Filed: 12/21/2018 3:47 PM

IN THE
COURT OF APPEALS OF INDIANA

No. 18A-CR-02041

JOHN L. SOLOMON,
Appellant-Defendant,

v.

STATE OF INDIANA,
Appellee-Plaintiff.

Appeal from the
Marion Superior Court,
Criminal Division, Room 14,

No. 49G14-1704-CM-13921,

The Honorable
Jose Salinas, Judge.

BRIEF OF APPELLEE

CURTIS T. HILL, JR.
Attorney General
Attorney No. 0013999-20

GEORGE P. SHERMAN
Supervising Deputy Attorney General
Attorney No. 0023745-53

OFFICE OF ATTORNEY GENERAL
Indiana Government Center South
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone (317) 233-1877
George.Sherman@atg.in.gov

Attorneys for Appellee

TABLE OF CONTENTS

Table of Authorities 3

Statement of the Issues 6

Statement of the Case 6

Statement of the Facts 6

Summary of the Argument.....8

Argument

Solomon waived the claim he raises on appeal, but it is unavailing Regardless.....8

A. Solomon's claim is waived 8

B. Article 1, Section 1 contains no judicially enforceable Rights 10

C. There is no right under Section 1 to possess a controlled Substance 17

Conclusion 23

Certificate of Service.....23

TABLE OF AUTHORITIES

Cases

Adams v. State, 804 N.E.2d 1169 (Ind. Ct. App. 2004) 9

Beebe v. State, 6 Ind. 501, 1855 WL 3616 (Ind. 1855) 14, 16

Blea v. City of Espanola, 870 P.2d 755 (N.M. Ct. App. 1994) 12

Conley v. State, 972 N.E.2d 864 (Ind. 2012) 17

Department of Financial Institutions v. Holt, 108 N.E.2d 629 (1952) 13, 16

Department of Insurance v. Schoonover, 72 N.E.2d 747 (1947) 13, 16

Doe v. O'Connor, 790 N.E.2d 985 (Ind. 2003) 11, 12, 16

Hawaii v. Mallan, 950 P.2d 178 (Haw. 1998) 22

Herman v. State, 8 Ind. 545, 1855 WL 3695 (Ind. 1855) ..... *passim*

Hoose v. Doody, 886 N.E.2d 83 (Ind. Ct. App. 2008), *trans. denied* 10

Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374,
404 N.E.2d 585 (1980) 18

