IN THE SUPREME COURT, STATE OF WYOMING

MARIA ANN JOSEPH,	)	
	)	
Appellant,	)	
	)	
v.	)	No. S-22-0250
	)	
THE STATE OF WYOMING,	)	
	)	
Appellee.	)	

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

This appeal arises from a criminal conviction in the District Court for the Second Judicial District, Carbon County, Wyoming. (R. at 221-23). The district court filed the judgment and sentence on July 26, 2022. (*Id.*). A judgment and sentence is a final, appealable order. *See Price v. State*, 716 P.2d 324, 327 (Wyo. 1986). As required by Rule 2.01 of the Wyoming Rules of Appellate Procedure, Maria Ann Joseph timely filed her notice of appeal within thirty days of the order, on August 22, 2022. (R. at 224). Therefore, jurisdiction is vested in this Court under article 5, section 2 of the Wyoming Constitution.

STATEMENT OF THE ISSUE

Did the district court err when it denied Joseph's motion to suppress alleging that a canine sniff of the outside of her car was a search that required probable cause under article 1, section 4 of the Wyoming Constitution?

STATEMENT OF THE CASE

I. Nature of the Case

Following a lawful traffic stop, a canine sniffed the outside of Joseph's car and alerted to the presence of narcotics. Police searched the car and discovered narcotics. Joseph filed a motion to suppress the evidence found during the search. Following the district court's denial of her motion to suppress, Joseph entered a conditional guilty plea.

Joseph raises two issues on appeal. First, she argues that, due to the legalization of hemp, a canine sniff of the outside of a car is a search that requires probable cause under article, section 4 of the Wyoming Constitution. Second, she argues that the district court erred when it denied her motion to suppress. The State will combine the issues. The State asserts that the result of this case is the same under either article 1, section 4 of the Wyoming Constitution or the Fourth Amendment to the United States Constitution. The district court did not err when it denied Joseph's motion because Joseph has not established that the legalization of hemp undermines the justifications for why a canine sniff of the outside of a car is not a search. To resolve this issue, this Court should review the evidence adduced at the suppression hearing and analyze Fourth Amendment cases such as *Morgan v. State*, 2004 WY 95, 95 P.3d 802 (Wyo. 2004) and *Illinois v. Caballes*, 543 U.S. 405 (2005) to decide whether those cases remain valid despite the legalization of hemp.

II. Facts Relevant to the Issue Presented for Review and Relevant Procedural History

On October 11, 2021, Trooper Nicholas Haller of the Wyoming Highway Patrol observed a car crossing the center lanes on the highway and initiated a traffic stop.

(Suppression Hr'g Tr. at 5, 9-11). Trooper Haller identified the driver of the car as Joseph. (*Id.* at 19). During the traffic stop, Trooper Haller developed reasonable suspicion that Joseph was engaged in drug trafficking. (*Id.* at 14-21). Trooper Haller requested the assistance of a canine unit to sniff the outside of the car for narcotics. (*Id.* at 22).

Deputy Casey Lehr of the Carbon County Sheriff's Office arrived with his canine, Zeus. (*Id.* at 43-44, 48-49). Zeus sniffed the outside of Joseph's car and alerted to the presence of narcotics. (*Id.* at 50). Deputy Lehr and Trooper Haller searched Joseph's car. (*Id.* at 51). They discovered twenty-five pounds of THC wax, two pounds of psilocybin mushrooms, and fifty-eight pounds of marijuana. (R. at 6). Trooper Haller arrested Joseph. (*Id.* at 6-7). The State charged Joseph with felony possession of marijuana, possession of marijuana with intent to deliver, felony possession of THC wax, possession of THC wax with intent to deliver, and felony possession of psilocybin mushrooms. (*Id.* at 1-2).

Joseph filed a motion to suppress containing a nearly identical argument as her appellate brief. (*Compare id.* at 62-78 with Appellant's Br.). She claimed that Deputy Lehr and Trooper Haller violated her rights under article 1, section 4 of the Wyoming Constitution. (R. at 62-78). Specifically, she claimed that a canine sniff of the outside of a car is a "search" that must be justified by probable cause. (*Id.* at 63-64). She pointed out that hemp is legal under Wyo. Stat. Ann. § 11-51-102(b) and that both hemp and marijuana come from the cannabis plant family. (*Id.* at 74). She claimed, without citing any authority, that "it is axiomatic" that a canine trained to detect marijuana will alert to hemp. (*Id.*).

