THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0171

The State of New Hampshire
v.
Jeremy D. Mack

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE COOS COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
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Whether the trial court properly found that prosecuting the defendant for possessing the controlled drug psilocybin would not violate his rights under part I, article 5 of the New Hampshire Constitution because the controlled drug act is facially neutral, generally applicable, and touches only incidentally on one aspect of his ability to practice his religion.

STATEMENT OF THE CASE

In April of 2018, the defendant, Jeremy Mack was indicted on one class B felony count of possession of the controlled drug psilocin or psilocybin. ASB 44.[1] *See* RSA 318-B:2, I (2017); RSA 318-B:26, II(a) (Supp. 2018). Before trial, the defendant filed a motion to dismiss, and the State filed an objection. AOD 4-21. Following a hearing on September 24, 2018, the Coos County Superior Court (*Bornstein*, J.) denied the motion. AAD 3-6. The defendant filed a motion to reconsider. AOD 22-27. The trial court denied the motion on November 9, 2018. AAD 7.

On November 14, 2018, the defendant stood trial, and the jury found him guilty as charged. JT 159-60. On February 25, 2019, the trial court sentenced the defendant to a term of twelve months, deferred for one year; a term of one year of probation that could be terminated after six months if his probation officer (PPO) so recommended; and a fine of $350. AOD 28-29. The trial court also ordered the defendant to remain of good behavior, "complete a LADC intake interview and mental health evaluation within 120 days of sentencing, comply with all treatment recommendations, and … execute appropriate waivers to allow his PPO to communicate with providers." AOD 29. This appeal followed.

[1] "AAD" refers to the defendant's appendix of appealed decisions.
"AOD" refers to the defendant's appendix of other documents.
"ASB" refers to the attached appendix to the State's brief.
"DB" refers to the defendant's brief.
"JT" refers to the transcript of the jury trial on November 14, 2018.
"MH" refers to the transcript of the motion hearing on September 24, 2018.

STATEMENT OF FACTS

A. The facts set forth in the defendant's pretrial motion to dismiss and the State's objection.

On November 9, 2017, troopers Jay Stephens and Matthew Podell went to the defendant's home in Columbia to serve him with a Connecticut order of protection. AOD 5, 13. The defendant's mother, who also lived there, told them he was not home and invited them inside. AOD 5, 13. In the house, the troopers saw "drug paraphernalia, … tetrahydrocannabinol ("THC") oil, and smoking devices in various locations …." The defendant's mother also showed them "a bag of finely-ground marijuana" and her "valid Connecticut Medical Marijuana card." She then told the troopers that she and the defendant "were in the process of obtaining New Hampshire cards." AOD 13.

The protective order required the troopers to seize the defendant's firearms, so they asked his mother to contact him. She called him, and the troopers then told him about the order and its requirement that they seize any firearms and ammunition he had. The defendant told the troopers that he had firearms in a safe in the basement and in a bedroom closet, and he gave them two possible combinations for the safe's lock. AOD 5, 14.

The defendant's mother and the troopers went downstairs, and the troopers determined that the safe's door was unlocked. AOD 14. They opened the door and saw a bag of psilocybin mushrooms in plain view on the top shelf. They also saw five firearms and several boxes of ammunition. AOD 5, 14. They showed the mushrooms to the defendant's mother, who claimed that they belonged to the defendant's ex-girlfriend, and that he had

"put them in his safe after he found out she was growing them." AOD 14. The troopers seized the firearms, ammunition, and mushrooms. AOD 5.

On November 14, Trooper Stephens interviewed the defendant. AOD 5, 14. The defendant said that he was "a minister in the Oklevueha native American Oratory of Mystical Sacraments" (OMS). AOD 5. He also said that he had received psilocybin spores from the church, grown them into mushrooms, and then used the mushrooms and shared them "with a friend." AOD 14. He then showed Trooper Stephens a card that said he "had been a member of the church since February of 2017," AOD 5, and "that members … [were] qualified to possess sacraments such as Peyote, Ayahuasca, Cannabis, and Psilocybin," AOD 6. He also showed Trooper Stephens "an expired Connecticut Medical Marijuana card." AOD 15.

B. Additional evidence from the State's case at trial.

The order the troopers took to the defendant's house was a domestic violence protective order (DVPO), and the protected party was his wife, Tria. JT 47, 57, 78. At that time, he was in Connecticut working on a court hearing regarding a child custody issue. JT 22-23, 47. Trooper Stephens spoke to him on the phone and said that he wanted to meet with the defendant, go over the DVPO line by line, and then remove his firearms and ammunition. JT 22-23. The defendant said that he did not want to make a trip back to New Hampshire, so the troopers could go ahead and take his firearms and ammunition and he would go to the court or the police in Connecticut, so he could be served with the DVPO. JT 22.

The safe "was in a very dark part of the basement." JT 24. Trooper Stephens pulled on the door and it opened. JT 24. Trooper Podell shined his flashlight inside and he and Trooper Stephens immediately saw two items on the top shelf—a handgun and "a fairly large Ziploc bag" of what they recognized as hallucinogenic mushrooms, which are controlled drugs that are illegal to possess. JT 27-28; *see also* JT 48-49, 54. The defendant's mother claimed that the mushrooms belonged to "Tria." JT 54, 57.

At his later interview, the defendant also said that he had been an Army combat medic in the Middle East, and that he had post-traumatic stress disorder (PTSD). JT 29-30. He said that taking hallucinogenic mushrooms gave him "a slight escape from reality," JT 41, and that he used them "for healing," JT 42. However, he also said that they were "part of his religious … group," the Oklevueha Native American Church (ONAC), JT 30, that "[h]e had joined it by sending money," and that he was member of it "from a distance," JT 31.

The defendant claimed that he grew the mushrooms "in his bathroom, which was locked," but the troopers had seen a grow light hanging from his basement ceiling. JT 32. The OMS membership card he showed Trooper Stephens said that the church's charter was from another state, so Trooper Stephens call the state police in that state and learned that they had experienced "a lot of problems with the misuse and legitimacy of it," and that it "was [not] a legal card in their experience." JT 42-43.