Johnson v. State, 879 N.E.2d 649 (Ind. Ct. App. 2008) 9

Kirtley v. State, 84 N.E.2d 712 (1949) 13, 16

Layman v. State, 42 N.E.3d 972 (Ind. 2015) 9, 10

Lee v. State, 973 N.E.2d 1207 (Ind. Ct. App. 2012), *trans. denied* 9

Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.,
335 U.S. 525 (1949) 15

Lochner v. New York, 198 U.S. 45 (1905) 14, 15, 16

McIntosh v. Melroe Co., 729 N.E.2d 972 (Ind. 2000) 16

Morrison v. Sadler, 821 N.E.2d 15 (Ind. Ct. App. 2005) 17

Payne v. State, 484 N.E.2d 16 (Ind. 1985) 9

Plank v. Community Hospitals of Indiana, Inc., 981 N.E.2d 49 (Ind. 2013) 9

Price v. State, 911 N.E.2d 716 (Ind. Ct. App. 2009), *trans. denied* 9

Republic Iron & Steel Co. v. State, 160 Ind. 379. 66 N.E. 1005 (1903) 15

Rhinehardt v. State, 477 N.E.2d 89 (Ind. 1985) 9

Rowe v. State, 867 N.E.2d 262 (Ind. Ct. App. 2007) 9

Schmitt v. F.W. Cook Brewing Co., 187 Ind. 623, 120 N.E. 19 (1918) 14, 20

Sepe v. Daneker, 68 A.2d 101 (R.I. 1949) 12

Shields v. Gerhart, 658 A.2d 924 (Vt. 1995) 12

Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763 (1976) 17

Slone v. State, 912 N.E.2d 875 (Ind. Ct. App. 2009), *trans. denied* 10

State Board of Barber Examiners v. Cloud, 44 N.E.2d 972 (1942) 14, 15, 16

State v. Moss-Dwyer, 686 N.E.2d 109 (Ind. 1997) 17

State v. Rendleman, 603 N.E.2d 1333 (Ind. 1992) 17

State v. Williams, 728 N.E.2d 342 (Ohio 2000) 11, 12

Street v. Varney Electrical Supply Co., 66 N.E. 895 (Ind. 1903) 14, 15, 16

Tooley v. State, 911 N.E.2d 721 (Ind. Ct. App. 2009), *trans. denied* 9

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) 15

Wiggins v. State, 727 N.E.2d 1 (Ind. Ct. App. 2000) 9

Statutes

21 U.S.C.A. § 844 20

Other Authorities

Fourteenth Amendment to the United States Constitution 15

Article 1, § 1 of the Indiana Constitution ..... *passim*

Justice, Drug Enforcement Administration, *Drugs of Abuse*, *A DEA Resource Guide* 75 (2017) 19, 20

Meier, M.H., Caspi, A., Ambler, A., Harrington, et al., *Persistent cannabis users show neuropsychological decline from childhood to midlife*, Proceedings of the National Academy of Sciences, (2012) USA, 109, E2657-E2664 19

Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 Minn. L. Rev, 91 (1950) 15

Nora D. Volkow, M.D., Ruben D. Baler, Ph.D., Wilson M. Compton, M.D., & Susan R.B. Weiss, Ph.D., *Adverse Health Effects of Marijuana Use*, New England Journal of Medicine 370; 23 at 2219, June 5, 2014 19

William J. Bennet & Robert A. White, Opinion, *Legal Pot is a Public Health Menace: Public Opinion is Moving in Favor of Marijuana, Even as Medical Research Raises Fresh Alarms*, Wall St. J., Aug. 13, 2014 18

STATEMENT OF THE ISSUE

Whether Solomon could not be convicted of a crime for possession of marijuana because, he alleges on appeal, marijuana makes him happy.

STATEMENT OF THE CASE

On April 16, 2017, the State charged Solomon with Class B misdemeanor possession of marijuana (App. Vol. 2 at 6, 14). A bench trial was held on August 1, 2018, and Solomon was found guilty as charged (App. Vol. 2 at 9). The trial court sentenced Solomon to 20 days in jail, with fourteen days suspended (App. Vol. 2 at 9).

On August 27, 2018, Solomon filed a Notice of Appeal (Online Docket). On October 17, 2018, the Notice of Completion of Transcript was filed (Online Docket). Following an extension of time, Solomon filed and electronically served the Brief of Appellant on November 21, 2018 (Online Docket).

STATEMENT OF FACTS

On April 15, 2017, Indianapolis Police Officer Mitchel Farnsley observed a silver Buick commit several traffic infractions in the area near 30th Street and Capitol Avenue (Tr. 8, 10). After the Buick nearly struck another vehicle, Officer Farnsley initiated a traffic stop (Tr. 8). When the Buick came to a stop, the driver and front seat passenger switched seats (Tr. 9). Officer Farnsley noticed that there were five individuals inside the vehicle (Tr. 9). Solomon was seated in the rear passenger seat (Tr. 9). Officer Farnsley checked the vehicle's license plate and

found that it was registered to a green Ford Explorer (Tr. 9). Officer Farnsley requested backup, and Officer Haley arrived on the scene to assist (Tr. 10).

Officer Haley noticed that one of the occupants of the vehicle was destroying a syringe, so the officers ordered everyone out of the vehicle (Tr. 10). Officer Farnsley looked inside the vehicle and saw eight syringes (Tr. 10). A syringe on the front passenger seat was next to aluminum foil containing what appeared to be heroin residue (Tr. 11). Another syringe was observed on the back, driver's side passenger seat with another piece of aluminum foil containing suspected heroin (Tr. 11). In addition, a syringe was found near the area where Solomon's feet would have been resting, while a marijuana blunt was on the back seat "where John Solomon's butt would have been sitting" (Tr. 11). A bag with more syringes was located in the trunk of the Buick (Tr. 11).