The district court held a hearing on Joseph's motion. (*See generally* Suppression Hr'g Tr.). Deputy Lehr testified that he is trained and certified as a narcotics detecting

canine handler. (*Id.* at 44-45). He explained that his canine, Zeus, is certified in detecting marijuana, cocaine, heroin, methamphetamine, and MDMA. (*Id.* at 45, 50). Zeus only alerts when he detects the odor of one of the substances that he is trained to detect. (*Id.* at 54-55). Deputy Lehr agreed that Zeus is unable to differentiate between "Kansas ditch weed" and "high-grade marijuana that has a very high THC concentration" such as "Willie Nelson's strain." (*Id.* at 54-55). However, Zeus is not trained to detect hemp and has never been exposed to hemp. (*Id.* at 53-54). Deputy Lehr explained that Zeus acted consistent with his training when he sniffed the outside of Joseph's car and alerted to the presence of controlled substances. (*Id.* at 49).

The district court denied Joseph's motion. (R. at 202-09). Joseph pleaded guilty to possession of marijuana with intent to deliver and the State dismissed the remaining charges. (*Id.* at 215-19). Joseph reserved her right to appeal the order denying her motion to suppress. (*Id.* at 219). The district court sentenced her to three to five years of incarceration, suspended in favor of three years of unsupervised probation. (*Id.* at 222-23). Joseph filed this appeal. (*Id.* at 224).

III. Rulings Presented for Review

Joseph challenges the district court's order denying her motion to suppress. (*See generally* Appellant's Br.). The court primarily engaged in fact finding and analysis regarding Trooper Haller's justification in stopping Joseph's car and the facts leading him to develop reasonable suspicion, which are not issues in this appeal. (R. at 202-08).

Only a small portion of the court's factual findings and analysis are relevant to this appeal. The court found that Zeus is a "certified drug canine" trained to alert on heroin,

cocaine, MDMA, marijuana, and methamphetamine. (*Id.* at 205). The court found that Zeus alerted to the presence of controlled substances in Joseph's car. (*Id.*). The court concluded that a canine sniff of the outside of a car is not a search under the Fourth Amendment. (*Id.* at 208) (citing *Wallace v. State*, 2009 WY 152, ¶ 15, 221 P.3d 967, 970-71 (Wyo. 2009) and *Caballes*, 543 U.S. at 409). The court made no findings of fact regarding hemp, nor did it provide legal analysis under the Wyoming Constitution. (*See generally id.* at 202-09). The court ultimately denied Joseph's motion. (*Id.* at 209).

ARGUMENT

The district court properly denied Joseph's motion to suppress because a canine sniff of the outside of a car is not a search.

Joseph claims that the district court erred when it denied her motion to suppress because, due to the recent legalization of hemp, a canine sniff of the outside of a car is a "search" under article 1, section 4 that must be justified by probable cause. (Appellant's Br. at 11-29). Although Joseph performs an analysis specific to the Wyoming Constitution, she essentially argues that the logic behind Fourth Amendment canine sniff cases no longer applies due to the legalization of hemp. (*Id.* at 21-28). Joseph's argument fails under both article 1, section 4 and the Fourth Amendment because she did not have a reasonable expectation of privacy in the odors emanating from her car into the public airspace. Further, Joseph has not presented any evidence to support the factual premise of her argument—that Zeus or any other narcotics detecting canine would actually alert to the presence of hemp when no other controlled substances are present.

