IN THE SUPREME COURT
STATE OF WYOMING

MARIA ANN JOSEPH,	)	
	)	
Appellant	)	
(Defendant),	)	
	)	
vs.	)	No. S-22-0250
	)	
THE STATE OF WYOMING,	)	
	)	
Appellee	)	
(Plaintiff).	)	

BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This is an appeal from a criminal case arising in the Second Judicial District Court before the Honorable Dawnessa A. Snyder. The Supreme Court shall have general appellate jurisdiction, co-extensive with the state, in both civil and criminal causes, and shall have a general superintending control over all inferior courts, under such rules and regulations as may be prescribed by law. Wyo. Const. art. V, § 2. A defendant may appeal his conviction in any criminal case in the manner provided by the Wyoming Rules of Appellate Procedure (W.R.A.P.). Wyo. Stat. Ann. § 7-12-101 (West). An appeal from a trial court to an appellate court shall be taken by filing the notice of appeal with the clerk of the trial court within 30 days from entry of the appealable order and concurrently serving the same in accordance with the provisions of Rule 5, W.R.C.P., (or as provided in W.R.Cr.P. 32 (c)(4)). W.R.A.P. 2.01. Defendant's Proposed Conditional Plea was filed on June 8, 2022 (R.A. 219). The Judgment and Sentence in this matter was filed on July 26, 2022 (R.A. 221-223), following the entry of a conditional guilty plea on July 7, 2022 (R.A. 221). A judgment and sentence entered is a final order when entered and is an appealable order. *Price v. State*, 716 P.2d 324, 327 (Wyo. 1986). The Notice of Appeal was timely filed on August 22, 2022. (R.A. 224). Jurisdiction is vested in this court.

STATEMENT OF THE ISSUES

I. DOES ARTICLE 1, §4 OF THE WYOMING CONSTITUTION PROVIDE GREATER PROTECTION THAN THE 4TH AMENDMENT TO THE UNITED STATES CONSITUTION REQUIRING PROBABLE CAUSE TO DEPLOY A CANINE?

II. DID THE DISTRICT COURT ERR WHEN IT DENIED MS. JOSEPH'S MOTION TO SUPPRES?

STATEMENT OF THE CASE

Relevant Factual and Procedural History

The relevant factual history of this case can be gleaned from multiple sources, each with its own unique perspective.[1] On October 11, 2021, Ms. Joseph was pulled over by Trooper Nicholas Haller of the Wyoming Highway Patrol after he observed two (2) lane violations (R.A. 5). This traffic stop ultimately ended with a narcotics K9 alerting on Ms. Joseph's vehicle and law enforcement discovering various forms of marijuana and psilocybin mushrooms (R.A. 6-7, ¶'s 7, 9). Ms. Joseph was charged with one count of Felony Possession of a Controlled substance, to wit: Marijuana, in violation of W.S. §35-7-1031(c)(iii), Possession of a Controlled Substance, to wit: Marijuana, With Intent to Deliver, in violation of W.S. §35-7-1031 (a)(ii), Felony Possession of a Controlled Substance, to wit: tetrahydrocannabinol, in violation of W.S. §35-7-1031 (c)(iii), Possession of a Controlled Substance, to wit: Tetrahydrocannabinol, With Intent to Deliver, in violation of W.S. §35-7-1031 (a)(ii), and Felony Possession of a Controlled Substance, to wit: Psilocybin Mushrooms, in violation of W.S. §35-7-1031(c)(iii). (R.A. 1-3).

On December 2, 2022, Ms. Joseph entered pleas of Not Guilty at her Arraignment in the District Court and the district court subsequently entered a Criminal Case

[1] The pertinent facts of the stop and details leading up to the eventual discovery of the controlled substances in Ms. Joseph's vehicle have been outlined by DCI Special Agent Ford in his Affidavit (R.A. 4-8), trial counsel's Motion to Suppress Evidence (R.A. 62-78), State's Response to Defendant's Motion to Suppress Evidence (R.A. 96-106), and direct Testimony from Trooper Haller at the Hearing on Motion to Suppress (Suppression Hearing TR).

Management Order on December 27, 2021. (R.A. 55-57). Upon timely demands, the discovery process began between the State and trial counsel. (R.A. 36-54, 58-61). On January 18, 2022, trial counsel timely filed a Motion to Suppress Evidence, (R.A. 62-78), with the State filing its timely response on February 2, 2022. (R.A. 96-106). On May 5, 2022, the Court held a Suppression hearing and the matter was taken under advisement with a written opinion, denying Defendant's *Motion to Suppress Evidence*, filed on May 13, 2022. (R.A. 202-209).