Officer Farnsley advised Solomon of his rights, and Solomon replied that "nothing in the car was his except for the marijuana blunt" (Tr. 12). Solomon stated that he was on his way to a liquor store (Tr. 12). Officer Farnsley collected the marijuana blunt and placed it in an evidence bag (Tr. 12-14). Laboratory testing confirmed Solomon's admission that the substance in his possession was marijuana (St. Ex. 3).

At trial, Solomon's defense was that the marijuana did not belong to him (Tr. 29). The trial court found Solomon guilty of possession of marijuana (App. Vol. 2 at 9).

SUMMARY OF ARGUMENT

Solomon's claim that his conviction for possession of marijuana violates his constitutional right to happiness is waived for failure to raise it in the proceedings below. Waiver notwithstanding, there is no evidence in the record to support Solomon's claim. Additionally, even if such evidence existed, Solomon's reliance upon Article 1, Section 1 of the Indiana Constitution is unpersuasive, as that provision does not, by itself, create any judicially enforceable rights. Further, even if it did, there is no indication that the framers of the Indiana Constitution, in adopting Article 1, Section 1, would have intended to create a constitutional right to possess various controlled substances such as marijuana. Therefore, Solomon's conviction should be affirmed.

ARGUMENT

Solomon waived the claim he raises on appeal, but it is unavailing regardless.

A. Solomon's claim is waived.

At trial, Solomon claimed that he did not know about the marijuana and that it did not belong to him (Tr. 23). Solomon stated that Officer Haley told him that he found the blunt in Solomon's pocket, but Solomon alleged he did not realize he had a blunt in his pocket (Tr. 24). On appeal, Solomon changes course and claims that he had a constitutional right to possess marijuana in his pursuit of happiness (Appellant's Brief at 7). Solomon acknowledges that he did not raise this issue in the trial court but argues he should be allowed to raise it for the first time on appeal (Appellant's Brief at 7 n.2).

Generally, a challenge to the constitutionality of a criminal statute must be raised by a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal. *See e.g.*, *Payne v. State*, 484 N.E.2d 16, 18 (Ind. 1985); *Rhinehardt v. State*, 477 N.E.2d 89, 93 (Ind. 1985); *Lee v. State*, 973 N.E.2d 1207, 1209 (Ind. Ct. App. 2012), *trans. denied*; *Johnson v. State*, 879 N.E.2d 649, 654 (Ind. Ct. App. 2008); *Rowe v. State*, 867 N.E.2d 262, 267 (Ind. Ct. App. 2007); *Adams v. State*, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004) (defendant waived his challenge to the constitutionality of a statute because he did not file a motion to dismiss in the trial court); *Wiggins v. State*, 727 N.E.2d 1, 5 (Ind. Ct. App. 2000) (defendant waived his argument that the statute was unconstitutionally vague even though he had filed a motion to dismiss because the motion only alleged that the statute violated the prohibition against ex post facto laws).

It is true that an appellate court is not prohibited from considering the constitutionality of a statute even though the issue otherwise has been waived. *Plank v. Community Hospitals of Indiana, Inc.*, 981 N.E.2d 49, 53-54 (Ind. 2013). However, that does not mean that it should. As our Supreme Court has stated, "judicial intervention to address constitutional claims for the first time at the appellate level is not appropriate[.]" *Layman v. State*, 42 N.E.3d 972, 976 (Ind. 2015). Likewise, this Court has cautioned that by addressing the merits of a claim, it was not inviting future litigants to neglect to file a motion to dismiss and then argue for the first time on appeal that a statute is unconstitutional. *Price v. State*, 911 N.E.2d 716, 719 n.2 (Ind. Ct. App. 2009), *trans. denied*; *Tooley v. State*, 911