C. The defendant's case at the trial.

During his direct examination, the defendant testified as follows: In 2009, he left active duty, joined the National Guard, and started college. JT 70-71. He had been "a devout Christian," but he met a woman in 2009 "who kind of introduced [him] to new spiritual ideas." JT 72. He studied "a whole bunch of religions" and determined that he "felt comfortable [with] a Shamanic, earth-based religion," so he started practicing that in 2010 or 2011. JT 712. At that time, he "was having auditory hallucinations due to [his] PTSD," so he "went to the VA," and it treated him with "about six different psych meds …." He also went "to a civilian psychologist" for behavioral therapy on and off for about five years. JT 76.

In late 2016 or early 2017, the defendant learned about, and began studying, the "Native American Churches" and their sacraments. JT 74. The OMS website had posted a Utah Supreme Court ruling "showing the legality of the church allowing members to possess these sacraments." JT 74-75; *see also* JT 82. The site also posted United States Supreme Court rulings. JT 82. However, the rulings all addressed "the Religious Freedom Restoration Act [(RFRA)] that applied to the Native American Church," and the website did not say it "applie[d] to New Hampshire." JT 87. The cases also "were not specifically for psilocybin," but they mentioned peyote, which was the main sacrament of "that church …." JT 88.

The OMS "had a special rate for veterans, because they really wanted to … help with them healing …." JT 75. He showed Trooper Stephens his OMS membership card, but he also had one for "the ONAC out of Utah," which was the "parent church …." JT 74. He did about 20

hours of training, and the OMS made him "a minister … regarding the sacraments." JT 75. He sometimes called himself "Sitting Bear." JT 112.

The defendant "grew the mushrooms in order to take them as a sacrament," JT 77, but they also had "a medical side effect," JT 80. He took doses of ".1 grams and that amount ha[d] no psychoactive effect," but it did "produce … medical effects … slowly over time." JT 81. The church's rules prohibited him from taking mushrooms in public, when he was not in "a secluded spot where [it was] just [him]," or when he was around children. They also prohibited him from operating a vehicle or using firearms while he was taking mushrooms. JT 79.

On cross-examination, the defendant testified as follows: He was working with his primary care doctor to get a New Hampshire medical marijuana card, but he never told his doctor he was using psilocybin. JT 105. The "normal dose … of [psilocybin] would be 3.5 grams," JT 109-10, but he took the doses of .1 grams, JT 109, as "kind of a daily sacrament," JT 110, and took doses of "3.5 to 5 grams" almost every week, which was "akin to going to church on Sunday," JT 111. He took five-gram doses "[e]very few weeks, or once a week, depending on when ... [he] could … find a quiet place for eight hours." JT 111. Doing so "allow[ed him] to process a lot of past trauma" in a short time. JT 112.

D. The parties' pretrial pleadings and the court's orders.

1. The defendant's motion to dismiss.

The defendant filed a motion to dismiss. AOD 4-12. He first argued that prosecuting him would violate his right "to freely exercise his religion"

under the First Amendment to the United States Constitution, and his "right to 'worship God according to the dictates of his own conscience'" under part I, article 5 of the New Hampshire Constitution. AOD 4. He next argued that in *Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court (the Court) "arguably weakened religious liberty" under the First Amendment by "permit[ing] blanket laws that [did] not intentionally single out a person or group from requiring the State to tender a compelling state interest for [it]s action of law." AOD 7. He also argued that "Congress ha[d] created exceptions to the controlled drug laws for Native American Churches … since at least 1965," and that in *Gonzales v. O Centro Espirita Beneficient Uniao do Vegetal*, 546 U.S. 418 (2016), the Court had "found that the federal controlled substances act included … Hoasca, or Anyhuasca, a tea originating in Brazil" and then "unanimously upheld an injunction" that prohibited the Customs Service from seizing a shipment of it. AOD 7-8.

The defendant argued that the "plain language" of part I, article 5 was "more detailed and stronger than the … First Amendment," and that it protected his conduct as long as "no other persons [were] harmed in the process of exercising his religious beliefs." He also argued that his "membership of a Native American church [was] but one piece of evidence indicating he utilize[d] sacraments as part of his religious practice," that "[n]othing in the discovery suggest[ed] anybody was harmed by [it]," and that a "plain reading of [part I, article 5] indicate[d] that the exercise of such a religious belief, without harming others, supersede[d] … RSA 318-B:2." AOD 8. He did not explain why he believed that to be the case.

The defendant next argued that although the RFRA did not "apply to State or local laws," AOD 8, and "New Hampshire ha[d] no equivalent statute" like Utah did, the court should hold, as the Utah Supreme Court had, that because the state controlled drug act was "tied to the scheduling by the federal government," it had "to utilize federal authority in determining what constitute[d] a controlled drug … and in what context," AOD 9 (citing *State v. Mooney*, 98 P.3d 420, 423-24 (Utah 2004)). The defendant then acknowledged: (1) that he had the burden because he was challenging his indictment, AOD 9; and (2) that he had been unable to find (a) "a case … where a state drug statute [was] being challenged and [there was] no state equivalent of RFRA," or (b) "New Hampshire authority that directly addresse[d] a First Amendment, or [p]art I, article 5 challenge[] to the Controlled Drug statute," AOD 10.

2. The State's objection.

The State filed an objection. AOD 12-21. It first argued that the defendant had "not articulated how his claim would be successful under a *Smith* analysis." AOD 16. The State also argued that in *State v. Perfetto*, 160 N.H. 675 (2010), and *Appeal of Trotzer*, 143 N.H. 64 (1998), this "Court had the opportunity to distinguish New Hampshire religious jurisprudence from [that] in *Smith*," but "it declined to do so and … quoted *Smith* in its *Perfetto* ruling." The State argued that those decisions and the legislature's failure to pass any "RFRA-style statutes or exceptions to the Controlled Drug Act, show[ed] that New Hampshire does not believe a person's free exercise of religion is infringed upon by laws applying

equally to everyone [that] do not specifically target a person's religious beliefs." AOD 18.