Although Joseph does not mention it in her issue statements, she makes two statements concerning the validity of the automobile exception to the warrant requirement under article 1, section 4 in the absence of exigent circumstances. (Appellant's Br. at 25-26, 29). She bases her claim on an Oregon case, which she cites "in its entirety" without providing any legal analysis. (*Id.*) (citing *State v. McCarthy*, 501 P.3d 478 (Ore. 2021)). This Court should not consider this issue because Joseph does not present cogent argument and she has not properly framed the issue as required by this Court's precedent. *See Woods v. State*, 2017 WY 111, ¶ 24, 401 P.3d 962, 971 (Wyo. 2017) (holding that this Court will

not consider issues that are not properly framed and supported by cogent argument). Further, Joseph fails to address the fact that this Court has already held that a warrantless search of an automobile based on probable cause is proper under article 1, section 4. *Moulton v. State*, 2006 WY 152, ¶ 16, 148 P.3d 38, 43 (Wyo. 2006). If law enforcement has probable cause to search an automobile, "[n]o further exigent circumstances are required." *McKenney v. State*, 2007 WY 129, ¶ 12, 165 P.3d 96, 99 (Wyo. 2007). The State will not address this argument any further.

A. Standard of Review

When reviewing a district court's order denying a motion to suppress, this Court accepts the district court's findings of fact unless those findings are clearly erroneous. *Kern v. State*, 2020 WY 60, ¶ 6, 463 P.3d 158, 160 (Wyo. 2020). This Court views "the evidence in the light most favorable to the district court's decision because the court conducted the hearing and had the opportunity to assess the witnesses' credibility, weigh the evidence and make the necessary inferences, deductions and conclusions." *Id.* (citation and internal quotation marks omitted). "Where the district court did not make specific findings of fact on issues before it, this Court will uphold the general ruling of the district court if it is supported by any reasonable view of the evidence." *Id.* The ultimate question of whether a constitutional violation occurred is a question of law that this Court reviews de novo. *Id.*

B. Joseph does not show that the Wyoming Constitution offers greater protection than the Fourth Amendment with respect to canine sniffs.

Joseph argues that, under article 1, section 4, a canine sniff of the outside of a car is a search that requires probable cause. (Appellant's Br. at 11-24). This Court and the United

States Supreme Court have made it clear that no justification is required for a canine sniff because a canine sniff of the outside of a car is not a search under the Fourth Amendment. *Morgan*, ¶ 18, 95 P.3d at 807; *Caballes*, 543 U.S. at 409. Although this Court recognizes that article 1, section 4 may provide stronger protection than the Fourth Amendment, this Court will only consider an independent analysis of the Wyoming Constitution when the appellant uses "a precise and analytically sound approach" designed "to ensure the future growth of this important area of law." *Morgan*, ¶ 20, 95 P.3d at 808 (citation omitted). This Court has suggested six factors, also known as the *Saldana* factors, that may be helpful to determine if the state constitution provides stronger protection than the federal constitution: "1) the textual language of the provisions; 2) differences in the texts; 3) constitutional history; 4) preexisting state law; 5) structural differences; and 6) matters of particular state or local concern." *O'Boyle v. State*, 2005 WY 83, ¶ 24, 117 P.3d 401, 408 (Wyo. 2005) (citing *Saldana v. State*, 846 P.2d 604, 622 (Wyo. 1993) (Golden, J., concurring)).

Under the Fourth Amendment, the question is whether the search or seizure was "reasonable under the totality of the circumstances." *Levenson v. State*, 2022 WY 51, ¶ 18 n.3, 508 P.3d 229, 235 n.3 (Wyo. 2022) (citation omitted). Under article 1, section 4, the question is whether the search or seizure was "reasonable under all the circumstances." *Id.* (citation omitted). Almost twenty years ago, this Court stated that it was open to the question of whether the Wyoming Constitution "provides greater protection from warrantless canine sniffs than the Fourth Amendment." *Morgan*, ¶ 20, 95 P.3d at 808. However, in many cases since *Morgan*, this Court has applied the *Saldana* factors in search and seizure cases. *See Klomliam v. State*, 2014 WY 1, ¶ 17, n.1, 315 P.3d 665, 669, n.1

(Wyo. 2014) (citing cases which apply *Saldana* to search and seizure claims). Most of the *Saldana* factors are "of little assistance in analyzing claims brought specifically under [the] search and seizure provision." *O'Boyle*, ¶ 24, 117 P.3d at 409. Ultimately, this Court has concluded that the analysis is the same under both the federal and state constitution because both constitutions require this Court to consider "the reasonableness of the government intrusion in light of all the circumstances." *Levenson*, ¶ 18, n.3, 508 P.3d at 235, n.3.