On May 23, 2022, a *Notice of Intent to Enter Conditional Plea* was filed. (R.A. 213). Subsequently, on June 8, 2022, the State filed a signed Plea Agreement, and Defendant's counsel filed *Defendant's Proposed Conditional Plea*. (R.A. 215-219). On July 7, 2022, Ms. Joseph entered her conditional guilty plea to Count II, Felony Possession of a Controlled Substance, to wit: Marijuana, With Intent to Deliver, in violation of W.S. § 35-7-1031(a)(ii) and was sentenced to a term of incarceration of not less than three (3) nor more than five (5) years, with credit for time served of four (4) days. The term of incarceration was suspended in favor of three (3) years of unsupervised probation and Counts I, III-V were dismissed. (RA 221-223). At Sentencing, the Court explained the effect of a Conditional Plea. (Sent TR pp 3-4).

ISSUE I

DOES ARTICLE 1, §4 OF THE WYOMING CONSTITUTION PROVIDE GREATER PROTECTION THAN THE 4TH AMENDMENT TO THE UNITED STATES CONSITUTION REQUIRING PROBABLE CAUSE TO DEPLOY A CANINE?

Standard of Review.

"The ultimate question of whether a search or seizure violated a constitutional right is a question of law that we review de novo." *Levenson v State*, 2022 WY 51, ¶16, 508 P.3d 229, 235 (Wyo. 2022), *quoting Elmore v. State*, 2021 WY 41, ¶8, 482 P.3d 358, 361 (Wyo. 2021). In reviewing a district court's denial of a motion to suppress, this Court will "view the evidence in the light most favorable to the district court's determination and defer[] to the district court's factual findings unless they are clearly erroneous." *Id*, *quoting Simmons v. State*, 2020 WY 132, ¶10, 473 P.3d 1259, 1261 (Wyo. 2020).

State Constitutional Analysis

THE CANINE SNIFF PERFORMED ON DEFENDANT'S AUTOMOBILE WAS A SEARCH UNDER ARTICLE I, § 4 OF THE WYOMING CONSTITUTION.

Justice Michael Golden of the Wyoming Supreme Court, stated in his opinion in Morgan v. State, 95 P.3d 802, 808 (Wyo. 2004), that:

> **While this Court is certainly open to an argument that Article 1, Section 4, of the Wyoming Constitution provides greater protection against unreasonable searches than the Fourth Amendment**, Morgan did not present a sufficient state constitutional analysis to persuade us to consider that issue in this case. We have repeatedly directed that, in order for this Court to undertake an independent state constitutional analysis, the appellant must "use a precise and analytically sound approach and provide us with the proper arguments and briefs to ensure the future growth of this important area of law." *Saldana v. State*, 846 P.2d 604, 624 (Wyo.1993) (Golden, J., *concurring*).

(Emphasis added).

Wyoming constitutional law has already established that an individual has a greater privacy interest in his automobile than the privacy interest recognized by federal

law. Vasquez v. State, 990 P.2d 476, 488-89 (Wyo. 1999). (Rejecting the bright-line rule permitting searches of automobiles incident to arrest established in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 [1981]). In Wyoming, no bright line rule exists as to when the police may search an automobile. Vasquez, 990 P.2d at 489. Instead, Vasquez held that any search of an automobile incident to arrest must be "reasonable under all of the circumstances". Id.

Subsequent cases have extended and clarified the Vasquez ruling to hold that absent a showing of exigent circumstances, officer safety, a need to secure the automobile, a need to search for additional evidence of the crime, probable cause that the automobile contains contraband or is being used in the commission of a crime, or another exception to the requirement that searches be authorized by search warrants[2], no warrantless search of automobile may take place. Holman v. State, 183 P.3d 368, 373-75 (Wyo. 2008); Sam v. State, 177 P.3d 1173, 1177 (Wyo. 2008); Pierce v. State, 171 P.3d 525, 531-32 (Wyo. 2007). In essence, the Wyoming Supreme Court has been strict by requiring the State to provide a basis to search the interior of an automobile other than the fact that a defendant was placed under arrest. If the State provides no basis to justify the

[2] The exceptions to the requirement that a search be pursuant to a warrant under Wyoming law are:

1) Consent,
2) A search of a suspect's person and the area within his control incident to his arrest,
3) A search conducted while in pursuit of a fleeing suspect,
4) To prevent imminent destruction of evidence,
5) A search of an automobile upon probable cause,
6) When an object that gives probable cause is within the plain view of the police when the police are where they have right to be,
7) A search that results from an entry into a dwelling in order to prevent loss of life or property.