The State then argued that RSA chapter 318-B had not been "enacted to specifically prohibit the religious use of hallucinogenic substances," and that the defendant had been indicted only because he possessed a controlled substance. AOD 18. The State last argued that RSA chapter 318-B did "not incorporate the federal Controlled Substances Act into its own regulatory scheme," AOD 18, so the defendant's reliance on *Mooney* and the RFRA was misplaced, AOD 19.

3. The motion hearing and the court's order.

At a hearing on the motion, the State said that it would "take [the defendant] at his word … that [his] religious beliefs [were] sincere." MH 2. The defendant then argued that the plain language of part I, article 5 was "unambiguous" and "essentially [said] that if an individual [was] worshipping God and under the dictates of [his] own conscience, … the government [was not] to interfere … in any way so long as [he was] not harming any … third parties." MH 2-3. He next argued that the only questions were: (1) whether any third party was harmed, and (2) whether there was "anything that[was] sort of abnormal or strange about his practice of this religion." He then argued that there had not "been any allegation that any third party [was] really harmed," but he was being harmed by "being prosecuted," so "all of the elements [had been] met based on the plain language … for [a] religious exception to apply." MH 3.

The defendant next argued that *Perfetto* was distinguishable: (1) because this Court had addressed whether a condition of Perfetto's suspended sentence was "reasonably related to the rehabilitation or supervision of [him]," but the defendant had not been sentenced, MH 4; and (2) because this Court had found "that there [was not] really a direct infringement on [Perfetto's] religious liberty," given that there were ways he could "still practice his religion without violating the [condition]," but the defendant's "consumption of … earth-base[d] sacraments [was] part of [his] religion, directly," and there was no other way "he could possess the mushrooms and it would be lawful." MH 6.

The defendant further argued that RSA chapter 318-B depended "on the federal [controlled drug] schedule for 99 percent of everything on [the New Hampshire] list," including "psilocybin or psilocin," so "it would be perfectly reasonable … to determine that the federal regulatory regime regarding controlled drugs [was] implied," MH 8, and that the federal drug exceptions and the RFRA test applied, MH 9-10. The court asked if there was a "federal provision for Psilocin or Psilocybin?" Defense counsel answered that in *Oklevueha Native American Church of Hawaii v. Lynch*, 828 F.3d 102 (9th Cir. 2016), the ONAC had "claim[ed] use of 'all … naturally occurring substances," including "iboga, kava, cannabis, psilocybin, san pedro, soma, teonanacatyl, tsi-ahga, and others" as "part of [its] religious practice." MH 10.

The court noted that in *Mooney,* the Utah statute at issue "specifically excepted [substances] listed in … the federal schedule." MH 10-11. It then asked, "Do the New Hampshire statutes have any similar provision?" MH 11. Defense counsel answered that RSA 318-B:2, I,

included the language, "except as authorized in this chapter." The court asked, "So where in this chapter is Psilocin authorized?" MH 11. Defense counsel answered that by incorporating the federal drug schedules, RSA chapter 318-B had impliedly "incorporated the entire federal regulatory regime …." MH 12.

Defense counsel then argued that if the RFRA "three-step analysis applie[d]," the defendant prevailed because: (1) a burden was being placed on his exercise of religion, (2) the State was not asserting that it had a compelling interest in enforcing the prohibition on the possession of controlled drugs, and (3) the State was essentially conceding that there was no tailoring to that prohibition by asserting it was a blanket rule. MH 12-13. He then conceded that *Gonzales* "involved the [C]ourt's application of the [RFRA]," and that there were no federal exceptions for psilocin. MH 14.

The prosecutor said that for purposes of the motion, the State would "agree that it appear[ed] that [the defendant's] use of the Psilocybin and Psilocyn [were] for religious purposes," but it was "not entirely clear" whether he was using them for that purpose or "for reasons relating to his military service …." MH 15. The prosecutor then reiterated the arguments in the State's objection. MH 16-18, 20-21.

The court asked the prosecutor to respond to the defendant's argument that *Perfetto* was distinguishable because the restriction at issue "less directly affected [Perfetto's] free exercise rights …." MH 19. The prosecutor answered that "taking away [the defendant's] ability to use an illegal substance, completely remove[d] the core of his religion," and that "the State's position [was] not to attempt to draw lines on … what aspects of the religion [a person] could do without …." MH 19.

The court denied the motion. AAD 3-6. It first noted that this "Court referred to the *Smith* test when determining whether [Perfetto's] right under Part I, Article 5 … had been violated." AAD 5 (citing *Perfetto*, 160 N.H. at 679). The court next noted that this Court had cited *Smith* after it said:

> "We note that the condition [at issue] does not directly infringe on the defendant's free exercise of his religion: it is instead facially neutral and applies to the defendant's conduct regardless of whether he is in a church or elsewhere. Under these circumstances, we see no reason to require the State to show a compelling government interest."

AAD 5 (quoting *Perfetto*, 160 N.H. at 679). The trial court then said:

> [T]he state law making it illegal to possess a controlled drug … is a facially neutral law that applies to every person in the State regardless of the person's religious beliefs or lack thereof. The effect of the law only incidentally touches on the defendant's ability to possess for sacramental purposes psilocin or psilocybin. For this reason, the State is not required to show a compelling government interest. Because the State has a clear interest in the safety of its citizens and because this law is not directed at chilling the defendant's religious practices but rather only incidentally touches on one aspect of his ability to practice his religion, the law does not violate either the federal or the state constitution.
>
> Furthermore, the State of New Hampshire has enacted no RFRA-style statute and has not exempted from RSA chapter 318-B the sacramental use of psilocin or psilocybin in the state. Exemption from prosecution … is best left to the political process.

AAD 6.