In her brief, Joseph repeats what this Court has previously said concerning the *Saldana* factors and concludes that, under article 1, section 4, law enforcement must act "reasonable under all of the circumstances." (Appellant's Br. at 11-19). The State agrees that law enforcement must act reasonable. *Levenson*, ¶ 18, n.3, 508 P.3d at 235, n.3. Joseph then leaps to the conclusion that the Wyoming Constitution requires that law enforcement obtain probable cause before conducting a canine sniff of the outside of a car. (Appellant's Br. at 19). But she does not explain anything unique about the Wyoming Constitution or the facts of her case that render the canine sniff of her car unreasonable under the circumstances. Her analysis suffers from two fatal flaws.

First, Joseph's attempt at a *Saldana* analysis does nothing to "ensure the future growth of this important area of law." *Morgan*, ¶ 20, 95 P.3d at 808 (citation omitted). She repeats what this Court has already said about the *Saldana* factors in search and seizure cases without adding anything to the analysis. (*See* Appellant's Br. at 11-20). Further, she overlooks this Court's conclusion that the search and seizure analysis is the same under the federal and state constitutions. *See e.g., Levenson*, ¶ 18, n.3, 508 P.3d at 235, n.3.

Instead of developing her state constitutional analysis, Joseph supports her argument with the fact that some other states have found canine sniffs to be searches under their state constitutions. (Appellant's Br. at 20-23). However, this Court has already heard and rejected this same argument regarding canine sniffs. *Morgan*, ¶ 19, 95 P.3d at 808 (citing the same cases as Joseph's brief). In *Morgan*, this Court concluded that relying on out-of-state cases is insufficient to develop an independent analysis under the Wyoming Constitution. *Id.*, ¶ 21, 95 P.3d at 808. Joseph's attempt to cite these cases while adding a superficial *Saldana* analysis does not change this result in the present case.

Additionally, the out-of-state cases cited by Joseph do not support her argument that the police need probable cause before a canine sniff. (Appellant's Br. at 19-21). For example, she cites the Pennsylvania case of *Commonwealth v. Johnston* and the Montana case of *State v. Tackitt*. (*Id.*) (citing *Commonwealth v. Johnston*, 530 A.2d 74, 79-80 (Pa. 1987) and *State v. Tackitt*, 67 P.3d 295, 303-04 (Mont. 2003)). In those cases, the courts held that the police must have reasonable suspicion—not probable cause—before conducting a canine sniff under the respective state constitutions. *Johnston*, 530 A.2d at 79–80; *Tackitt*, 67 P.3d at 302. Joseph also cites *State v. Pellicci* and *State v. Carter* for the proposition that the New Hampshire and Minnesota constitutions require that police obtain probable cause before a canine sniff. (Appellant's Br. at 20-21) (citing *State v. Pellicci*, 580 A.2d 710, 715-17 (N.H. 1990) and *State v. Carter*, 697 N.W.2d 199, 209-12 (Minn. 2005)). But she mischaracterizes both cases. The New Hampshire and Minnesota courts clearly held that the police needed reasonable suspicion for a canine sniff under their state constitutions, not probable cause. *Pellicci*, 580 A.2d at 717; *Carter*, 697 N.W.2d at 212.

Here, Trooper Haller developed reasonable suspicion that Joseph was trafficking narcotics before requesting the canine sniff. (Suppression Hr'g Tr. at 14-21). Although Joseph never directly challenged whether Trooper Haller formed reasonable suspicion, the district court analyzed the issue and concluded that Trooper Haller had reasonable suspicion before requesting the canine sniff. (R. at 207-08). Joseph does not challenge this conclusion. (*See generally* Appellant's Br.). Thus, even the more stringent standard for canine sniffs adopted in some other states would not change the result of Joseph's case.

