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IN THE INDIANA COURT OF APPEALS
APPELLATE CASE NO. 18A-CR-02041

JOHN SOLOMON,	**)**	**Marion Superior Court**
Appellant (Defendant below),	**)**	**Criminal Division 14**
	)	
vs.	**)**	**No. 49G14-1704-CM-13921**
	)	
STATE OF INDIANA,	**)**	**The Honorable**
Appellee (Plaintiff below).	**)**	**Jose Salinas, Judge**

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

Article 1, Section 1 of the Indiana Constitution provides Hoosiers broad personal autonomy to make choices that do not impact the safety or well-being of others. Criminalizing the mere possession of a single marijuana blunt by an adult who is not driving violates Section 1. Mr. Solomon's conviction for possession of marijuana should therefore be vacated.

The State's brief largely talks around the straightforward argument raised in this appeal. To be clear, the stakes are significant: Hoosiers who are in no way affecting the peace, safety, or well-being of others face arrest; the stigma of court proceedings; convictions that often carry collateral consequences; fines; and even days, weeks, or months of incarceration.

The claim is not waived. This is a legal claim, and the record from trial is significantly developed to address the narrow as-applied challenge.

Moreover, Section 1 does provide judicially enforceable rights. Solomon's only claim is substantive, unlike the *procedural* Section 1 claim pressed in the State's cited authority, and the Indiana Supreme Court has recently addressed a substantive Section 1 claim with no hint of judicial unenforceability.

Next, the supreme court's 1855 opinion in *Herman* remains good law and is especially relevant because cases decided near the drafting and ratification of the Indiana Constitution are "accorded strong and superseding precedential value." That most Section 1 cases have been in the economic

realm does not limit the reach of that provision, as more recent authority has shown.

The State's citation of articles that discuss the potential harm to an adolescent who uses marijuana do not address the broad liberty afforded adult Hoosiers, especially when they are not affecting the peace, safety, or well-being of others. The State does not dispute that marijuana possession and use was legal in 1851 and for decades that followed; no authority suggests that Section 1 requires "widespread" use or a "large-scale" operation for continued constitutional protection.

Finally, a state appellate court finding a marijuana statute unconstitutional would not be unprecedented. As the Alaska Supreme Court concluded more than four decades ago, there is no adequate justification for the state's intrusion into an individual's liberty by prohibiting possession of marijuana by an adult for personal consumption.

ARGUMENT

Criminalizing possession of a small amount of marijuana violates the right to liberty and pursuit of happiness in Article 1, Section 1 of the Indiana Constitution when applied to an adult who is not driving or otherwise impacting the safety or well-being of others.

As explained below, the State's brief is largely not responsive to the straightforward and significant issue in this appeal: Section 1 guarantees the right of adults who are not operating vehicles or affecting others to possess a small amount of marijuana.

A. This case is about the "liberty . . . inherent in the people."

The State's brief appears to diminish and demean the important interests at stake in this appeal. Beginning with the Statement of the Issue, the State posits the case is about Solomon's ability to use marijuana because it "makes him happy." Br. of Appellee at 6. The argument later refers to a "right to happiness" and a lack of evidence that "marijuana brings him happiness." Br. of Appellee at 18.

As framed from the outset, this appeal is about the liberty that Section 1 promises adult Hoosiers. In broadly written and far-reaching text, Section 1 declares that "all power is inherent in the people," and the reach of government is limited to areas necessary for "peace, safety, and well-being." Ind. Const. Art. 1. Sec. 1.

Criminalizing the possession of a small amount of marijuana by an adult who is not operating a vehicle infringes upon that liberty. Adult Hoosiers who are in no way affecting the peace, safety, or well-being of others face arrest; the stigma of court proceedings; convictions that often carry collateral consequences; fines; and even days, weeks, or months of incarceration.