4. The defendant's motion to reconsider and the court's order.

The defendant filed a motion to reconsider. AOD 23-27. He argued that the court had not addressed his claim that part I, article 5 "is superior to RSA [chapter] 318-B and bars prosecution …." He also argued that "[t]he New Hampshire Constitution reiterates through its numerous articles the fundamental nature of personal and religious expression." AOD 23. He next argued that the Massachusetts Supreme Judicial Court had "set forth a two-part standard for evaluation of [religious freedom] claims," which required a defendant to show "there [was] a substantial burden to his free exercise of religion," and if he did so, the State had to "show a sufficiently compelling governmental interest to justify that burden." AOD 25. He then argued that the foregoing standard was "the best fit with the specific guarantees provided in [the] New Hampshire Constitution," and therefore, the court "should apply the RFRA/pre-*Smith* compelling interest test …." AOD 26. He last argued that the court had failed to address his claim that the federal "analysis and reasoning favorable to [him] … appl[ied] … because RSA chapter 318-B incorporated 99 percent of federal drug schedules." AOD 26.

The trial court "conclude[d] that it ha[d] not overlooked or misapprehended any point of fact or law," so it denied the motion. AAD 7.

SUMMARY OF THE ARGUMENT

This Court should not address the substance of the defendant's arguments that the history of part I, article 5 of the New Hampshire Constitution demonstrates it was intended to protect conduct like his, that this Court has not adopted the *Smith* standard under part I, article 5, and that it is incompatible with the plain language and history of part I, article 5 because he did not preserve them in the trial court, and he has not invoked the plain error rule on appeal. The defendant also cannot meet that strict standard for two reasons. First, the court did not err because the plain language and history of part I, article 5 demonstrate that the "disturb the public peace" proviso in it means violate the law, and because this Court did adopt the *Smith* standard in *Perfetto*, and it is entirely compatible with part I, article 5 and this Court's prior interpretations of it. Even if the court did err, the error was not plain because to the extent this Court's prior opinions did not resolve the issues, they are of first impression and turn upon interpretations of part I, article 5 this Court has never adopted.

ARGUMENT

THE DEFENDANT DID NOT PRESERVE HIS ARGUMENTS THAT THE HISTORY OF PART I, ARTICLE 5 DEMONSTRATES IT WAS INTENDED TO PROTECT CONDUCT LIKE HIS, THAT THIS COURT HAS NOT ADOPTED *SMITH*, AND THAT IT IS INCOMPATIBLE WITH THE ELECTORATE'S INTENT IN ADOPTING PART I, ARTICLE 5; HE HAS NOT INVOKED THE PLAIN ERROR RULE; AND HE CANNOT MEET THAT STRICT STANDARD BECAUSE THE TRIAL COURT DID NOT ERR, AND EVEN IF IT DID, THE ERROR WAS NOT PLAIN.

Part I, Article 5 of the New Hampshire Constitution provides:

> Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.

On appeal, the defendant argues that the trial court erred in denying his motion to dismiss and motion to reconsider: (1) because the plain language and history of part I, article 5 demonstrate that it was intended to protect conduct like his, DB 19-25; (2) because this Court has not adopted *Smith* under part I, article 5; (3) because "[t]he view expressed in *Smith* is incompatible with the State's Constitution's plain meaning and unlikely to have been commonly understood by the electorate that ratified it," DB 40 (quotation omitted); and (4) because his "possession of mushrooms injured no others," so "it could not have 'disturbed the public peace,' as that phrase was understood in 1784, DB 44.

A. This Court will not address the substance of the majority of the defendant's appellate arguments because he did not preserve them in the trial court and has not invoked the plain-error rule on appeal.

"The defendant, as the appealing party, has the burden to provide this [C]ourt with a sufficient record to decide his issues on appeal and demonstrate that he raised [them] before the trial court." *State v. Brooks*, 162 N.H. 570, 583 (2011). "A motion to dismiss must state the specific ground on which it is based on order to preserve the issue for appeal." *State v. Guay*, 162 N.H. 375, 380 (2011). "The trial court must have had the opportunity to consider any issues asserted by the defendant on appeal; thus, to satisfy this preservation requirement, any issues that could not have been presented to the trial court before its decision must be presented to it [by him] in a motion for reconsideration." *State v. Mouser*, 168 N.H. 19, 27 (2015); *see also N.H. R. Crim. P.* 43(a).

As demonstrated in § D of the statement of facts, above, in the trial court, the defendant never argued that this Court had never adopted *Smith* or that its interpretation of the protections in the First Amendment was incompatible with the plain meaning and history of part I, article 5. Instead, he argued that the RFRA test should apply to claims involving the religious use of illegal drugs because the legislature impliedly incorporated that test when it incorporated 99 percent of the federal drug schedules in RSA chapter 318-B, an argument he has now abandoned on appeal. He also never mentioned, cited to, or relied on the history of part I, article 5 or the First Amendment in making those arguments or his argument that "disturb the public peace" means harm a third party.

Furthermore, the defendant first argued that the court should apply the Massachusetts Supreme Judicial Court's test for evaluating religious freedom claims in his motion to reconsider. AOD 25-26. However, a motion for reconsideration is "designed to bring to the trial court's attention 'points of law or fact that [it] has overlooked or misapprehended.'" *Farris v. Daigle*, 139 N.H. 453, 455 (1995) (quoting *Super. Ct. R.* 59-A(1) (superseded by *N.H. R. Crim. P.* 43(a) (same)). Thus, when a party first raises issues or submits evidence in a motion for reconsideration that he had the opportunity to raise or submit before the trial court ruled on his initial pleading, the court has the discretion not to consider those new issues or accept that new evidence. *Smith v. Shepard*, 144 N.H. 262, 265 (1999).

Here, the defendant could have made all the foregoing arguments before the trial court denied his motion to dismiss because the State had argued in its objection and at the hearing that this Court adopted the *Smith* test in *Perfetto*, and that the pre-*Smith* test set forth in the RFRA did not apply. Therefore, the trial court did not err in denying the motion for reconsideration on the basis that it "ha[d] not overlooked or misapprehended any point of law or fact" in its ruling. AAD 7.

Moreover, the defendant has not invoked this Court's plain error rule. Therefore, this Court will decline to address the substance of the foregoing arguments. *See State v. Brum,* 155 N.H. 408, 417 (2007) (declining to consider Brum's argument because he did not preserve it in the trial court or invoke the plain error rule on appeal).