Further, Joseph's argument relies on an improper comparison between Wyoming's legalization of hemp and Colorado's legalization of marijuana. (*Id.* at 22-23) (citing *People v. McKnight*, 446 P.3d 397, 408 (Colo. 2019)). In *McKnight*, the Colorado Supreme Court recognized that canine sniffs can reveal marijuana that is legal under the Colorado Constitution. *McKnight*, 446 P.3d at 408. The court held that a canine sniff that can defect marijuana is a search under the Colorado Constitution. *Id.* at 414. *McKnight's* logic does not apply in Wyoming. The change in the law recognized in *McKnight* was entirely based on the legalization of marijuana, not hemp. Marijuana is not protected under the Wyoming Constitution—in fact, marijuana remains illegal in Wyoming. Wyo. Stat. Ann. § 35-7-1014(d)(xiii). Thus, like her reliance on the other out-of-state cases, Joseph's reliance on *McKnight* does nothing to advance the interpretation of the Wyoming Constitution.

Joseph's state constitutional analysis also fails because, instead of arguing based on the Wyoming Constitution, Joseph is really asking this Court to find that the logic behind prior Fourth Amendment cases is no longer applicable. Specifically, Joseph challenges the logic of Fourth Amendment cases such as *Caballes* due to the legalization of hemp.

(Appellant's Br. at 22-22, 27-28) (citing *Caballes*, 543 U.S. at 408). This Court should not allow Joseph to challenge Fourth Amendment case law under the guise of a state constitutional analysis. Instead, this Court should analyze Joseph's argument under the Fourth Amendment to determine if the legalization of hemp defeats the logic of *Caballes* and *Morgan* and transforms a canine sniff into a search.

C. The holdings of *Caballes* and *Morgan* remain valid in the aftermath of Wyoming's legalization of hemp.

Joseph claims that a canine sniff of the outside of a car is a "search" that must be justified by probable cause. (Appellant's Br. at 11-24). "[A] Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001). This Court and the United States Supreme Court have long held that canine sniffs of the outside of a car are not searches because they do not implicate a person's reasonable expectation of privacy. *Morgan*, ¶ 18, 95 P.3d at 807; *Caballes*, 543 U.S. at 409. Here, Joseph's argument that canine sniffs are searches is contrary to the established precedent from *Morgan* and *Caballes*. This Court follows precedential case law unless the precedent is "no longer workable, or [is] poorly reasoned." *Hassler v. Circle C Res.*, 2022 WY 28, ¶ 19, 505 P.3d 169, 175 (Wyo. 2022) (citation omitted). Joseph fails to make either showing in this case.

A canine sniff of the outside of a car is not a search for two reasons. First, a canine sniff of the outside of a car is brief and "much less intrusive than a typical search." *United States v. Place*, 462 U.S. 696, 707 (1983). A canine sniff of the outside of a car does not involve opening anything or rummaging through personal belongings. *Id.*; *Morgan*, ¶ 12,

95 P.3d at 806. Unlike a house, individuals already have a reduced expectation of privacy in their cars. *Morgan*, ¶ 18, 95 P.3d at 807; *cf. Florida. v. Jardines*, 569 U.S. 1, 11 (2013) (holding canine sniff outside of a house is a search because law enforcement physically intrudes upon the house). An individual does not have a legitimate expectation of privacy in any odor emanating from his or her car when that odor is detectable from the public airspace. *United States v. Morales-Zamora*, 914 F.2d 200, 205 (10th Cir. 1990); *Kern*, ¶ 10, 463 P.3d at 162 (citing *State v. Garcia*, 535 N.W.2d 124 (Wis. 1995)).

Second, "the information obtained [from a canine sniff] is limited." *Place*, 462 U.S. at 707. Canine sniffs are designed to detect the presence or absence of illegal drugs, which citizens do not have a legitimate privacy interest in possessing. *Morgan*, ¶ 12, 95 P.3d at 806; *Caballes*, 543 U.S. at 409. Because a canine sniff is not a search, "law enforcement does not need probable cause, reasonable suspicion, or consent to run a trained drug dog around vehicles[.]" *Kern*, ¶ 10, 463 P.3d at 161.