Moulton v. State, 148 P.3d 38, 43 (Wyo. 2006).

search that meets an exception to the warrant requirement under Art. I, § 4 of the Wyoming Constitution, then the Wyoming courts will not hesitate to suppress the fruits of the search. (See Holman and Pierce, *supra*).

A logical extension of these rulings is that using canines to sniff out the contents of automobiles constitutes a search under Art. I, § 4 of the Wyoming Constitution that must be supported by probable cause or an exception the warrant requirement. Given that Wyoming courts already reject a lockstep approach with Federal law regarding the search of automobiles incident to arrest, the Court should likewise hold that Art. I, § 4 provides greater privacy protections to operators of automobiles when faced with a search of the contents of an automobile by indirect means, such as walking a canine around an automobile to conduct drug interdiction searches and otherwise fishing for probable cause when no probable cause otherwise exists. (*See* O'Boyle v. State, 117 P.3d 401, 408-14 (Wyo. 2005).

In analyzing whether the Wyoming Constitution provides greater protections than the

U.S. Constitution, the Court must use six *non-exclusive* neutral criteria:

- the textual language of the provisions;
- differences in the texts;
- constitutional history;
- preexisting state law;
- structural differences; and
- matters of particular state or local concern.

Saldana v. State, 846 P.2d 604, 622 (Wyo. 1993).

As to the first two factors, the Wyoming Supreme Court did not place much weight upon them in Vasquez v. State, 990 P.2d 476, 484-85 (Wyo. 1999), in holding that Art. I, § 4 provided additional protection to criminal defendants in a search and seizure context. The Wyoming Supreme Court has repeatedly noted that the primary textual difference between Art. 1, § 4 and the Fourth Amendment is the requirement that Art. 1, § 4 requires that warrants be supported by affidavits. *See* Abeyta v. State, 167 P.3d 1 (Wyo. 2007), *citing* Hixson v. State, 33 P.3d 154 (Wyo. 2001).

Nevertheless, the Wyoming Supreme Court has not hesitated to find that Art 1, § 4 provides greater protection than the Fourth Amendment, meaning that the Wyoming Supreme Court has never let the textual similarities between the Fourth Amendment and Art. I, § 4 hinder it from finding that Art. I, § 4 of the Wyoming Constitution provides greater protection from searches and seizures than the Fourth Amendment. The following paragraph from Vasquez, *supra*, demonstrates that the Wyoming Supreme Court has not felt constrained to follow the Fourth Amendment in a lockstep manner due to similarities or differences between the texts of Art. I, § 4 and the Fourth Amendment:

> Vasquez also contends that the simple fact that Article 1, § 4 has different language from the Fourth Amendment demonstrates an intent to provide greater protection. Again, we have no way of knowing whether this is true, and tend to think that the slight textual difference demonstrates little. Nor do we think that had the provisions been identical, it would demonstrate an intent that the Wyoming provision provide the same protection as the federal provision. *See Sibron v. New York*, 392 U.S. 40, 60–61, 88 S.Ct. 1889, 1901–02, 20 L.Ed.2d 917 (1968); *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967); *People v. Belton*, 55 N.Y.2d

> 49, 447 N.Y.S.2d 873, 432 N.E.2d 745 (1982) (recognizing that identical provisions do not mean that an independent interpretation is not warranted).

Vasquez, 990 P.2d at 485.

As to the history of the Wyoming Constitution, Appellant would direct the Court's attention to the following language:

> The authors of the two foremost treatises on the Wyoming Constitution's history believe that they have discerned an intent by the framers to provide greater protection of citizens' rights. Although the Wyoming Declaration of Rights was passed "without rancorous debate," there is evidence the framers "endorsed the principle of liberal construction of the Declaration of Rights." Robert B. Keiter and Tim Newcomb, The Wyoming State Constitution, A Reference Guide 11-12 (1993).
>
> > In the beginning of the century, when the Wyoming Supreme Court was composed of former delegates to the constitutional convention, the court understood this section to protect liberty more stringently than the level of protection provided by the Fourth Amendment of the U.S. Constitution. That early court adopted the equivalent to *Miranda* rights and the exclusionary rule more than fifty years before the federal judiciary followed suit (*Maki v. State*, [18 Wyo. 481, 112 P. 334] (1911)). But now, in the aftermath of the Warren Court's criminal procedure rulings, the Wyoming Supreme Court appears to follow federal precedent and typically treats this provision as offering no greater protection than does the Fourth Amendment.
>
> *Id*. at 35. Liberal construction of state constitutions in the Rocky Mountain Region was the prevailing view. *Id*. at 12. The framers' deep-rooted concern for individual rights was demonstrated during a debate at the constitutional convention over whether it was worth the cost to create and support a supreme court. "Lawyer George C. Smith of Rawlins asked:

> 'what is the matter of a few thousand dollars compared with the rights of life and liberty.'" T.A. Larsen, History of Wyoming 248 (1965).