B. Even if this Court addresses the defendant's arguments under the plain error rule, there was no error, and even if there was, it was not plain.

> [This Court will] apply the [plain error] rule sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result. To reverse a trial court decision under the plain error rule: (1) there must be an error; (2) [it] must be plain; (3) [it] must affect substantial rights; and (4) [it] must seriously affect the fairness, integrity or public reputation of judicial proceedings.

State v. Pennock, 168 N.H. 294, 310 (2015) (quotations omitted). "[T]he defendant bears the burden under the plain error test." *State v. Cooper*, 168 N.H. 161, 168 (2015). Here, the defendant cannot meet that strict standard because there was no error and even if there was, it was not plain.

i. The trial court did not err in denying the defendant's motion to dismiss because the term "disturb the peace" in part I, article 5 meant violate the law when the electorate adopted it.

The defendant argues that the trial court erred in denying his motion to dismiss because: (1) the State never claimed (a) that he was not "'hurt, molested, or restrained' … in his person or liberty'" by the prosecution, DB 20 (brackets omitted) (quoting part I, art. 5); (b) that the State did not "initiate[] his prosecution because [he] 'worshiped God in the manner and season most agreeable to the dictates of his own conscience,'" DB 20 (quoting part I, article 5); or (c) that his "conduct disturbed or adversely affected anyone else in any way," DB 21; and (2) "[i]n light of these undisputed facts, the plain language of Part I, Article 5 protect[ed his]

conduct," DB 21. However, in the State's objection, it explicitly stated that the defendant was not "indicted for any reason other than possessing a controlled substance …." AOD 18. In other words, the State initiated the prosecution only because he possessed and controlled the mushrooms, and doing so was illegal regardless of why he did so. Therefore, the question is whether the trial court erred in finding that prosecuting the defendant for doing so did not violate his rights under part I, article 5. The answer is no.

In order to determine whether there was error, this Court must interpret part I, article 5, which was adopted by popular vote in 1784. "As the final arbiter of state constitutional disputes, [it] will review the trial court's construction of constitutional provisions *de novo*." *NSBC Bank USA, Nat. Ass'n, Inc. v. MacMillan*, 160 N.H. 375, 376 (2010). "When interpreting the meaning of a constitutional provision adopted by popular vote, [this Court] will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast." *In re Opinion Of Justices*, 162 N.H. 160, 167 (2011) (quotation omitted).

The defendant argues: (1) that "[t]he 1784 electorate would have [(a)] regarded modern drug laws as bizarrely paternalistic," DB 25, (b) found "the assertion of governmental power over religion illegitimate, except to the extent necessary for the protection of others," DB 25 (quotation omitted), and (c) "rejected the notion that the government could restrict a citizen's religious worship by prohibiting him from possessing and consuming a disfavored type of mushroom," DB 26; and (2) that "[i]n the 1780s, to 'disturb the public peace' required, at the very least, 'that there be a victim,'" DB 44 (quoting *Commonwealth v. Nissenbaum*, 536

N.E.2d 592, 601 (Mass. (1989) (Liacos, J. dissenting)). Those claims lack merit.

It should first be noted that the defendant claims "[i]ntoxicating and hallucinogenic substances, including psilocybin mushrooms, were known to Europeans since before the eighteenth century," DB 25 (citing John Parkinson, *Theatrum Botanicum* 1321 (London, 1640)). However, he fails to note that *Theatrum Botanicum* also says that the mushrooms on that page "are dangerous, if not poisonous," and calls the mushrooms he refers to "Deadly Mushrooms." *Theatrum Botanicum* 1321. He also has not cited, nor could the State find, any evidence that anyone used hallucinogenic mushrooms for any purpose before the eighteenth century. Therefore, the electorate of 1784 would likely have found doing so very bizarre.

Furthermore, in 1784, "most citizens were Protestant, belonging to the Congregational church," and the electorate also enacted part I, article 6, which "empowered the legislature to authorize towns to 'make adequate provision at their own expense, for the support and maintenance of public protestant teachers of piety, religion and morality," Susan E. Marshall, *The New Hampshire State Constitution* 53 (2011), and "provided equal protection only to denominations of 'Christians," *supra* at 54. The defendant has not cited, nor could the State find, any evidence that Christians used dangerous and potentially deadly hallucinogenic mushrooms for any purpose, much less a religious purpose, before the eighteenth century. Therefore, it seems unlikely that the electorate would have found it bizarrely paternalistic to prohibit persons from doing so, even if those persons claimed that their religious practice included using hallucinogenic mushrooms.

In any event, this Court's prior case law demonstrates that it has interpreted the "disturb the public peace" proviso in part I, article 5 of the New Hampshire Constitution to mean violate a generally applicable law. In *State v. White*, 64 N.H. 48 (1886), the respondents beat a drum in the compact part of Somersworth, *id.*, and they were then charged with violating a statute that provided: "No person shall, within the compact part of any town, fire or discharge any cannon, gun, pistol, or other fire-arms, or beat any drum, except by command of a military officer," *id.* At 49. At trial, they "offered to prove that they beat the drum in accordance with their sense of religious duty, and in so doing were worshiping God according to the dictates of their own consciences, and were not disturbing the public peace, or the religious worship of others." *Id.* at 48. "The court ruled the evidence did not constitute a defense, and the respondents excepted." *Id.*.

On appeal, this Court first held that "it would be no defense to show that no actual disturbance of the peace or of the religious worship of others resulted from the violation of the statute." *Id.* at 49. It then rejected the respondents' contention "that the statute [was] in conflict with article 5 of the bill of rights, and that it [was] an unauthorized invasion of the rights of conscience and religious freedom secured by the constitution." *Id.* at 50. In doing so, this Court held that it was not "a legal justification that the act was done in the performance of religious services, in accordance with the religious belief of the respondents," and that "[t]o recognize such a defense would be to make the professed religious belief and practices of [them] superior to the statute." *Id.* at 50. This Court also held that "[r]eligious liberty as recognized and secured by [part I, article 5] does not … include

the right to disregard those regulations which the legislature has deemed reasonably necessary for the security of public order." *Id.* at 50.