N.E.2d 721, 723 n.3 (Ind. Ct. App. 2009), *trans. denied*. This is because "[t]he waiver rule is founded on important policy considerations, including 'the preservation of judicial resources, opportunity for full development of the record, utilization of trial court fact-finding expertise, and assurance of a claim being tested by the adversary process.'" *Slone v. State*, 912 N.E.2d 875, 878 (Ind. Ct. App. 2009), *trans. denied* (quoting *Hoose v. Doody*, 886 N.E.2d 83, 93 (Ind. Ct. App. 2008), *trans. denied*). Here, because Solomon did not provide the trial court with an opportunity to consider a challenge to the constitutionality of the marijuana possession statute nor the State an opportunity to offer evidence in support of the constitutionality of the statute, this Court should find his claim waived and decline to address it. *Layman*, 42 N.E.3d at 976 (declining to address constitutional claims that were raised for the first time on appeal).

B. Article 1, Section 1 contains no judicially enforceable rights.

Waiver notwithstanding, Solomon's claim fails. Solomon alleges that the statute criminalizing possession of marijuana is unconstitutional as applied to him because it violates his right to the pursuit of happiness under Article 1, Section 1 of the Indiana Constitution (Appellant's Brief at 7). This provision states,

> WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the people; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the people have, at all times, an indefeasible right to alter and reform their government.

The Indiana Supreme Court has cast serious doubt that Article 1, Section 1 is a self-executing provision capable of judicial enforcement rather than an unenforceable expression of the general principles that animate our Constitution. *See Doe v. O'Connor*, 790 N.E.2d 985, 989-91 (Ind. 2003). In *Doe*, the Court called Section 1's enforceability into question and compared Section 1 to similar provisions in other states' constitutions that have been deemed not to create any judicially enforceable rights. *Id*.

For example, the Ohio Constitution provides that "'[a]ll men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety." *See State v. Williams*, 728 N.E.2d 342, 352 (Ohio 2000) (quoting Ohio Const., art. I, § 1). The Ohio Supreme Court held that this expression of natural rights, in and of itself, is "not an independent source of self-executing protections." *Id*. at 354. "Rather, it is a statement of fundamental ideals upon which a limited government is created" but that "requires other provisions of the Ohio Constitution or legislative definition to give it practical effect." *Id*. Moreover, even these fundamental ideals or natural rights may be regulated or restricted in ways that bear a "real and substantial relation to the public health, safety, morals, or general welfare" and that are not "arbitrary or unreasonable." *Id*. at 355.

Similarly, the Vermont Supreme Court held that an analogous provision in the Vermont Constitution "expresses fundamental, general principles…that infuse

the rights of individuals and powers of government specified elsewhere in the constitution." *See Shields v. Gerhart*, 658 A.2d 924, 928 (Vt. 1995). As such, these principles are not self-executing, enforceable rights, but merely provide the "philosophical truisms" that should guide all legislative decision-making. *See id*. at 928-29. Other states have also declared that similar state constitutional declarations of natural rights do not provide a basis, in and of themselves, upon which legislation may be challenged. *Doe*, 790 N.E.2d at 991; *see also*, *e.g.*, *Sepe v. Daneker*, 68 A.2d 101, 105 (R.I. 1949) (stating that an analogous constitutional provision was advisory rather than mandatory and was "addressed rather to the general assembly by way of advice and direction, than to the courts, by way of enforcing restraint upon the law-making power") (citation omitted); *Blea v. City of Espanola*, 870 P.2d 755, 759 (N.M. Ct. App. 1994) (stating that "vague references to safety or happiness" in an analogous constitutional provision "are not sufficient" to support a claim).