Vasquez, 990 P.2d at 484-85.

According to *The Wyoming State Constitution, A Reference Guide*, as quoted in Vasquez, *supra*, the Wyoming Constitutional Convention modeled the Wyoming Constitution after other state's constitutions. *The Wyoming State Constitution, A Reference Guide*, pg. 4. During the convention, the delegates only referred to the Federal Constitution twice. (Id). The most references (more than twenty) were to the Colorado Constitution. Other mentions states included Pennsylvania (7), Montana (5), Illinois (5), Nebraska (4), and Nevada (4). (Id). It is clear that other state's constitutional provisions were more influential to the Wyoming Constitution than the federal ones. In fact, the Wyoming Constitution is much more verbose than the Federal Constitution, containing over three times as many words. (Id. at pg. 12).

The Wyoming State Constitution, A Reference Guide further states the following:

> Significantly, the convention endorsed the principle of liberal construction of the Declaration of Rights. During debates over the individual rights article, Laramie County delegate Henry Hay, a cattleman and later state treasurer, offered an amendment providing that "[t]he provision of this clause [the Declaration of Rights] are mandatory unless by express words they are qualified or declared to be otherwise" (*Journal*, p. 723). Hay's proposal was challenged immediately by delegate George Smith, a Rawlins attorney, who asserted that this change "would demand a strict construction of these matters instead of a liberal [one] as intended" (Journal, p. 724). In response, Hay withdrew his proposal without objection from the other delegates. As interpreted by George Bakken, a prominent historian of state constitutionalism in the Rocky Mountain region, this colloquy reflected the prevailing view

> that the principle of liberal construction should be applied to the state bill of rights provisions. This conclusion is confirmed, at least implicitly, by the sheer number of provision protecting individual rights in the Wyoming Constitution, as well as the broad language used to define many of these rights.

(Id).

As for the fourth factor, as noted above, the Wyoming Supreme Court has already held in a series of cases that Art. I, § 4 of the Wyoming Constitution provides greater protection regarding the right against search and seizure than the Fourth Amendment to the United States Constitution regarding searches of automobiles pursuant to arrest. For this reason, the pre-existing state law already provides for a greater protection under Art. I, § 4.

In addition, the Wyoming Supreme Court has not hesitated to find that the Wyoming Constitution provides greater protection than the Federal Constitution in the area of equal protection under Art. I, §§ 3 & 36. Johnson v. State Hearing Examiner's Office, 838 P.2d 158, 165 (Wyo. 1992). Potentially greater protection exists under Art. I, § 14, due to the difference of wording of the Eighth Amendment's protection from cruel and unusual punishment. Johnson v. State, 61 P.3d 1234, 1249 (Wyo. 2003); Bear Cloud v. State, 275 P.3d 377, 397 (Wyo. 2012), *later overturned on federal constitutional grounds*. Under these rulings—in addition to the rulings relevant to Art. I, § 4, cited above—the Wyoming Supreme Court has made several rulings that the provisions of the Wyoming Constitution provide greater protection than the provisions of the Federal Constitution.

The fifth factor, structural differences does not appear to make a difference in the

analysis in this case. As with the first two factors, textual language and differences in the texts, Art. I, § 4 is structurally similar to the Fourth Amendment, protecting similar interests against search and seizure by the government.

As far as a matter of state or local concern, Art. I, § 4 should provide greater protection and freedoms than the Federal Constitution. Given that Wyoming is a particularly freedom-loving state, the Court should find no difficulty in ruling that Art. I, § 4 requires that the police act "reasonably under all of the circumstances" and that this legal term provides greater protection than the Fourth Amendment as to whether using a canine to probe the contents of an automobile constitutes a search.