In *State v. Cox*, 91 N.H. 137 (1940), *cert. denied*, 312 U.S. 569 (1941), Jehovah's Witnesses and ordained ministers, *id.* at 138, "marched on the sidewalks of certain streets, some carrying placards or signs" about religion and God, and they did so without a license, "but no technical breach of the peace occurred," *id.* at 139. They were convicted of violating a statute that provided: "No … parade or procession upon any public street or way … shall be permitted, unless a special license therefor shall first be obtained …." *Id.* at 140. This Court "held that the act [was] a due exercise of the police power under the state constitution." *Id.* at 145. It next said it "thought significant that the act prescribe[d] no measures for controlling or suppressing the publication on the highways of facts and opinions," and that "[t]he regulation, in respect to highways, [was] only of parades and processions in their generality." *Id.* This Court then held:

> The public good for which legislation may be enacted is the good of all, and the state constitution recognizes no favored classes. Freedom to worship God, of speech, and of the press, is not abridged by the act, so far as the state constitution protects that freedom. An ordered freedom is all that the guaranty of individual rights secures. Maintenance of order neither abridges nor denies freedom. …A religious doctrine that divine law should be obeyed rather than man's law when the two conflict may be entitled to statement but not observance.

Id. Therefore, it is clear that this Court has concluded that "disturb the public peace" in the context of part I, article 5 does not mean actually

disturb or harm another person. Instead, it means violate a generally applicable law enacted to protect public order or public safety.

Moreover, "Part I, Article 5 of the New Hampshire constitution is virtually identical to Part I, Article 2 of the Massachusetts Constitution," DB 39, and the Massachusetts Supreme Judicial Court has reached the same conclusion as this Court did in *Cox* and *White.* In *Commonwealth v. Nissenbaum*, 536 N.E.2d 592 (Mass. 1989), the court interpreted "the term 'disturb the public peace' in the context of [part I,] art[icle] 2" of the Massachusetts Constitution. *Id.* at 595. In doing so, the court said:

> Within two weeks after the Massachusetts Constitution went into effect in 1780, the General Court released a statement that suggest[ed] its understanding that practices may 'disturb the public peace' in the Constitutional sense without the type of disturbance associated with breach of the peace crimes. ... In a broad sense, all offenses are breaches of the public peace. Unless otherwise provided by statute, every indictment, whether for a common law or statutory offense, concludes by alleging that the offense was committed "against the peace of the state." Clark & Marshall, *Crimes*, § 419 at 560 (5th ed. 1952).

Id. at 596 (brackets and ellipsis omitted). The court next noted that in "interpreting … Art. I, § 6, cl. I, of the [United States Constitution]," the United States Supreme Court had used the same definition and reasoned:

> "Now, as all crimes are offenses against the peace, the phrase 'breach of the peace' would seem to extend to all indictable offenses ... [including] those which are in fact attended with force and violence, as [well as] those which are only constructive breaches of the peace of the government, inasmuch as they violate its good order."

Id. at 596 (brackets and ellipsis omitted) (quoting *Williamson v. United States,* 207 U.S. 425, 444 (1908)).

The court held that the "proviso … contemplate[d] and require[d] a balancing of the individual's interest in religious freedom with the State's interest in preserving the public peace." *Id.* at 594. It then applied the balancing test federal courts applied, *id.* at 594-95, which "weighed the State's interest in preventing possession of controlled substances against the burden that statutes criminalizing such activity may impose on the free exercise of religion," *id.* at 594 (quotation omitted). The court next observed that federal courts had "uniformly determined that the First Amendment does not protect the possession of controlled substances from the reach of criminal statutes." *Id.* at 594. The court then held:

> Balancing the competing interests, and giving significant weight and deference to the Legislature's determination that the possession, distribution, and cultivation of marihuana and hashish disturb the public order, although not controlled by that determination, we conclude that such conduct is not protected by art. 2 even if motivated by sincere religious purpose. … We agree with the unanimous precedent that recognizes both an overriding governmental interest in regulating such substances and the practical impossibility of doing so and at the same time accommodating religious freedom.

Id. at 596.

Later, in *Attorney General v. Desilets*, 636 N.E.2d 233 (Mass. 1994), the court declined to adopt the *Smith* "standard for determining whether conduct was protected under the free exercise of religion clause" of the First Amendment," and instead decided to "adhere to the standard of earlier First Amendment jurisprudence." *Id.* at 236. The court then held that any

"violation of a State statute would disturb the peace." *Id.* at 242. The defendant argues that the fact that the court did so "does not support affirmance, for three reasons." DB 41.

The first reason the defendant posits is that "the State never argued that [his] possession of mushrooms disturbed the public peace, and the trial court never addressed the issue," so "this Court will not consider it." DB 41. However, he also argues that "'[w]hen State constitutional issues have been raised, this [C]ourt has a responsibility to make an independent determination of the protections afforded in the New Hampshire Constitution.'" DB 18 (quoting *State v. Ball*, 124 N.H. 226, 231 (1983)). He has presumably done so because, as demonstrated in § A, above, he did not preserve most of his arguments. If this Court reviews his unpreserved arguments under its plain error standard, it should also review the State's unpreserved arguments responding to them under that standard.

The second reason the defendant posits is that "unlike this Court, the Massachusetts Supreme Judicial Court, when construing its State Constitution, does not 'place itself as nearly as possible in the situation of the parties at the time the instrument was made, that it may gather their intention,' nor does it construe constitutional language according to 'that sense in which it was used at the time when the constitution and laws were adopted.'" DB 41 (quoting *State v. Addison*, 165 N.H. 381, 565-66 (2013)). However, as demonstrated above, in *Nissenbaum*, the Massachusetts Supreme Judicial Court did place itself in the situation of the parties when part I, article 2 of the Massachusetts Constitution was enacted, and it construed that language in the sense in which it was used at that time. In fact, the court's "traditional principles of constitutional interpretation"

require it to "bear in mind that the Constitution was written to be understood by the voters to whom it was submitted for approval and that it is to be interpreted in the sense most obvious to the common intelligence." Those principles also require the court to "construe the language of a provision in light of the conditions under which it was framed, the ends designed to be accomplished, the benefits expected to be conferred, and the evil hoped to be remedied." *In re Opinion of the Justices to the Governor*, 964 N.E.2d 941, 945 (Mass. 2012) (quotations omitted).