B. The claim is not waived.

Our supreme court "has steadfastly held to the general rule that in determining the constitutionality of a statute involving the exercise of police power the question is one of law, and extrinsic evidence will not be received

on the constitutionality of such statute." *Dep't of Ins. v. Schoonover*, 225 Ind. 187, 190, 72 N.E.2d 747, 748 (1947). "The only extrinsic facts which will be considered are those of which the court will take judicial notice." *Id.*

Nevertheless, the State faults Solomon for not raising this constitutional challenge in the trial court, which would have allowed "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." Br. of Appellee at 10 (quoting *Slone v. State*, 912 N.E.2d 875, 878 (Ind. Ct. App. 2009), *trans. denied* (in turn quoting *Hoose v. Doody*, 886 N.E.2d 83, 93 (Ind. Ct. App. 2008), *trans. denied*)).[1] Under *Schoonover*, it is unclear what record (beyond the trial in this case) could have been developed. *Accord Kirtley v. State*, 227 Ind. 175, 180, 84 N.E.2d 712, 714 (1949) (considering "only the statute upon which the charge is founded, and the sections of the state constitution with which it is claimed to be in conflict"). Moreover, the waiver finding in *Slone* was grounded in concerns about "considering items outside of the record" and basing a decision "upon speculation" because the record was silent about the labels on medications at issue in that appeal. 912 N.E.2d at 878. Those concerns do not exist here.

[1] As to the timing of the challenge, *Slone* reiterated that "Indiana appellate courts have considered the constitutionality of statutes even where the defendant failed to file a motion to dismiss," including raising the issue sua sponte. 912 N.E.2d at 878.

Every criminal appeal from a conviction comes to this Court with a factual record, and the trial transcript in this case is sufficiently developed to address Mr. Solomon's very narrow, as-applied, constitutional claim. Specifically, there is evidence in the record that he (1) is an adult (2) who possessed a single blunt of marijuana (3) while not operating a vehicle. Tr. 11-12; App. 14.

The State's truncated citation of *Layman v. State*, 42 N.E.3d 972, 976 (Ind. 2015), actually cuts against it: "judicial intervention to address constitutional claims for the first time at the appellate level is not appropriate, *especially here where for the most part Appellants' claims are dependent on potentially disputed facts*." (emphasis added). Here, as the State concedes, the claim is a legal one that should be "reviewed de novo." Br. of Appellee at 17 (quoting *Conley v. State*, 972 N.E.2d 864 (Ind. 2012)).

Finally, even if this claim is not perfectly preserved, "addressing the merits of a claim notwithstanding waiver . . . . is a common practice not only with our Court of Appeals colleagues but with [the Indiana Supreme] Court as well." *Sharp v. State*, 42 N.E.3d 512, 515 (Ind. 2015); *see also Humphrey v. State*, 73 N.E.3d 677, 687 n.2 (Ind. 2017) ("Waiver notwithstanding, we address the State's claim which fails on the merits."); *Hale v. State*, 54 N.E.3d 355, 359 (Ind. 2016) (quoting *Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015)) ("[W]henever possible, we prefer to resolve cases on the merits instead of on procedural grounds like waiver."); *Lee v. State*, 43 N.E.3d 1271, 1275

(Ind. 2015) ("[W]e exercise our discretion here, as in *Young*, to review that constitutional issue on our own accord, despite appellate waiver by advancing it for the first time on rehearing.").

C. Article 1, Section 1 provides judicially enforceable rights.

As previously discussed, the Indiana Supreme Court has struck down numerous statutes as violations of Article 1, Section 1. Br. of Appellant at 10-11. The State's suggestion that Section 1 contains no judicially enforceable rights is insupportable.

In *Doe v. O'Connor*, 790 N.E.2d 985, 991 (Ind. 2003), our supreme court merely stated that it "need not decide whether Art. I, § 1, presents any justiciable issues here because Doe does not press a substantive claim." Here, in sharp contrast, Mr. Solomon has presented a substantive claim—indeed, the only challenge in this appeal is substantive, unlike the *procedural* Section 1 claim pressed in *Doe*. Moreover, since *Doe*, the Indiana Supreme Court has addressed a substantive Section 1 claim with no hint of judicial unenforceability. *Moore v. State*, 949 N.E.2d 343, 345 (Ind. 2011).[2] Finally, even if there were some doubt on this point, as an intermediate appellate court, this Court is "bound to follow Indiana Supreme Court precedent and

[2] In another case, the Court declined to address the State's argument "that Article I, Section 1, protects no judicially enforceable rights in general" because the plaintiffs had not met their burden of showing a facial violation of the abortion statute at issue. *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 978 (Ind. 2005).

will not declare its decision to be invalid." *Gill v. Gill*, 72 N.E.3d 945, 949 (Ind. Ct. App. 2017), *trans. denied*.