Furthermore, the Wyoming Supreme Court recognized that the state and local concerns exist to find greater protection from the Wyoming Constitution as follows:

> In general, the Wyoming Constitution does contain a longer list of rights using more detailed and more specific language that positively declares rights in contrast to the Federal Constitution's use of prohibitory language. The Wyoming Constitution also contains language and rights not provided for in the Federal Constitution. It is a unique document, the supreme law of our state, and this is sufficient reason to decide that it should be at issue whenever an individual believes a constitutionally guaranteed right has been violated. Just as we have done with other state constitutional provisions which have no federal counterpart, we think that Article 1, § 4 deserves and requires the development of sound principles upon which to decide the search and seizure issues arising from state law enforcement action despite its federal counterpart and the activity it generates for the United States Supreme Court. Development of sound constitutional principles on which to decide these issues may lead to decisions which parallel the United States Supreme Court; may provide greater protection than that Court; or may provide less, in which case the federal law would prevail; but whatever the result, a state constitutional analysis is required unless a party desires to have

> an issue decided solely under the Federal Constitution.
>
> When a state court independently analyzes a state constitutional provision which has a federal counterpart, it can address the state issue first; or first decide whether the claim fails under the Federal Constitution before addressing the state issue; or decide that resolution of the state issue will always parallel the Fourth Amendment decisions. Our decision requiring an independent analysis upon development of sound constitutional principles would obviously not be workable under the third choice, and the second choice, or interstitial approach, is often criticized as result-oriented. We do not think this would necessarily have to be the case; however, the first approach best suits our decision that we must further develop our own constitutional principles under the state provision by consideration of constitutional theory appropriate to this state.

Vasquez, 990 P.2d at 485-86.

Regarding independent constitutional analysis from the other states, the Court does not have to look further afield than our neighbor, Montana, to find a state supreme court that held that the use of a canine to search exterior of an automobile for the odor of illegal controlled substances constitutes a search under the state constitution. State v. Tackitt, 67 P.3d 295 (Mont. 2003). In Tackitt, the police received an anonymous tip that the defendant was trafficking in marijuana. Id., 67 P.3d at 297. As a result, the police walked a canine around the automobile while it was parked in front of the defendant's home, which allegedly triggered a hit for controlled substances. Id. at 298. The police then obtained a search warrant for another residence and the automobile, obtaining evidence as a result. Id.

In reversing the judgment arising from the district court, the Montana Supreme Court held that no particularized suspicion existed to justify the warrantless use of a

canine to search the exterior of the automobile trunk for the odor of illegal controlled substances. Id. at 303-04. In an earlier case, the Montana Supreme Court held that "[w]hat a person knowingly exposes to the public is not protected, but what an individual seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." State v. Elison, 14 P.3d 456 (Mont. 2000). In Tackitt and Elison, that included the trunk of an automobile, which is the area of the automobile searched by the canine in this case.

State v. Pellicci, 580 A.2d 710, 715-16 (N.H. 1990), held that a person has a sufficient privacy interest in the person's automobile under Part I, Article 19 of the New Hampshire Constitution to require probable cause to have a canine search the vehicle by performing a sniff of the vehicle from outside of it. However, the Supreme Court of New Hampshire ultimately held that due to the defendant's pattern of suspicious behavior at a drinking establishment being investigated for harboring drug dealing, the police had probable cause to deploy the canine and search the vehicle. Id. at 717. Nevertheless, independent state constitutional grounds were found to impose a probable cause requirement upon the use of canine to search an automobile by sniffing the automobile from the outside of it. This is the exactly what Appellant requests of the Court in this case: to establish probable cause as the standard to be met before deploying a canine.

An entire line of state constitutional cases arose due to the ruling by the United States Supreme Court in U.S. v. Place, 462 U.S. 696, 103 S.Ct. 2637 (1983). Place involved the canine sniff of luggage at an airport, and the U.S. Supreme Court ruled that the canine sniff was not a search under the Fourth Amendment. Place, 462 U.S. at 707;

103 S.Ct. at 2644-45. Soon, some states held that their constitutions granted greater rights to their residents than the Fourth Amendment. First, the Court of Appeals of Alaska ruled that the canine sniff of luggage at the Anchorage Airport constituted a search under the Alaska Constitution, albeit a search that only required reasonable suspicion. Pooley v. State, 705 P.2d 1293, 1311 (Alaska Ct. App. 1985). The Supreme Court of Pennsylvania reached a similar result in a case that involved a canine sniff of a storage locker in Com. v. Johnston, 530 A.2d 74, 79-80 (Pa. 1987), although again the court required less than probable cause. Penultimately, the Supreme Court of Minnesota held that Art. I, § 10 of the Minnesota Constitution required probable cause to conduct a canine sniff outside of a defendant's storage locker in State v. Carter, 697 N.W.2d 199, 209-12 (Minn. 2005). Finally, and perhaps the case most directly on point is the recent Colorado Supreme Court case *People v. McKnight*, 446 P.3d 397 (Colo. 2019).

