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IN THE
INDIANA SUPREME COURT

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**

APPELLANT'S PETITION TO TRANSFER

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QUESTION PRESENTED ON TRANSFER

Does the statute criminalizing any and all possession of marijuana violate the right to liberty and pursuit of happiness in Article 1, Section 1 of the Indiana Constitution when applied to an adult with a single blunt who is not driving or otherwise impacting the safety or well-being of others?

TABLE OF CONTENTS

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

On April 15, 2017, John Solomon accepted a ride to a liquor store from individuals he did not know. Tr. 12, 20-21. Within about a minute, the vehicle was pulled over by the police for "multiple infractions." Tr. 8, 22. The police officer noticed several syringes in the vehicle and ordered everyone out of the vehicle when one occupant was seen destroying a syringe. Tr. 10.

Police found a marijuana blunt "tucked behind" the back passenger seat where Solomon had been sitting. Tr. 11. A police officer testified that Solomon told him "nothing in the car was his except for the marijuana blunt." Tr. 12. He was charged with and convicted of possession of marijuana. App. 14, Tr. 30-31.

On direct appeal, Solomon argued the statute criminalizing possession of marijuana was unconstitutional as applied to him, an adult with a single blunt who was not driving. Just twenty-three days after the case was transmitted, and without benefit of oral argument that had been requested, the Court of Appeals affirmed in a published opinion. The opinion devotes nearly six pages to summarizing the arguments of counsel before a final paragraph resolving the issue of first impression in Indiana. Slip op. at 4-11. Specifically, the Court of Appeals opined that earlier opinions of this Court involving the control of liquor had been "overruled during the Prohibition Era." Slip op. at 10 (quoting *Morrison v. Sadler*, 821 N.E.2d 15, 32 (Ind. Ct. App. 2005)). The opinion concluded, without citation to authority, that the criminalization of marijuana "is a legislative determination and not a judicial one." Slip op. at 11.

INTRODUCTION

This Court has long applied a thoughtful and consistent approach in analyzing Indiana constitutional claims. But here, the Court of Appeals eschewed that analytical framework in deciding an issue of first impression. The published opinion sows confusion about Indiana constitutional analysis generally, Section 1 particularly, and the viability of some of this Court's precedent. Perhaps most troubling, without citation to authority the opinion broadly declares an Article 1 constitutional claim is off-limits as "a legislative determination and not a judicial one." Slip op at 11. Transfer is warranted because the published opinion conflicts with precedent of this Court and decided an issue of first impression in a manner that significantly departs from precedent and practice. Ind. Appellate Rule 57(H)(2), (4), & (6).

Simply by possessing a substance that was legal in 1851 and for decades later, Mr. Solomon and thousands of other Hoosiers now face a significant loss of liberty through arrests, incarceration, criminal charges, convictions, and lifelong collateral consequences. He simply asks this Court to put itself in the shoes of the framers, ratifiers, and judges of the 1850s and conclude, as they would have, that the liberty guarantee of Section 1 protects the right of an adult to possess a single blunt of marijuana if the possession is not impacting the safety or well-being of others.

ARGUMENT

The right to liberty and pursuit of happiness in Article 1, Section 1 of the Indiana Constitution protects the possession of a blunt of marijuana by adult Hoosiers who are not driving or otherwise impacting the safety or well-being of others.

Indiana Code section 35-48-4-11 criminalizes any and all possession of marijuana. This case presents a narrow issue of first impression: Do Hoosiers who are not driving have a constitutional right to possess a small amount of marijuana for personal use when that possession does not impact the safety or well-being of others? Article 1, Section 1 of the Indiana Constitution provides robust protection of individual liberty, mirroring the language of the Declaration of Independence, in relevant part:

> WE DECLARE, That all men are created equal; that they are endowed by their CREATOR with certain unalienable 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.

Ind. Const. art 1, § 1. This Court's analytical approach to addressing Indiana Constitutional challenges to statutes

> is well established. It requires a search for the common understanding of both those who framed it and those who ratified it. To determine this intent, we examine the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions. We look to history to ascertain the old law, the mischief, and the remedy.

Paul Stieler Enters., Inc. v. City of Evansville, 2 N.E.3d 1269, 1272–73 (Ind. 2014) (cleaned up).[1] The Court of Appeals failed to follow this framework and its abbreviated analysis did not fully or properly address the significant issue presented.

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

As framed from the outset, this appeal deeply affects 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, § 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. Marijuana was legal in Indiana in 1851.