D. Old cases, including *Herman*, are still binding.

Surprisingly, the State seeks to diminish cases finding Section 1 violations because the cases are at least sixty-five years old. Br. of Appellee at 13. But old cases are generally stronger authority when addressing Indiana constitutional arguments. Our supreme court has repeatedly explained that cases decided near the time of the drafting and ratification of the Indiana Constitution are "accorded strong and superseding precedential value." *Richardson v. State*, 717 N.E.2d 32, 43 (Ind. 1999) (quoting *Collins v. Day,* 644 N.E.2d 72, 76 (Ind. 1994)).

Herman v. State, 8 Ind. 545, 558 (1855), decided within a few years of the 1851 Constitution, is the leading Section 1 case and remains sound precedent in Indiana. The State's suggestion that *Herman* was "implicitly overruled" by *Schmitt v. F. W. Cook Brewing Co*., 187 Ind. 623, 120 N.E. 19, 21 (1918), is wholly at odds with the numerous cases that have cited and relied on it. Br. of Appellee at 14, 20 n.2. Our supreme court relied on *Herman*, with no mention of any sort of limitation or implicit overruling, as recently as 2011. *See Moore*, 949 N.E.2d at 345. As did a federal court just months ago. *Trisvan v. Annucci*, 284 F. Supp. 3d 288, 297 (E.D.N.Y. 2018).

Finally, Mr. Solomon's claim does not rest on a "rickety doctrinal foundation." Br. of Appellee at 16. That most Section 1 cases have been in

the economic realm, Br. of Appellee at 13-14, does not limit the reach of that provision. Indeed, the Indiana Supreme Court recently considered a Section 1 challenge to the public intoxication statute, ultimately finding no violation of the defendant's "personal liberty rights under the Indiana Constitution." *Moore*, 949 N.E.2d at 345.

The State's citation of *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2015), is curious and further undermines its Section 1 argument. There, the plaintiffs advocating for the right to marry partners of the same sex noted that Article 1, Section 1 guaranteed "the right to walk abroad and look upon the brightness of the sun at noon-day[.]" *Id.* at 34 (quoting *In re Matter of Lawrance,* 579 N.E.2d 32, 39 n.3 (Ind. 1991) (in turn quoting 1 Debates in Indiana Convention 968 (1850)). This Court rejected the attempt to convert that statement, which "seems to contemplate a lack of excessive governmental influence in private affairs, into public, state recognition of marriage to anyone of a person's choice as a constitutional 'core value.'" *Morrison*, 821 N.E.2d at 34.[3]

[3] The panel in *Morrison v. Sadler* observed that a "core value" under the Indiana Constitution is arguably similar to a "fundamental right" under the federal or other state constitutions, and "most courts have not looked favorably upon finding a 'fundamental right' to marry a person of the same sex." *Id.* at 32. More recently, the United States Supreme Court rejected that reasoning, holding "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

Here, the State does not dispute that the right to possess and use marijuana, unlike a right to same-sex marriage, was well-established in Indiana in 1851 and for decades later. Thus, Solomon is not arguing for a "new right to possess marijuana." Br. of Appellee at 16. Moreover, the criminalization of small-scale possession or use of marijuana is precisely the type of "excessive governmental influence in private affairs" that the framers and ratifiers sought to protect against with Section 1. Adult Hoosiers were able to "look upon the brightness of the sun" or sit within their home while holding or smoking marijuana—not because it would make them healthier or was a choice every one of their neighbors or public officials supported—but because "all power is inherent in the people" and "free governments" can only get involved when necessary to protect "peace, safety, and well-being." Ind. Const. Art. 1, Sec. 1.

E. Possession of a single blunt does not harm the community.

The State has not identified any harm to the broader community from possession of a single blunt of marijuana by Mr. Solomon, an adult, who was not driving a vehicle. Rather, the State offers a string citation to articles that it contends "support the legislature's conclusion that marijuana should be illegal." Br. of Appellee at 18. But not every legislative conclusion is constitutional; deeper digging is required.

Here, the relevant inquiry is whether criminalizing possession of a small amount of marijuana by an adult who is not operating a vehicle (1)

impacts that individual's liberty or pursuit of happiness, and if it does, (2) whether the government can intervene to protect the "peace, safety, and well-being" of the broader community. Art. 1, Sec. 1.