Although the natural rights philosophy expressed in Section 1 informs our understanding of the other provisions in our Bill of Rights, the language of that section is not sufficiently complete and definitive to provide the meaningful guidance necessary for uniform judicial enforcement. *See Williams*, 728 N.E.2d at 354 (stating that the overarching natural rights language in Ohio's analogous provision "lacks the completeness required to offer meaningful guidance for judicial enforcement"). An overarching declaration of a right to liberty or a right to pursue happiness does not provide sufficient guidance for a court to determine what

activities would fall within this protection or what limits might be placed upon those activities. To allow unexpressed, enforceable rights to spring forth from these vague references to fundamental ideals would be to invite improper judicial legislating as a matter of constitutional law.

The sounder approach is to recognize that these fundamental ideals are the guiding principles by which the specific protections in the Bill of Rights or statutory enactments should be interpreted rather than to treat them as self-executing language. Therefore, this Court should find that Section 1, standing alone, does not provide a basis upon which a constitutional challenge to a statute may be brought.

Solomon fails to cite a single case from the last 65 years that has found a statute unconstitutional solely on the basis of Article 1, Section 1 of the Indiana Constitution. Further, the cases he does cite from the early to mid-1900's do not consider the validity of criminal statutes, but rather, address the authority of the State or a political subdivision thereof to regulate a lawful trade, profession or business (Appellant's Brief at 11). *See*, *e.g.*, *Department of Financial Institutions v. Holt*, 231 Ind. 293, 301, 310, 108 N.E.2d 629, 633, 637 (1952) (invalidating statute limiting prices on retail installment contracts based on asserted Section 1 "freedom of contract"); *Kirtley v. State*, 227 Ind. 175, 182, 84 N.E.2d 712, 715 (1949) (invalidating law requiring tickets to any "place of public amusement" to be resold only at face amount based on asserted Section 1 "property rights of the ticket owner"); *Department of Insurance v. Schoonover*, 225 Ind. 187, 193-94, 72 N.E.2d 747, 750 (1947) (invalidating insurance agent compensation law based on "freedom

to contract"); *State Board of Barber Examiners v. Cloud*, 220 Ind. 552, 572, 44 N.E.2d 972, 980 (1942) (striking down barber regulation that established minimum prices and maximum hours based on asserted "right to engage in a lawful business"); *Street v. Varney Electrical Supply Co.*, 160 Ind. 338, 66 N.E. 895, 897 (Ind. 1903) (invalidating public work minimum wage legislation based on asserted "liberty to contract").

The Indiana Supreme Court at one time also found a right to possess alcohol as a species of property right. *See Beebe v. State*, 6 Ind. 501, 1855 WL 3616 (Ind. 1855); *Herman v. State*, 8 Ind. 545, 1855 WL 3695 *8 (Ind. 1855). But the Court ultimately rejected this right and effectively overruled *Beebe* (and by implication *Herman*). *See Schmitt v. F.W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19, 21 (1918) (upholding prohibitions on liquor sales and saying of *Beebe*, "[i]t cannot be determined…on what principle the court was acting").

That Section 1 has provided meaningful protection only for economic interests (and then only sporadically) is important because economic rights doctrine has been discredited. Indiana's Section 1 economic rights cases are the product of an old model of judicial supremacy over public policy that was discredited long ago. The United States Supreme Court's analogous economic rights era is most closely associated with *Lochner v. New York*, 198 U.S. 45 (1905), where the Court invalidated a New York State law that limited the hours employees in bakeries could work based on notions of the "right of contract between the employer and employees." *See id*. at 53. The entire *Lochner* era, of course, has long been

discredited, disavowed and overruled by the United States Supreme Court. *See*, *e.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949). "The doctrine is seen as a violation of sound democratic procedures in that it permits judges to substitute their judgment as to political policy for that of the legislature." Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 Minn. L. Rev, 91, 92 (1950) (citation omitted).