The State does not dispute that marijuana use was legal in 1851 when the Indiana Constitution was drafted and ratified. Rather, the possession of marijuana

[1] "'Cleaned up' is a new parenthetical intended to simplify quotations from legal sources. Use of 'cleaned up' signals that the current author has sought to improve readability by removing extraneous, non-substantive clutter (such as brackets, quotation marks, ellipses, footnote signals, internal citations or made un-bracketed changes to capitalization) without altering the substance of the quotation." *Chassels v. Krepps*, 174 A.3d 896, 901 n.3 (Md. 2017) (cleaned up).

appears to have first been criminalized in Indiana in the 1930s.[2] When immigrants from Mexico and the West Indies began the practice of smoking marijuana around 1900, states began to criminalize the possession or sale of marijuana in statutes that "stemmed largely from racism and concern that use would spread." Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 Wash. & Lee L. Rev. 779, 793-94 (2018).

C. Section 1 decisional law provides broad protection.

This 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; it found the liquor act of 1855 unconstitutional because

> 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, so far as he may be capable of producing them, or they may be within his reach, and that the legislature cannot take away that right by direct enactment. If the constitution does not secure this right to the people, it secures nothing of value.

[2] *See generally Spight v. State*, 248 Ind. 287, 288, 226 N.E.2d 895, 896 (1967) (citing 1935 Narcotic Act as amended; Acts 1935, Ch. 280, s 2, p. 1351; 1961, Ch. 90, s 2, p. 169, being Burns' Ind. Stat. Ann, s 10-1350 (Supp. 1956)).

Even though some may abuse the use of beverages or other substances, "[t]he happiness enjoyed in the exercise of general, reasonably regulated liberty by all, overbalances the evil of occasional individual excess." *Id.* at 564.

The Court of Appeals' suggestion that *Herman* was "overruled" by *Schmitt v. F. W. Cook Brewing Co.*, 187 Ind. 623, 120 N.E. 19, 21 (1918), cannot be reconciled with the numerous cases that have cited and relied on it. Slip op. at 10 (citing *Morrison*, 821 N.E.2d at 32). This Court relied on *Herman*, with no mention of any sort of limitation or implicit overruling, as recently as 2011. *Moore v. State*, 949 N.E.2d 343, 345 (Ind. 2011). Likewise, a federal court cited *Herman* just months ago. *Trisvan v. Annucci*, 284 F. Supp. 3d 288, 297 (E.D.N.Y. 2018).

Because cases decided near the time of the drafting and ratification of the Indiana Constitution are accorded "superseding precedential value," *Schmitt* and not *Herman* was the wrong turn in Indiana jurisprudence. Moreover, any decision to disapprove or overrule an opinion of this Court must be done by this Court—not the Court of Appeals. *See, e.g., Horn v. Hendrickson*, 824 N.E.2d 690, 694 (Ind. Ct. App. 2005) ("We are bound by the decisions of our supreme court. Supreme court precedent is binding upon us until it is changed either by that court or by legislative enactment.") (citations omitted).

Moreover, the robust protection in *Herman* is echoed in several other opinions of this Court, which have found statutes to violate Section 1.

See Dep't of Fin. Insts. v. Holt, 231 Ind. 293, 309, 108 N.E.2d 629, 637 (1952) (invalidating a statute limiting the amount that purchasers of retail installment contracts could agree to pay retail dealers); *Kirtley v. State,* 227 Ind. 175, 179–80, 84 N.E.2d 712, 714 (1949) (striking down statute prohibiting "scalping" of tickets to sports events); *Dep't of Ins. v. Schoonover,* 225 Ind. 187, 192–94, 72 N.E.2d 747, 749–50 (1947) (invalidating regulation requiring commissions to be paid on insurance sales); *State Bd. of Barber Exam'rs v. Cloud,* 220 Ind. 552, 572–73, 44 N.E.2d 972, 980 (1942) ("The individual's right to engage in a lawful business, to determine the price of his labor and to fix the hours when his place of business shall be kept open, except as they conflict with the police power, are personal privileges and liberties within the protection of [Article I, Sections 1 and 23 of] the Indiana Bill of Rights."); *Street v. Varney Elec. Supply Co.,* 160 Ind. 338, 342, 66 N.E. 895, 896–97 (1903) (invalidating minimum wage legislation for public works projects).[3]

As a final point, the State's reliance on *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*

[3] These cases were helpfully collected and summarized in Justice Boehm's dissenting opinion in *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 998 (Ind. 2005).

Lawrance, 579 N.E.2d 32, 39 n.3 (Ind. 1991) (in turn quoting 1 Debates in Indiana Convention 968 (1850)). The Court of Appeals 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.[4]

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.