In *McKnight*, the Colorado Supreme Court held that a "sniff from a drug-detection canine that is trained to alert to marijuana constitutes a search…under the Colorado Constitution." *At* ¶ 7. The Colorado Court rejected the long-held, federal constitutional decision of *Illinois v Caballes,* holding that a canine "sniff" is not a search, because canine "sniffs" can, and do, detect lawful activity under Colorado law. The expectation of privacy in lawful activity, the Court further held, was not diminished by the automobile exception to the Colorado Constitution, thus making canine "sniffs" a search that must be supported by probable cause.

The fact that these states have found independent state constitutional grounds to recognize the use of canines in the area outside of a storage unit or luggage in an airport

is important because courts have generally held that a person renting a storage unit or travelling in an airport with luggage has a limited expectation of privacy. Therefore, if a state is willing to recognize a state constitutional privacy interest for these areas of diminished privacy, it would logically stand to reason that those states would also hold that the deployment of a canine around a vehicle would also constitute a search that would require at least reasonable suspicion. The Supreme Court of Minnesota held in State v. Wiegand, 645 N.W.2d 125, 137-37, (Minn. 2002), that such a privacy interest existed and held that the standard for the police to meet to justify the intrusion of deploying a canine around a vehicle was the reasonable suspicion that a crime was being committed. Likewise, the canine sniff of a satchel carried by a person in a parking lot of a restaurant constituted a search that required probable cause under Pennsylvania constitutional law. Com. v. Martin, 626 A.2d 136, 143-45 (Pa. 1993). Canine sniffs of automobiles in Pennsylvania require reasonable suspicion to pass state constitutional muster. Com. v. Rogers, 849 A.2d 1185, 1191-92 (Pa. 2004).

Wyoming Statute § 11-51-102(b) provides, "Notwithstanding the requirements of this chapter, the possession, purchase, sale, transportation and use of hemp and hemp products **by any person is allowable without restriction**." *Emphasis added.* As both marijuana and hemp come from the same plant, i.e., the cannabis sativa plant, it is axiomatic that the use of "narcotics-detection k-9", trained to detect the odor of marijuana, will produce alerts on the lawful possession of hemp.[3] In fact, the Indiana

[3] For a comprehensive discussion on the history of hemp legalization see *Dines v Kelly,* 2022 WL 16762903 (US D. Kansas, 2022).

Legislature passed a law in 2019, outlawing smokeable hemp. In its appeal from an injunction on said law, the State of Indiana represented to the Seventh Circuit Court of Appeals one of the reasons for outlawing smokeable hemp was "that its law enforcement officers find it nearly impossible to distinguish between low-THC smokeable hemp and marijuana in the field." *C.Y. Wholesale, Inc. v. Holcomb,* 965 F.3d 541, 546 (7th Cir. 2020). As such, and much like the Colorado decision in *McKnight*, Article 1 §4 of the Wyoming Constitution requires probable cause to conduct a canine odor search of an automobile as said search can, and surely does, detect the odor of lawful activity. Ms. Joseph can absolutely expect her privacy to possess hemp, without restriction, be protected from warrantless searches into her automobile.

ARGUMENT

It is well-held Wyoming law that the searches must be conducted by warrant or be considered presumptively unreasonable. Hixson v. State, 33 P.3d 154, 160 (Wyo. 2001), *later abrogated on other grounds*. Of the six recognized exceptions to the warrant requirement as listed from Moulton v. State, 148 P.3d 38, 43 (Wyo. 2006), the only one that would potentially apply to the facts of this case would be the automobile exception, which requires probable cause to search for contraband. None of the other exceptions apply to the facts of this case.