The Indiana Supreme Court relied heavily on the Supreme Court's Fourteenth Amendment economic rights activism in 1903 when it spoke of a "liberty to contract" and invalidated public works minimum wage legislation under Section 1. *See Street*, 66 N.E. at 897. That same year, the Court invalidated (in part based on Section 1) a statute that prescribed when wages must be paid and that proscribed their assignment, declaring that it was "the duty of the court, when called on, to decide whether the particular regulation is *just and reasonable*…" *Republic Iron & Steel Co. v. State*, 160 Ind. 379. 66 N.E. 1005, 1007 (1903) (emphasis added). These are very nearly the same non-deferential words that *Lochner* used two years later. *Lochner*, 198 U.S. at 556 ("Is this a fair, reasonable, and appropriate exercise of the police power…?"). This non-deferential spirit continued in Indiana until the middle part of the Twentieth Century. *See Cloud*, 220 Ind. at 572, 44 N.E.2d at 980 (invalidating prices and hours regulations applicable to barbers and relying on *Lochner* to support its view that legislatures must, by rule of judicial reason, be limited in their powers over economic matters);

Schoonover, 225 Ind. at 192-93, 72 N.E.2d at 749-50 (dismissing any notion of legislative deference in determining whether an action is in the public's interest); *Kirtley*, 227 Ind. at 181, 84 N.E.2d at 714 (divining for the Court the power to determine that which is harmless in itself); *Holt*., 231 Ind. at 307-10, 108 N.E.2d at 636-38 (second-guessing legislative determinations regarding the market effects of free price competition in the area of retail installment sales contracts).

However, this era of judicial activism and supremacy in the arena of public policy—economic or otherwise—is now over in Indiana. *See McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975 (Ind. 2000) (describing *Lochner* and other property rights cases as "now discredited"). As far as the State is aware, the last time this Court or the Indiana Supreme Court invalidated legislation based on economic (or other) rights under Section 1 was in 1952, in the *Holt* case. Accordingly, the *Lochner*-esque reasoning of *Herman*, *Beebe*, *Holt*, *Kirtley*, *Schoonover*, *Cloud*, and *Street* provides a rickety doctrinal foundation for finding a new right to possess marijuana. In light of the serious questions that *Doe v. O'Connor* poses for the judicial enforceability of Section 1 as a general matter, it would be a mistake to assume that any meaningful and enforceable economic rights protections remain, let alone infer that they lay the foundation for a new right to possess marijuana. Given "the fact that no statute has been invalidated under Article 1, § 1 for over [sixty-five] years, and that prior cases that did invalidate statutes under Article 1, § 1 did so using a now-discredited view of the scope of the government's police power to regulate businesses[,]" this Court should find that Section 1, by itself, does not provide a basis upon which a

constitutional challenge to a statute may be brought. *See Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005).

C. There is no right under Section 1 to possess a controlled substance.

Even if Section 1 were to provide some level of judicially enforceable protection for some asserted "natural rights," there is no textual or historical basis for concluding that it protects any right to possess marijuana. Thus, Solomon has failed to establish that criminalizing the possession of marijuana violates this provision.

"The constitutionality of statutes is reviewed de novo." *Conley v. State*, 972 N.E.2d 864 (Ind. 2012). Such review is "'highly restrained'" and "'very deferential,'" beginning "'with [a] presumption of constitutional validity, and therefore the party challenging the statute labors under a heavy burden to show that the statute is unconstitutional.'" *Id.* (quoting *State v. Moss-Dwyer*, 686 N.E.2d 109, 110 (Ind. 1997)).

"'[E]very statute stands before us clothed with the presumption of constitutionality, and such presumption continues until clearly overcome by a showing to the contrary.'" *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind. 1992) (quoting *Sidle v. Majors*, 264 Ind. 206, 209, 341 N.E.2d 763, 766 (1976)). "The legislature has wide latitude in determining public policy, and [a reviewing court will] not substitute [its] belief as to the wisdom of a particular statute for those of the legislature." *Id.* "'A statute is not unconstitutional simply because the court might consider it born of unwise, undesirable, or ineffectual policies.'" *Id.* (quoting

Johnson v. St. Vincent Hospital, Inc., 273 Ind. 374, 382, 404 N.E.2d 585, 591 (1980)).

