insists with great confidence the unimpeachable clarity of the legislature's intent when it enacted 2011 Am.Sub.H.B. No. 64: "There is no other purpose that can be read from the legislature's clearly articulated broad intentions..."; "…the amendments to the Revised Code enacted in October 2011 were clearly intended to criminalize [ ] controlled substance analogs."; "…a clear intention to criminalize…." (Appellee's Merit Brief p.7, 8, 9). However, the General Assembly did not share the State's confidence in the clarity of 2011 Am.Sub.H.B. No. 64, which is supported by the subsequent enactment of 2011 Am.Sub.H.B. No. 334. As such, there is no better evidence that the legislature's intent was unclear than its near immediate passage of 2011 Am.Sub.H.B. No. 334 *after* the passage of 2011 Am.Sub.H.B. No. 64. And for additional evidence, this Court need only look to the Am.Sub.H.B. No. 334 Bill Summary, which states:

> **Creates the criminal offenses** of trafficking in and possession of controlled substance analogs and specifies penalties for the offenses.

***

> Specifies that controlled substance 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 controlled substance analogs. (Emphasis added.)

B. The Attorney General recognized 2011 Am.Sub.H.B. No. 64 failed to unambiguously define and criminalize "controlled substance analogs."

Notably, the Attorney General is quoted in numerous interviews heralding the arrival of 2011 Am.Sub.H.B. No. 334 as an answer to the ambiguous state of the law: '"Because of these creative chemical changes, we're seeing cases involving dangerous synthetic drugs that we can't prosecute right now under current law,' DeWine said. 'That is very frustrating for me. We need to change that, and this bill will change that."'

Irby, *Ohio Bill Would Strengthen Laws Banning Synthetic Drugs*, The Plain Dealer (Nov. 14, 2012),

http://www.cleveland.com/open/index.ssf/2012/11/ohio_bill_would_strengthen_law.html (accessed June 7, 2016); *see also* Mike DeWine, Ohio Attorney General, *Synthetic Drugs News Conference* (Nov. 14, 2012), http://www.ohioattorneygeneral.gov/Media/Videos/Synthetic-Drugs-News-Conference (accessed June 7, 2016);

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http://www.dispatch.com/content/stories/local/2011/07/01/ohio-ban-covers-drugs-yet-to-come.html (accessed June 7, 2016). '"The thought was the first bill was flexible enough to cover any changes (made by chemists), but that didn't work,' he said. 'We think this will cover this for a while,..."'

Frolik, *Tougher Synthetic Drug Bill Passes Final Hurdle*, Dayton Daily News (Dec. 6, 2012), http://www.daytondailynews.com/news/news/tougher-synthetic-drug-bill-passes-final-hurdle/nTPdq/ (accessed June 7, 2016).

The Attorney General recognized that the language enacted by 2011 Am.Sub.H.B. No. 64 lacked the specificity to encompass "analogs," whereas 2011 Am.Sub.H.B. No. 344 defined analogs and addressed substances that the legislature did not previously contemplate.

True, the General Assembly created 2011 Am.Sub.H.B. No. 64 and enacted R.C. 3719.013, which provided:

> Except as otherwise provided in section 2925.03 or 2925.11 of the Revised Code, a controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

R.C. 3719.013 (2011). Notably, 2011 Am.Sub.H.B. No. 64 also amended R.C. 3719.01 to add subsection (HH). Specifically, R.C. 3719.01(HH)(2)(a) states that a '"controlled substance analog' does not include any of the following: (a) A controlled substance." In so doing, the General Assembly contradicted its newly created R.C. 3719.013. Yet, the State and Amici insist that the General Assembly's intentions were clear and that R.C. 3719.013 unambiguously made the sale of controlled-substance analogs illegal.

Further, R.C. 3719.013 did not add, transfer, or remove any chemical to the controlled substance schedules. Nor did the amendment define "controlled substance analogs" as "controlled substances." Instead, that statute indicated that a "controlled substance analog" shall be treated as a schedule I "controlled substance." This distinction is significant because only trafficking in chemicals specifically included on the drug schedules was criminalized under R.C. 2925.03 during the relevant time period.

The General Assembly recognized this because 2011 Am.Sub.H.B. No. 64 criminalized specifically named compounds by adding six synthetic cannabinoids and six synthetic derivatives of cathinone to the list of schedule I controlled substances. Thus, 2011 Am.Sub.H.B. No. 64 did not allow unknown iterations of scheduled controlled substances to be prosecuted in the same manner as controlled substances. Conversely, 2011 Am.Sub.H.B. No. 334 criminalized an entire class of dangerous drugs, not just specifically named compounds, by inserting the phrase "controlled substance analogs" into the drug statutes. At that point, the General Assembly allowed the sale of controlled-substance analogs to be prosecuted in the same manner as controlled substances.

C. Ohio's controlled-substance-analog statute is structurally dissimilar to the federal statute that broadly criminalized analogs.