However, the police in this case lacked any probable cause to make their search of the automobile by canine reasonable under the circumstances, which is the standard by which searches are measured under Wyoming constitutional law. Vasquez v. State, 990 P.2d 476, 488-89 (Wyo. 1999). Trooper Haller's testimony at the Suppression Hearing

indicates that the canine was deployed after consent to search the vehicle was denied. (Sup Tr p 34, lines 7-12) Up until this point, Trooper Haller's reasonable, articulable suspicion was based entirely on nervousness and his subjective conclusions regarding Ms. Joseph's travel plans, including broad conclusions based entirely on Trooper Haller's unfamiliarity with the circumstances surrounding the death of Ms. Joseph's son and the way she commemorates its anniversary. (Sup Tr pp 18-22, pp. 30-33). All of these factors together contribute nothing to establish probable cause to deploy the canine. Later in the Suppression Hearing, Trooper Haller admitted he did not possess probable cause to search Ms. Joseph's vehicle prior to calling for a canine:

> Q: So, at the point in time where you called for the canine, you did not believe you had probable cause to search the vehicle; is that correct?
>
> A: No, sir, I did not.
>
> Q: You did not have probable cause?
>
> A: Before calling for the canine, no, I did not.
>
> Q: And so that is specifically why you waited for the canine to come and go around the car, correct?
>
> A: Correct.
>
> Q: And if the canine had not alerted, you would have let the car go?
>
> A: Absolutely.

(Sup. Tr. p. 38, lines 5-17). Prior to Trooper Haller's testimony, the parties stipulated to the entry of Trooper Haller's dash-cam video, as well as a transcript of the audio of said video, for the district court to review at its leisure. (Sup Tr Exhibits 1-1a). Following

Trooper Haller's testimony, Deputy Lehr testified as to the deployment of his canine on Ms. Joseph's car.

Carbon County Sheriff's Deputy, Casey Lehr testified as to his training and that of his narcotics-detecting canine partner, Zeus. On direct examination, Deputy Lehr testified that his canine is trained to detect marijuana, cocaine, heroin, methamphetamine and MDMA. (Sup Tr p. 50, lines 13-14). Zeus is a five-odor canine. However, on cross-examination Deputy Lehr testified his canine has never been subjected to an exercise with hemp, nor has his dog ever been exposed to hemp. (Sup Tr pp. 53-54, lines 22-2). Further, Deputy Lehr testified that Zeus cannot, to the best of Deputy Lehr's knowledge, differentiate "between high-grade marijuana…and Kansas ditch weed."[4] (Sup Tr pp. 54-55, lines 20-5).

Trooper Haller testified that approximately forty (40) minutes passed waiting on Deputy Lehr to arrive with Zeus. Neither Deputy Lehr, nor Trooper Haller, sought to obtain a warrant from a Carbon County Court. Instead, both relied upon the automobile exception to the warrant requirement, as well as Illinois v. Caballes. As such, the deployment of Zeus wasn't a search in their minds. The "per se automobile exception" without demonstrating any true exigent circumstances to support such exception violates the warrant requirement of Article 1, §4 of the Wyoming Constitution. *See in its entirety, State of Oregon v. Charles Steven McCarthy*, 369 Or. 129, 501 P.3d 478 (Or. 2021). October 11, 2021 was a Monday and Ms. Joseph's entire stop occurred during business hours. Six (6) minutes into the traffic

[4] "Kansas Ditch Weed" is a slang term for marijuana with a low concentration of THC. The sort of marijuana the State of Indiana identifies as indistinguishable from hemp.

stop she was placed in investigative detention and a canine unit was called. Ms. Joseph was the only occupant of the vehicle. By placing Ms. Joseph in investigative detention, Trooper Haller could be confident that her vehicle was not going to leave the scene. As such, Trooper Haller had ample opportunity to apply for a search warrant of Ms. Joseph's vehicle.

ISSUE II

DID THE DISTRICT COURT ERR WHEN IT DENIED MS. JOSEPH'S MOTION TO SUPPRES?

Standard of Review.

As previously stated above, in reviewing a district court's denial of a motion to suppress, this Court will "view the evidence in the light most favorable to the district court's determination and defer[] to the district court's factual findings unless they are clearly erroneous." *Id*, *quoting Simmons v. State*, 2020 WY 132, ¶10, 473 P.3d 1259, 1261 (Wyo. 2020).

Argument

A CANINE SNIFF IS A SEARCH AND MUST BE BASED UPON PROBABLE CAUSE

On October 11, 2021, Ms. Joseph was pulled over for a traffic violation. Six minutes into that traffic stop sees Ms. Joseph being detained for over 40 minutes while Trooper Haller, based only on his suspicions, waits for a narcotics-detection canine to arrive. The canine that does arrive, Zeus, is trained to alert on marijuana, the same plant as hemp. Neither Trooper Haller, nor Deputy Lehr, have a search warrant for Ms. Joseph's car. Zeus alerts to one of five odors he has been trained on and Ms. Joseph's

vehicle is searched without a warrant and marijuana is found in her vehicle. These facts are not in dispute. The district court, however, glosses over the entirety of hemp legalization, both at the federal level and by the Wyoming Legislature. As such, it bears repeating: Wyoming Statute § 11-51-102(b) provides, "Notwithstanding the requirements of this chapter, the possession, purchase, sale, transportation and use of hemp and hemp products **by any person is allowable without restriction**." *Emphasis added*.