As to the first issue, based on Mr. Solomon's testimony denying ownership of the marijuana at trial, the State argues that "there is no evidence that marijuana provides any happiness" to him. Br. of Appellee at 18. The State's brief and the record belie this; the arresting officer testified that a blunt was found where Mr. Solomon had been sitting and that Solomon told him "nothing in the car was his except for the marijuana blunt." Br. of Appellee at 7 (quoting Tr. 12).

Although the State focuses on the right to "happiness," Section 1 protects far more, including "liberty." Mr. Solomon, and any adult Hoosier who is not driving, has an interest in being able to go about their own business—with a single blunt of marijuana on their person—without being arrested, taken to jail, and charged with a crime. Mr. Solomon's liberty has plainly and deeply been affected by this statute through his arrest, incarceration, criminal charges, and conviction.

As to the articles cited, the State offers no specific or cogent argument about the harm to the "peace, safety, and well-being" of the community from an adult, non-driver's possession of a small amount of marijuana. The failure to make a cogent argument waives an issue for appellate review. *Lindsey v. State*, 916 N.E.2d 230, 239 n.10 (Ind. Ct. App. 2009), *trans. denied*; Ind.

Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant on the issues presented, supported by cogent reasoning.") & 46(B)(2) ("The argument shall address the contentions raised in the appellant's argument.").

Regardless, the articles focus on the potential harm to an individual who uses marijuana rather than to the peace, safety, or well-being of others. Specifically, one article discusses such risks as addiction, "possible role as a gateway drug," and effect on brain development and school performance. Nora D. Volkow, M.D. *et al.*, *Adverse Health Effects of Marijuana Use*, 370 New England J. of Med. 2219 (2014). The article primarily discusses surveys or studies involving childhood and adolescence. The article acknowledges the inherent difficulty of a causal connection with the risk of mental illness and notes that the risk of cancer "is lower with marijuana than with tobacco." *Id.* at 2221-22. Finally, the article includes a helpful, nearly full-page summary of "Clinical Conditions with Symptoms That May Be Relieved by Treatment with Marijuana or Other Cannabinoids," including glaucoma, nausea, AIDS-associated wasting, chronic pain, multiple sclerosis, and epilepsy. *Id.* at 2224.[4]

[4] The article also includes a short section on the "risk of motor-vehicle accidents," *Id.* at 2221-22, but Solomon was not operating a vehicle and his challenge is an as-applied one to non-drivers. Moreover, a separate statutes criminalizes the operation a vehicle while "intoxicated." Ind. Code § 9–30–5–2. A person may be intoxicated by a drug other than alcohol when that drug creates "an impaired condition of thought and action and the loss of normal control of a person's faculties." Ind. Code § 9–13–2–86; *see generally Curtis v. State*, 937 N.E.2d 868, 874 (Ind. Ct. App. 2010).

The title of another cited article accurately summarizes its focus, again, on childhood or adolescent use of marijuana. M.H. Meier, *et al.*, *Persistent cannabis users show neuropsychological decline from childhood to midlife*, Proceedings of the National Academy of Sciences E2657 (2012). The article notes concerns with persistent use over a period of twenty years, especially for "more persistent users. This effect was concentrated among *adolescent*-onset cannabis users, a finding consistent with results of several studies showing executive functioning or verbal IQ deficits among *adolescent*-onset but not adult-onset chronic cannabis users . . . ." *Id.* at E2661 (emphasis added).

The final article from the Wall Street Journal is an opinion piece and is unfortunately behind a paywall. William J. Bennett & 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. The article cites some studies—mostly about adolescents, which again is a subject far beyond the narrow as-applied challenge raised in this case. The authors are also unhappy that "a record 55% of Americans support marijuana legalization," which the authors view to be the result of a "misinformation campaign" because "Americans ranked sugar as more harmful than marijuana." *Id.* But as one critique of the work of Bennett and White aptly explains, they "do not

begin to grapple with the question of how it can be just to treat people as criminals when their actions violate no one's rights."[5] Their "free-ranging paternalism" makes "no distinction between self-regarding behavior and actions that harm others, or between the sort of injury that violates people's rights and the sort that does not. It would be hard to come up with a broader license for government intervention . . . ." *Id.* Indeed, it would also be difficult to find an approach more inconsistent with Section 1 and its broad guarantee of liberty to Hoosiers who are not affecting the peace, safety, or well-being of others.