The State and Amici contend that 2011 Am.Sub.H.B. No. 64 broadly criminalized analogs in a way similar to the federal Controlled Substances Analogue Enforcement Act of 1986 (CSAEA). Indeed, 2011 Am.Sub.H.B. No. 64 was seemingly modeled after that act, but with notable structural differences. The Tenth District recognized the significance of those differences:

> Under the Controlled Substance Analogue Enforcement Act of 1986, all of the relevant provisions, including the definition of "controlled substance analogue" and 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—i.e., Subchapter I ("Control and Enforcement") of Chapter 13 ("Drug Abuse Prevention and Control") of Title 21 ("Food and Drugs") of the United States Code. See 21 U.S.C. 802(32) (defining "controlled substance analogue"); 21 U.S.C. 813 (providing that controlled substance analogues shall be treated as controlled substances); and 21 U.S.C. 841(a)(1) (prohibiting the manufacture, distribution, or dispensation of controlled substances, or possession of controlled substances with intent to manufacture, distribute, or dispense). By contrast, House Bill 64 placed the controlled substance analog provisions in Chapter 3719 separate from the prohibitions and penalties set forth in Chapter 2925, and failed to incorporate any explicit cross-references in Chapter 2925 to the controlled substance analog provisions.

State v. Smith, 10th Dist. Franklin Nos. 14AP-154 and 14-AP-155, 2014-Ohio-5303, ¶ 15. Thus, the CSAEA defined "controlled substance analogue" and the requirement that the analogs be treated as controlled substances by placing them in the prohibition portions of the law. Contrarily, 2011 Am.Sub.H.B. No. 64 placed the provisions regarding "controlled substance analogs" in a chapter unrelated to prohibitions and penalties.

The Attorney General, as amicus, identified a handful of states such as Texas and California that do not place their drug-analog provisions in the chapters governing criminal offenses. However, numerous states specifically include controlled-substance analogs in chapters governing prohibitions and penalties.

State	Location in the Statute
Arkansas	Title 5: Criminal Offenses Subtitle 6: Offenses Against Public Health, Safety, or Welfare
Colorado	Title 18: Criminal Code Article 18: Uniform Controlled Substances Act of 1992
District of Columbia	Title 48: Food and Drugs Subtitle III: Illegal Drugs Chapter 9: Controlled Substances
Florida	Title XLVI: Crimes (chapters 775-899) Chapter 893: Drug Abuse Prevention and Control
Illinois	Chapter 720: Criminal Offenses, Offenses Against the Public Act 570: Illinois Controlled Substances Act Article IV: Violations and Penalties
Indiana	Title 35: Criminal Law and Procedure Article 48: Controlled Substances
Kansas	Chapter 21: Crimes and Punishments Article 57: Crimes Involving Controlled Substances
Maryland	Criminal Law Title 5: Controlled Dangerous Substances, Prescriptions, and Other Substances Subtitle 4: Schedules
Nebraska	Chapter 28: Crimes and Punishments Article 4: Drugs and Narcotics
New Jersey	Title 2C: The New Jersey Code of Criminal Justice Subtitle 2: Definition of Specific Offenses Part 5: Offenses Against Public Order, Health and Decency Chapter 35: Controlled Dangerous Substances
New Mexico	Chapter 30: Criminal Offenses

	Article 31: Controlled Substances
Tennessee	Title 39: Criminal Offenses Chapter 17: Offenses Against Public Health, Safety, and Welfare

Nat'l Alliance for Model State Drug Laws, Controlled Substance Analog Statutory Comparison and Compilation (Oct. 30, 2012), http://tinyurl.com/ju5txax (accessed June 1, 2016). After the passage of 2011 Am.Sub.H.B. No. 334, the General Assembly inserted the phrase "controlled substance analog" in the title governing penalties and prohibitions. *See* R.C. 2925.03(A)(1) and (2). *At that point*, the General Assembly allowed the sale of controlled-substance analogs to be prosecuted in the same manner as controlled substances.

The Tenth District recognized in *Smith* that prior to February of 2012, the illegality of the sale of controlled-substance analogs was ambiguous at best under the law. The Tenth District was correct. Likewise, Mr. Shalash did not commit offenses under Ohio law. Therefore, this Court should vacate Mr. Shalash's convictions with prejudice.

CONCLUSION

This Court should adopt the analysis and conclusions of the Tenth District Court of Appeals in *Smith*. Mr. Shalash's convictions should be vacated with prejudice.

Respectfully submitted,

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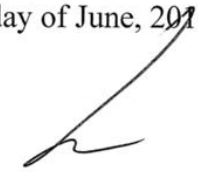
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **REPLY BRIEF OF DEFENDANT-APPELLANT HAMZA SHALASH** was sent by regular U.S. Mail, postage-prepaid to the office of Kathryn Horvath, Assistant Prosecuting Attorney, Warren County Prosecutor's Office, 500 Justice Drive, Lebanon, Ohio 45036; Eric E. Murphy, State Solicitor, Ohio Attorney General's Office, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215; and Steven L. Taylor, Assistant Prosecuting Attorney, Franklin County Prosecutor's Office, 373 South High Street, 13th Floor, Columbus, Ohio 43215, on this 13th day of June, 2016.



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