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[4] 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).

Recognizing that "[t]he rights guaranteed by Art. 1, § 1, are cherished rights and not to be surrendered lightly," *Schoonover,* 225 Ind. at 194, 72 N.E.2d at 750, this case should be another in that line, holding that Section 1 protects the liberty rights of adult Hoosiers who are not driving to possess a single blunt of marijuana when doing so has no effect on any other person or public safety.[5]

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

The State has not identified any harm to the broader community from Mr. Solomon's possession of a single blunt of marijuana. Rather, the State offered a string citation of articles that it contends "support the legislature's conclusion that marijuana should be illegal." Br. of Appellee at 18. Even more troubling, without citation to authority the Court of Appeals broadly held that the criminalization of marijuana "is a legislative determination and not a judicial one." Slip op. at 11.

Not every legislative conclusion is constitutional; the individual protections in Article 1 have always required deeper analysis.[6] As summarized in Part C,

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[5] Solomon was not required to "establish that the use of marijuana was widespread in Indiana at the time the Indiana Constitution was drafted in 1851" or show evidence of "a large-scale marijuana industry" at the time. Br. of Appellee at 20-21. *Herman* did not require evidence of a "widespread" or "large-scale" alcohol operation, nor have the post-*Herman* cases finding Section 1 violations set that bar. For example, in *Kirtley v. State,* 227 Ind. 175, 179-80, 84 N.E.2d 712, 714 (1949), this 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] *Cf. Citizens Action Coal. of Indiana v. Koch*, 51 N.E.3d 236, 241 (Ind. 2016) ("[W]here a particular function has been expressly delegated to the legislature by our Constitution without any express constitutional limitation or qualification,

above, this Court has held numerous statutes unconstitutional under Section 1. Those opinions make clear that "police power" is not a blank check for any and every legislative action. This Court's Article 1, Section 24 jurisprudence similarly sets a higher bar, distinguishing between the Legislature's "general" police power, which grants "broad authority," and the "necessary" police power, "which is much narrower." *Girl Scouts of S. Ill. v. Vincennes Ind. Girls, Inc.*, 988 N.E.2d 250, 257 (Ind. 2013). "Simply because a statute is a valid exercise of legislative authority pursuant to such general police power does not necessarily immunize it from our state constitution's" protections; rather, statutes must be "necessary for the general public and reasonable under the circumstances." *Clem v. Christole, Inc.*, 582 N.E.2d 780, 784 (Ind. 1991).

The possession of a single blunt of marijuana by an adult who is not driving or otherwise impacting others falls well within the protections afforded by Section 1. In declaring the decision to criminalize marijuana a legislative decision wholly unreviewable by the judicial branch, the Court of Appeals cites no effect on others or rebuttal to the widely held view that "the harms we know about now are practically nil compared with that of many other drugs, and . . . marijuana's effects are clearly less harmful than those associated with tobacco or alcohol abuse."[7]

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disputes arising in the exercise of such functions are inappropriate for judicial resolution.").

[7] Aaron E. Carroll, *It's Time for a New Discussion of Marijuana's Risks*, The Upshot, May 7, 2018, *available at* https://www.nytimes.com/2018/05/07/upshot/its-time-for-a-new-discussion-of-marijuanas-risks.html (last visited March 18, 2019 (summarizing the findings of a 2017 National Academies of Sciences, Medicine and Engineering comprehensive report on cannabis use).

The State offers no specific or cogent argument about any harm to the "peace, safety, and well-being" of the community from an adult, non-driver's possession of a small amount of marijuana. Rather, its cited 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.

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."[8] 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.

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[8] 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

E. The Alaska Supreme Court has decided a similar issue.

Finally, finding a marijuana statute unconstitutional on state constitutional grounds would not be unprecedented. In language similar to Section 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 "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 mirror 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

The Court of Appeals' published opinion is at odds with this Court's precedent and analytical approach to Indiana constitutional claims. Transfer is warranted to hold, as a matter of first impression but narrowly, that the guarantee of liberty in Article 1, Section 1 includes the right to possess a single blunt of marijuana by adult Hoosiers who are not driving.

Respectfully submitted,

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WORD COUNT VERIFICATION

I verify that this Petition to Transfer contains no more than 4,200 words.

/s/ Joel M. Schumm
Joel M. Schumm

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition to Transfer was served electronically on Deputy Attorney General George Sherman through the IEFS on this 18th day of March, 2019.

/s/ Joel M. Schumm
Joel M. Schumm