Joseph bases her entire argument on the unproven possibility that a canine can alert to the presence of hemp. (Appellant's Br. at 22-29). However, she completely ignores the primary reason why canine sniffs are not searches—they do not intrude upon a legitimate expectation of privacy. *Morgan*, ¶ 12, 95 P.3d at 806. Zeus's sniff of the outside of Joseph's car did not subject Joseph "to the embarrassment and inconvenience" that distinguishes a canine sniff from a search. *Place*, 462 U.S. at 707. Joseph already had a reduced expectation of privacy in her car, which was traveling on a public road. *Morgan*, ¶ 18, 95 P.3d at 807. Zeus did not intrude upon the physical boundaries of the car, nor did he rummage through its contents. *Cf. Jardines*, 569 U.S. at 11 (recognizing that the Fourth

Amendment protects against physical intrusions into a protected area). Instead, he stayed outside of Joseph's car and detected odors emanating from the car into the public airspace. (Suppression Hr'g Tr. at 49-50). Joseph simply did not have a reasonable expectation of privacy regarding odors detectable from outside of her car, regardless of whether the substance producing the odor is legal or illegal. *Morales-Zamora*, 914 F.2d at 205.

Joseph bases her entire argument in this appeal on her claim that the second justification from *Caballes* and *Morgan* no longer applies because hemp is legal. (Appellant's Br. at 22-23, 27-28); *see* Wyo. Stat. Ann. § 11-51-102 (legalizing possession of hemp). She claims that prior cases holding that canine sniffs are not searches such as *Caballes* and *Wallace* "rel[ied] upon the illegal nature of both hemp and marijuana." (Appellant's Br. at 28-29) (citing *Caballes*, 543 U.S. at 409 and *Wallace*, ¶ 15, 221 P.3d at 970-71). Joseph misstates the holding of both cases. Neither *Caballes* nor *Wallace* discussed hemp in any way, let alone relied on its illegality. *See generally Caballes*, 543 U.S. at 405-10; *Wallace*, ¶¶ 1-19, 221 P.3d at 967-71.

The State recognizes that both hemp and marijuana belong to the cannabis plant family and are legally distinguished by the "THC concentration" of the plants. Wyo. Stat. Ann. § 11-51-101. However, Joseph uses this fact to argue that canines trained in detecting narcotics are unable to distinguish hemp from marijuana. (Appellant's Br. at 24, 28). She cites to no precedential case law or scientific literature to support what she claims is a fact. (*See generally id.*). Despite her opportunity to do so at the suppression hearing, Joseph failed to present any evidence that Zeus or any canine will alert on hemp.

Joseph claims that "Deputy Lehr testified that Zeus cannot differentiate between hemp, high-concentration THC or low-concentration THC." (*Id.* at 28) (citing Suppression Hr'g Tr. at 54-55). The State disputes her characterization of Deputy Lehr's testimony. Deputy Lehr testified that he is a certified canine handler and that Zeus is certified in narcotics detection. (Suppression Hr'g Tr. at 44-45). Zeus is trained to detect marijuana, cocaine, heroin, methamphetamine, and MDMA. (*Id.* at 50). Deputy Lehr agreed that Zeus "can't differentiate between … high-grade marijuana that has a very high THC concentration and Kansas ditch weed." (*Id.* at 54). But he did not elaborate on what "Kansas ditch weed" is and never said that "Kansas ditch weed" is the same as hemp. Instead, he explained that Zeus is not trained to detect hemp and has never been exposed to hemp. (*Id.* at 53-54). He further testified that Zeus performed his sniff of Joseph's car consistent with his training and alerted to the presence of controlled substances. (*Id.* at 49-50). Neither Joseph nor the State presented any additional testimony regarding hemp.

The district court made few factual findings on the issue, potentially due to Joseph's failure to develop the record concerning hemp. However, the court did find that Zeus is a "certified" canine that produced a "positive alert for a controlled substance" in Joseph's car. (R. at 205). The court listed the substances that Zeus is trained to detect, which did not include hemp. (*Id.*). This Court should accept the district court's factual finding because Joseph presents nothing to show that the district court's finding of fact was clearly erroneous. Indeed, Joseph does not dispute that Zeus accurately alerted to the marijuana in her car. (*See generally* Appellant's Br.). Therefore, the second justification from *Caballes*

and *Morgan* still applies—Zeus's sniff of Joseph's car, like any canine sniff, was not a search because it can only detect the presence of marijuana and other controlled substances.