As illustrated by the frustrations of the entirety of the State of Indiana's law enforcement community, there is no way to distinguish hemp from marijuana. It is, in fact, the same plant, with only varying concentrations of Delta-9 THC. *See Dines at* ¶¶1-2. However, in denying Appellant's *Motion to Suppress Evidence*, the district court simply reapplied stale caselaw, caselaw that may very well have been applicable prior to the legalization of hemp at both the federal and state level, but fails to be applicable today. On this issue, the district court, relying upon *Illinois v. Caballes*, 543 U.S. 405, 409 (2005) and *Wallace v State*, 2009 WY 152, ¶15, 221 P.3d 967, 970-71 (Wyo. 2009), determined "A dog sniff of the exterior of a vehicle is not a search under the Fourth Amendment." (RA 208). Notably, the most recent of these two opinions, *Wallace*, was issued ten (10) years prior to the Wyoming Legislature's legalization of hemp.

Both *Caballes* and *Wallace* rely upon the illegal nature of both hemp and marijuana. Prior to the legalization of hemp, both Federal and Wyoming law prohibited the possession of any portion of the *Cannabis-Sativa* plant. All of that changed in 2018 and 2019, respectively, yet law enforcement and the trial courts continue to insist on applying old case law. Deputy Lehr testified at the suppression hearing that marijuana

and hemp are the same plant. (Sup Tr p. 54, lines 3-5). In order for *Caballes* and *Wallace* to apply in this case, the district court had to disregard Zeus alerting on a product that Ms. Joseph could possess without restriction: hemp. Moreover, Deputy Lehr testified that Zeus cannot differentiate between hemp, high-concentration THC or low-concentration THC. (Sup Tr. pp. 54-55, lines 14-4). Zeus can intrude into a legitimate privacy interest in Ms. Joseph's vehicle, her statutory right to possess hemp without restriction.

Finally, Ms. Joseph has never challenged the legality of the initial traffic stop, nor does she necessarily challenge the expansion of the scope of that stop. What she specifically challenges is expanding the scope of the initial detention so law enforcement can perform a warrantless search of her vehicle with a canine on less than probable cause. Further, Ms. Joseph challenges Zeus' "alert" when said alert could very well be due to lawful possession of hemp or hemp products. *See McKnight* at ¶7[5]

CONCLUSION

The district court abused its discretion in denying Ms. Joseph's *Motion to Suppress Evidence* by disregarding the Wyoming Legislature's legalization of hemp and hemp products in 2019. A state-law analysis shows the Wyoming Constitution affords greater protections to Ms. Joseph that the Federal Constitution. However, under either standard, the use of a narcotics-detecting canine, one trained to detect marijuana, cannot

[5] The *McKnight* Court relies upon the legalization of marijuana in Colorado. However, the legal reasoning is applicable to hemp and hemp products in Wyoming under W.S. § 11-51-102(b).

be deployed without a warrant and the alert of said canine is not exclusively indicative of possession of a prohibited, controlled substance. Finally, a vehicle with its sole occupant in detention, during business hours cannot be said to be an immediate threat of flight and, therefore, does not present an exigent circumstance within the automobile exception to either the Fourth Amendment to the U.S. Constitution and specifically to Article 1, §4 of the Wyoming Constitution. Ms. Joseph asks this Court to reverse the district court's denial of her *Motion to Suppress Evidence* and to remand this matter back to the district court for further proceedings on the granting of her motion.

Respectfully submitted this 3 day of January, 2023.

/S/
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3 day of January, 2023, he caused a true and correct copy of the foregoing to be delivered via electronic service to:

Jenny Craig
Assistant Attorney General
2424 Pioneer Ave.
Cheyenne, WY 82001

____/S/_____
H. Michael Bennett

The undersigned also certifies that all required privacy redactions have been made and, with the exception of any required redactions, this document is an exact copy of the written document filed with the Clerk. Furthermore, this document has been scanned for viruses and is free of viruses.

_____/S/_____
H. Michael Bennett

APPENDIX A

Judgment and Sentence

Conditional Plea