Solomon's claim that criminalizing possession of marijuana violates his right to happiness fails at the outset, as he offered no evidence that marijuana brings him happiness. Rather, as noted above, he claimed that the marijuana found in his possession did not belong to him. Thus, because there is no evidence that marijuana provides any happiness to him, his claim that the statute, as applied to him, is unconstitutional is completely unsupported by the record. Therefore, Solomon has failed to carry his burden of establishing that the statute is unconstitutional as applied to him.

Because there is no evidence in the record to support Solomon's argument, he is forced to refer to items outside the record, in particular, a newspaper article, which he claims states that a report indicated that marijuana is not as bad as other drugs (Appellant's Brief at 10 n.5). However, if this matter had been litigated in the trial court, the State would have been able to offer a number of studies that support the legislature's conclusion that marijuana should be illegal. *See*, *e.g.*, William J. Bennet & Robert A. White, Opinion, *Legal Pot is a Public Health Menace: Public Opinion is Moving in Favor of Marijuana, Even as Medical Research Raises Fresh Alarms*, Wall St. J., Aug. 13, 2014, http://online.wsj.com/articles/william-bennett-and-robert-white-legal-pot-is-a-public-health-menace-1407970966 (citing recent scientific studies and reports by Current Addiction Reports, the American Psychological Association, and the Northwestern School of Medicine finding

harmful effects from the use of marijuana); Nora D. Volkow, M.D., Ruben D. Baler, Ph.D., Wilson M. Compton, M.D., & Susan R.B. Weiss, Ph.D., *Adverse Health Effects of Marijuana Use*, New England Journal of Medicine 370; 23 at 2219, June 5, 2014; Meier, M.H., Caspi, A., Ambler, A., Harrington, et al., *Persistent cannabis users show neuropsychological decline from childhood to midlife*, Proceedings of the National Academy of Sciences, (2012) USA, 109, E2657-E2664. The trial court would then have had an opportunity to determine the admissibility of the evidence offered and evaluate its relevance and application to a challenge to the statute. There is certainly not an adequate record in this case to address the harms of marijuana.

Solomon notes that in recent years some states have legalized marijuana (Appellant's Brief at 9). "Although some states within the United States have allowed the use of marijuana for medicinal purpose, it is the U.S. Food and Drug Administration that has the federal authority to approve drugs for medicinal use in the U.S." United States Department of Justice, Drug Enforcement Administration, *Drugs of Abuse*, *A DEA Resource Guide* 75 (2017).[1] "To date, the FDA has not approved a marketing application for any marijuana product for any clinical indication." *Id*. "Consistent therewith, the FDA and DEA have concluded that marijuana has no federally approved medical use for treatment in the U.S. and thus it remains as a Schedule I controlled substance under federal law." *Id*. Marijuana's status as a Schedule I controlled substance means "that it has a high potential for

[1] This document can be accessed at:
https://www.dea.gov/sites/default/files/drug_of_abuse.pdf#page=75

abuse…" *Id.* Because it is a Schedule I controlled substance the possession or sale of marijuana remains illegal under federal law despite any state statutes to the contrary. 21 U.S.C.A. § 844.

Solomon also alleges that "George Washington reportedly cultivated marijuana" in the 1700's (Appellant's Brief at 10). While that is an interesting piece of historical trivia, if true, it is of no greater significance than the fact that cocaine and heroin were once legal in the United States before the harmful effects of such substances were known. It fails to establish that the use of marijuana was wide-spread in Indiana at the time the Indiana Constitution was drafted in 1851. Thus, *Herman v. State*, 8 Ind. 545, 558 (1855), upon which Solomon relies, is readily distinguishable.[2] The Court in *Herman* found a law unconstitutional under Article 1, Section 1 of the Indiana Constitution, where the law prohibited the sale of "any ale, porter, malt beer, lager beer, cider, wine," and prohibited the use of these items as a beverage. *Herman*, 8 Ind. at 547-48. The Court determined "that the right of liberty and pursuing happiness secured by the constitution, embraces the right, in each *compos mentis* individual, of selecting what he will eat and drink, in short, his beverages…" *Id.* at 558. In support of this conclusion, the Court observed,