F. The State's bar is artificially heightened.

The State does not dispute that marijuana possession and use was legal in 1851 and for decades that followed. Nevertheless, it faults Solomon for failing to "establish that the use of marijuana was widespread in Indiana at the time the Indiana Constitution was drafted in 1851"—and later for a lack of evidence of "a large-scale marijuana industry" at the time. Br. of Appellee at 20-21. Although our supreme court provided a specific description of alcohol use, manufacture, and sale in *Herman*, Br. of Appellee at 20-21, the court did not suggest a violation of Section 1 required a long-standing "widespread" or "large-scale" operation. Nor have the post-*Herman* cases finding Section 1 violations set that bar.

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[5] Jacob Sullum, *Bill Bennett's Confused and Confusing Defense of Pot Prohibition*, Forbes (Feb. 5, 2015, at 7:45 p.m.), *available at* https://www.forbes.com/sites/jacobsullum/2015/02/05/bill-bennetts-confused-and-confusing-defense-of-pot-prohibition/#53c394d354fe

For example, in *Kirtley v. State,* 227 Ind. 175, 179-80, 84 N.E.2d 712, 714 (1949), our supreme court struck down a statute prohibiting scalping of tickets to sporting events. Kirtley was charged with selling his $3.00 ticket to the State Final Games of the Indiana High Basketball Association for $25.00. The opinion does not suggest that ticket scalping was "widespread" or "large-scale" in 1851, which seems unlikely since the tournament did not begin until 1910.[6] Nearly every appellate claim includes a minimum legal standard to overcome; that some cases greatly exceed that standard does not raise the bar for all cases that follow.[7]

Moreover, the Food and Drug Administration's decision to classify marijuana as a Schedule I controlled substance is wholly irrelevant to the Indiana constitutional claim raised here. Br. of Appellee at 19. Many states have decriminalized or legalized marijuana possession; whether the federal government chooses to expend resources to prosecute small-time possession of marijuana does not impact the reach of the Indiana Constitution or appropriate analysis to resolve a state constitutional claim.

Finally, a state appellate court finding a marijuana statute unconstitutional would not be unprecedented. In language similar to Section

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[6] IHSAA, Boys Basketball State Champions, *available at* http://www.ihsaa.org/Sports/Boys/Basketball/StateChampions/tabid/124/Default.aspx

[7] For example, an opinion upholding the sufficiency of evidence for a criminal conviction might note that five witnesses, including a nun, saw the crime in broad daylight and testified at trial. That does not mean a future case, with only two witnesses of a similar crime on a cloudy day, should lead to the opposite result of insufficient evidence.

1 and Indiana cases, the Alaska Supreme Court found criminalizing the possession of marijuana by an adult for personal consumption a violation of the right to privacy under its state constitution, reasoning the

> authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free society.

Ravin v. State, 537 P.2d 494, 509 (Alaska 1975). Although it found the "need for control of drivers under the influence of marijuana" sufficient to warrant "as an exercise of the state's police power for the public welfare" for those operating a vehicle, it concluded "no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown." *Id.* at 511.

The narrow finding of unconstitutionality urged here would be similar to one by the Alaska Supreme Court more than four decades ago. Such a decision would not encourage the use of marijuana but simply recognize

> the responsibility of every individual to consider carefully the ramifications for himself and for those around him of using such substances. With the freedom which our society offers to each of us to order our lives as we see fit goes the duty to live responsibly, for our own sakes and for society's.

Id. at 511-12.

CONCLUSION

For all these reasons, John Solomon respectfully requests this Court vacate his conviction for possession of marijuana because the statute criminalizing the offense violates Article 1, Section 1 as applied to adults who are not driving or impacting others.

Respectfully submitted,

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WORD COUNT VERIFICATION

I verify that this brief contains no more than 7,000 words.

/s/ Joel M. Schumm
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CERTIFICATE OF SERVICE

I certify that the foregoing Reply Brief of Appellant was served by electronic filing through the IEFS upon Deputy Attorney General George Sherman on this 6th day of January, 2019.

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