Even if this Court looks beyond the record, the State is unable to locate any reliable law or science to support what Joseph claims is a fact concerning hemp. Joseph cites *C.Y. Wholesale, Inc. v. Holcomb*, 965 F.3d 541, 546 (7th Cir. 2020) and *Dines v. Kelly*, Civil Action No. 2:22-CV-02248-KHV-GEB, 2022 WL 16762903, at *1 (D. Kan. Nov. 8, 2022) to support her argument that canines are unable to distinguish marijuana from hemp. (Appellant's Br. at 22-23). Neither case supports her position. *C.Y. Wholesale* contains dicta suggesting that "law enforcement officers find it nearly impossible to distinguish between low-THC smokable hemp and marijuana in the field." *C.Y. Wholesale*, 965 F.3d at 544. The case says nothing about whether trained narcotics detecting canines can distinguish between the two substances. *See generally id. Dines* discusses the history of hemp legalization and the key differences between marijuana and hemp but also says nothing about whether canines can differentiate between the substances. *See generally Dines,* 2022 WL 16762903*,* at *1. In fact, the court in *Dines* recognized that "[h]emp and marijuana are distinct plants" with different chemical compositions and cultivation methods, which is the opposite of what Joseph claims. *Id.*

Moreover, many courts have rejected similar arguments despite recognizing difficulties in distinguishing legal hemp from illegal marijuana. Some courts have recently declined to depart from *Caballes* and other Fourth Amendment precedent despite the legalization of hemp. *State v. Walters*, 881 S.E.2d 730, 739 (N.C. Ct. App. 2022); *Owens v. State*, 317 So. 3d 1218, 1220 (Fla. Dist. Ct. App. 2021). Other courts have declined to

take judicial notice that hemp and marijuana smell the same and continue to accept and rely on testimony that law enforcement officers smelled marijuana. *United States v. Hayes*, No. 3:19-CR-73-TAV-HBG, 2020 WL 4034309, at *20 (E.D. Tenn. Feb. 21, 2020); *United States v. Bignon*, No. 18-CR-783 (JMF), 2019 WL 643177, at *2 (S.D.N.Y. Feb. 15, 2019); *United States v. Clark*, No. 3:19-CR-64-PLR-HBG, 2019 WL 8016712, at *5 (E.D. Tenn. Oct. 23, 2019); *United States v. Harris*, No. 4:18-CR-57-FL-1, 2019 WL 6704996, at *3 (E.D.N.C. Dec. 9, 2019).

Joseph asks this Court to find that the legalization of hemp negates the premise behind the long held conclusion that canine sniffs are not searches. (Appellant's Br. at 21-29). Like she did before the district court, Joseph presents this Court with nothing more than conjecture and conclusory opinions to argue that trained canines cannot differentiate between marijuana and hemp. (*Id.*). This is an issue of fact that Joseph has failed to prove. Further, she ignores the fact she had no legitimate expectation of privacy in the odors emanating from her car into the public airspace regardless of the legality of the substance producing the odor. *Morales-Zamora*, 914 F.2d at 205. Thus, this Court should not deviate from *Caballes* and *Morgan* because a canine sniff of the outside of a car is still not a search. The district court correctly concluded that Trooper Haller and Deputy Lehr did not violate Joseph's constitutional rights when they had Zeus sniff the outside of Joseph's car.

CONCLUSION

For the foregoing reasons, the State of Wyoming respectfully requests that this Court affirm the district court's order denying Joseph's motion to suppress in all respects.

DATED this 16th day of February 2023.

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CERTIFICATE REGARDING ELECTRONIC FILING

I, Donovan Burton, hereby certify that the foregoing BRIEF OF APPELLEE was served electronically via the Wyoming Supreme Court C-Track Electronic Filing System, this 16th day of February 2023, on the following;

H. Michael Bennett
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The undersigned also certifies that all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form or scanned .pdf is an exact copy of the written document filed with the Clerk, and that the document has been scanned for viruses and is free of viruses.

/s/Donovan Burton
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