> there were in the State fifty distilleries and breweries, in which a half a million of dollars was invested, and five hundred men were employed; which furnished a market annually for two million bushels of grain, and turned out manufactured products to the value of a million of dollars, which were consumed by our people, to a great extent, as a beverage. With these facts existing, the question of incorporating into the constitution the prohibitory

[2] As noted above, *Herman* was impliedly overruled by *Schmitt v. F.W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19, 21 (1918). However, as it is the principal case upon which Solomon relies, the State will address its applicability to Solomon's claim.

> principle was repeatedly brought before the constitutional convention, and uniformly rejected.

Id. at 559.

Unlike in *Herman*, there is no evidence in the record that there was a large-scale marijuana industry in Indiana when the present constitution was adopted. The Court in *Herman* also relied on the universal use of alcoholic beverages, which "show[ed] the judgment of mankind as to their value." *Id*. at 560. Specifically, the Court observed that alcoholic beverages had been "in general use amongst all the several nations who inhabited the western part of Europe" as well as Egypt since time immemorial. *Id*. The Supreme Court further cited "Biblical history" and concluded that the scriptures indicated "that these stimulating beverages were created by the Almighty expressly to promote his social hilarity and enjoyment[,]" noting,

> And for this purpose have the world ever used them, they have ever given, in the language of another passage of scripture, strong drink to him that was weary and wine to those of heavy heart. The first miracle wrought by our Saviour, that at Cana of Galilee, the place where he dwelt in his youth, and where he met his followers after his resurrection, was to supply this article to increase the festivities of a joyous occasion; that he used it himself is evident from the fact that he was called by his enemies a winebibber; and he paid it the distinguished honor of being the eternal memorial of his death and man's redemption.

Id. at 561.

Finally, the Court cited economic reports regarding the large scale use of alcoholic beverages in the United States, Great Britain, Ireland, and France and stated, "We have thus shown, from what we will take notice of historically, that the

use of liquors, as a beverage, and article of trade and commerce, is so universal that they cannot be pronounced a nuisance." *Id*. at 562. Our Supreme Court concluded, "The world does not so regard [liquor as a nuisance], and will not till the Bible is discarded, and an overwhelming change in public sentiment, if not in man's nature, wrought." *Id*.

Unlike *Herman*, Solomon fails to cite a long-standing, universal use of marijuana by the inhabitants of western civilization that the framers of the Indiana Constitution would have had in mind when adopting Article 1, Section 1. In other words, as the Hawaii Supreme Court has stated, "We cannot say that smoking marijuana is a part of the 'traditions and collective conscience of our people.'" *Hawaii v. Mallan*, 950 P.2d 178, 183 (Haw. 1998). Therefore, Solomon has not shown that the framers of the Indiana Constitution, in adopting Article 1, Section 1, would have intended to prohibit the criminalization of marijuana. There simply is no authority to support Solomon's position that the legislature's decision to make certain controlled substances illegal under Indiana law violates the right to the pursuit of happiness under the Indiana Constitution. Accordingly, Solomon has failed to carry his burden of showing that the statute at issue is unconstitutional as applied to him.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the trial court's judgment be affirmed.

Respectfully submitted:

CURTIS T. HILL, JR.,
Attorney General
Atty. No. 0013999-20

By:/s/ George P. Sherman
George P. Sherman
Supervising Deputy Attorney General
Atty. No. 0023745-53

Counsel for Appellee

CERTIFICATE OF SERVICE

I certify that on December 21, 2018, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that on December 21, 2018 the foregoing document was electronically served upon the following person via IEFS:

Joel M. Schumm
joelschumm@aol.com

/s/ George P. Sherman
George P. Sherman
Supervising Deputy Attorney General

OFFICE OF ATTORNEY GENERAL
Indiana Government Center South,
Fifth Floor
302 West Washington Street
Indianapolis, Indiana 46204-2770
Telephone (317) 233-1877