The third reason the defendant posits is that "this Court should reject the notion that the legislature has the power to alter the meaning of the constitutional phrase, 'disturb the public peace.'" DB 42. However, in 1784, the electorate also enacted part II, article 88 of the New Hampshire Constitution, which provides: "All indictments, presentments, and informations, shall conclude, 'against the peace and dignity of the state.'" Marshall, *supra* at 220. Therefore, it is clear that the electorate considered all violations of the law to be against the peace of the state, *i.e.*, a breach of the "public peace." That being the case, for the reasons stated in *Cox*, *White*, and *Nissenbaum*, interpreting the proviso "disturb the public peace" as a violation of the law would not alter its meaning. Instead, it would give that proviso the meaning the electorate intended it to have.

Moreover, United States Supreme Court Justice Antonin Scalia reached the same conclusion after interpreting the meaning of the states' "free exercise" enactments, including part I, article 5 of the New Hampshire Constitution, and their provisos, including the "disturb the public peace" proviso, and in doing so, he reviewed their history to determine what they meant when enacted. *City of Boerne v. Flores*, 521 U.S. 507, 537-44

(1997), *superseded by statute as stated in Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) (Scalia, J. concurring). Justice Scalia concluded that "the most plausible reading of those 'free exercise' enactments" "was a virtual restatement of *Smith*: Religious exercise shall be permitted *so long as it does not violate general laws governing conduct.*" *Id.* at 538-39.

Justice Scalia then said:

> At the time these provisos were enacted, keeping "peace" and "order" seems to have meant, precisely, obeying the laws. "Every breach of a law is against the peace." *Queen v. Lane,* 6 Mod. 128, 87 Eng. Rep. 884, 885 (Q.B.1704). Even as late as 1828, when Noah Webster published his American Dictionary of the English Language, he gave as one of the meanings of "peace": "8. Public tranquility; that quiet, order and security which is guaranteed by the laws; as, to keep the *peace;* to break the *peace.*" 2 *An American Dictionary of the English Language* 31 (1828). This limitation upon the scope of religious exercise would have been in accord with the background political philosophy of the age (associated most prominently with John Locke), which regarded freedom as the right "to do only what was not lawfully prohibited," West, *The Case Against a Right to Religion–Based Exemptions*, 4 Notre Dame J. L., Ethics & Pub. Pol'y 591, 624 (1990). Thus, the disturb-the-peace caveats apparently permitted government to deny religious freedom, not merely in the event of violence or force, but, more generally, upon the occurrence of illegal actions.

Id. at 539-40 (quotation and brackets omitted). For all the foregoing reasons, this Court should hold that the trial court did not err in denying the defendant's motion to dismiss because "disturb the public peace" meant violate a generally applicable law in 1784, and the defendant had admitted that he violated RSA 318-B:2, which is a generally applicable law.

ii. The trial court also did not err in denying the defendant's motion to dismiss because this Court adopted the *Smith* standard in *Perfetto*, and it is entirely consistent with the plain language and history of part I, article 5.

The defendant first argues that the trial court ruled that the prosecution did not violate part I, article 5 because it did not violate religious freedom under the *Smith* test, and that the court "apparently concluded that this Court adopted the *Smith* test under the State Constitution [in *Perfetto*] merely by referring to it." DB 26 (quoting AAD 5-6). He then argues that the court erred: (1) because this Court relies on federal precedents merely for guidance when considering state constitutional claims, and (2) this Court "cited *Smith* with a *'cf.*' signal" in *Perfetto*, which "means that 'cited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.'" DB 26 (brackets omitted) (quoting *The Bluebook: A Uniform System of Citation* R. 1.2 at 55 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010)). However, a review of the *Perfetto* opinion demonstrates that this Court used the *cf.* signal because it was adopting the *Smith* standard, but applying it in a different context.

Perfetto argued that he was "being deprived of the right to the free exercise of his religion" because his sentence condition that he "have no contact with minors under the age of seventeen" prevented him from attending the congregation of his choice. *Perfetto*, 160 N.H. at 677. This Court "first address[ed his] … argument under the State Constitution," and "cite[d] federal opinions for guidance only." *Id.* Perfetto argued "that the analytical framework governing restriction on probationers applie[d]," and

"that where a condition affecte[d] a probationer's fundamental rights, the State [had to] show that the condition [was] the least restrictive alternative available" and "establish a compelling interest to warrant infringing on a probationer's fundamental rights." *Id.* at 678.

This Court declined to adopt the compelling interest requirement, and quoted a federal court's holding that "'the crucial determination in testing probationary conditions [was] not the degree of 'preference' which [might] be accorded those rights limited by the condition, but rather whether the limitations [were] primarily designed to affect the rehabilitation of the probationer or insure the protection of the public," *id.* at 679 (quoting *United States v. Consuelo-Gonazalez*, 521 F.2d 259, 265 n.14 (9th Cir. 1975)). This Court next said: "We note that the condition in this case does not directly infringe on the defendant's free exercise of his religion: it is instead facially neutral and applies to [his] conduct regardless of whether he is in a church or elsewhere." This Court then cited to *Smith* with a *cf.* signal and noted in a parenthetical that it stood for the proposition that "facially neutral generally applicable *laws* that incidentally touch upon an individual's free exercise of religion do not require the government to show a compelling interest." *Id.* (emphasis added).

It makes sense that this Court used the *cf.* signal because the holding in *Smith* supported, but did not stand for, the proposition that facially neutral probation or sentence conditions that incidentally touch upon the person's free exercise of religion by prohibiting something that would otherwise be lawful do not require the government to show a compelling interest. In other words, this Court used the *cf.* signal because it was

adopting the *Smith* free exercise standard, but applying it in an entirely different context.

Conrary to the defendant's claim, the *Smith* standard is not "incompatible with the language set forth in Part I, Article 5," DB 32, and the "historical evidence [does not] suggest[] that [it] is," DB 34. Instead, the *Smith* opinion and the historical evidence both demonstrate that it is entirely consistent with the plain language of part I, article 5.

In *Smith*, the respondents "contend[ed] that their religious motivation for using peyote place[d] them beyond the reach of a criminal law that [was] not specifically directed at their religious practice, and that [was] concededly constitutional as applied to those who use[d] the drug for other reasons." *Smith*, 494 U.S. at 878 (brackets omitted). In rejecting that contention, the Court noted that it had "never held that an individual's religious beliefs excuse[d] him from compliance with an otherwise valid law prohibiting conduct that the State [was] free to regulate." *Id.* at 878-79. It then held that "the record of more than a century of [its] free exercise jurisprudence contradict[ed] that proposition." *Id.* at 879.

The Court next noted that in 1878, it had held that laws could not "interfere with mere religious belief and opinions, [but] they [might] with practices," and that permitting "a man [to] excuse his practices to the contrary because of his religious belief … would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.* at 879 (quoting *Reynolds v. United States*, 98 U.S. 145, 166-67 (1878)). The Court also noted that its "[s]ubsequent decisions ha[d] consistently held that the right of free exercise d[id] not relieve an individual of the obligation to comply

with a valid and neutral law of general applicability on the ground that [it] proscribe[d] (or prescribe[d]) conduct that his religion prescribe[d] (or proscribe[d]).” *Id.* (quotation omitted).

The Court then held that “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, [could not] depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” *Id.* at 885. The Court also held that “[t]o make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest [was] ‘compelling’—permitting him, by virtue of his beliefs, to become a law unto himself, … contradict[ed] both constitutional tradition and common sense.” *Id.* The Court further held that using the compelling government interest requirement as the standard of review “would produce … a private right to ignore generally applicable laws,” which was “a constitutional anomaly.” *Id.* at 885-86.

As demonstrated in § B.i, above, the holdings in this Court’s opinions in *White* and *Cox*, the holdings and history set forth in the Massachusetts Supreme Judicial Court’s opinion in *Nissenbaum*, and the holdings and history set forth in Justice Scalia’s concurring opinion in *Flores* all clearly demonstrate that the *Smith* standard is entirely compatible with the plain language and history of part I, article 5. Therefore, the trial court did not err in finding that “the State [was] not required to show a compelling government interest.” AAD 6.

iii. Even if the trial court erred, the error was not plain because to the extent that this Court's prior cases have not decided the issues raised, they are of first impression and turn upon interpretations of part I, article 5 that this Court has never adopted.

"When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error. 'Plain' as used in the plain error rule is synonymous with clear or, equivalently, obvious." *Pennock*, 168 N.H. at 310 (quotations, citations, and parentheticals omitted). This Court has held that an error cannot be plain if "if the case is one of first impression," *id.* at 310, or if the defendant's argument "turns upon an interpretation of [a statute] that [this Court] has never adopted," *Depanphilis v. Maravelias*, No. 2017-0139, order at 3 (N.H. July 28, 2017) (non-precedential).

This Court should apply the same rule here because to the extent that the opinions in *White* and *Cox* did not resolve the issue of whether the proviso "disturb the public peace" was intended to mean violate a generally applicable law or actually disturb another, it is of first impression and turns upon an interpretation of part I, article 5 that this Court has never adopted. This Court should also do so because it has never addressed the issues of whether it adopted the *Smith* standard in *Perfetto*, whether that standard is compatible with the plain language and history of part I, article 5, or whether it applies under part I, article 5. Therefore, any errors were not plain because the issues are all of first impression and turn upon interpretations of part I, article 5 that this Court has never adopted.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

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December 2, 2019

CERTIFICATE OF COMPLIANCE

I, Susan P. McGinnis, hereby certify that pursuant to New Hampshire Supreme Court Rule 16(11), this brief contains approximately 9,105 words, which is less than the total permitted by the rule. Counsel has relied on the word count of the computer program used to prepare this brief.

/s/ *Susan P. McGinnis*

December 2, 2019

CERTIFICATE OF SERVICE

I, Susan P. McGinnis, hereby certify that a copy of the State's brief will be served on Thomas Barnard, Senior Assistant Appellate Defender, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

/s/ *Susan P. McGinnis*

December 2, 2019

APPENDIX TABLE OF CONTENTS

Count I
RSA 318-B:2, I
Offense: Controlled Drug Act; Acts Prohibited
CLASS B Felony
Information Use Only

Superior Court Case: 214-2018-CR-44
Charge ID: 1487292C

THE STATE OF NEW HAMPSHIRE

COÖS, SS.

At the Superior Court held at Lancaster within and for the County of Coos, upon the 13th day of April, in the year of our Lord Two Thousand Eighteen

THE GRAND JURORS FOR THE STATE OF NEW HAMPSHIRE, upon their oaths present that:

RECEIVED
COOS SUPERIOR COURT
2018 APR 13 P 12:25

JEREMY D. MACK

DOB: 09/11/1987

of or formerly of 433 Bungy Road, Columbia, NH, on or about the 9th day of November 2017, at Columbia, in the County of Coös, aforesaid

did commit the crime of **Controlled Drug Act; Acts Prohibited**, in that he knowingly had in his possession or under his control a quantity of the controlled drug psilocyn and/or psilocybin, without the authority to do so,

contrary to the form of the statute, in such case made and provided, and against the peace and dignity of the State.

This is a true bill.
Dated at Lancaster, April 13, 2018

Michael Cross
Foreperson

Assistant Coös County Attorney
SJW

Arraignment _____
Waiver Date _____
Formal Date _____
Plea of Not Guilty _____
Clerk _____

Change(s) of Plea _____
Date(s) _____
Judge _____
Reporter _____
Clerk _____