SUPREME COURT

OF THE

STATE OF CONNECTICUT

GEOGRAPHICAL AREA NO. 1 AT STAMFORD

S.C. 20246

STATE OF CONNECTICUT

v.

RICARDO CORREA

BRIEF OF THE DEFENDANT-APPELLANT
WITH SEPARATELY BOUND APPENDIX

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TABLE OF CONTENTS

STATEMENT OF THE ISSUES

I. WHETHER THE APPELLATE COURT ERRED IN DETERMINING THAT THE DOG SNIFF THAT TOOK PLACE OUTSIDE THE DEFENDANT'S MOTEL ROOM WAS NOT A SEARCH THAT VIOLATED THE DEFENDANT'S RIGHTS UNDER ARTICLE FIRST, § 7 OF THE CONNECTICUT CONSTITUTION.

Pages 9-29

II. WHETHER THE APPELLATE COURT ERRED IN DETERMINING THAT THE POLICE'S VISUAL SWEEP OF THE DEFENDANT'S MOTEL ROOM WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES.

Pages 29-35

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

CONSTITUTIONAL PROVISIONS

CONNECTICUT GENERAL STATUTES

CONNECTICUT PRACTICE BOOK

NATURE OF THE PROCEEDINGS

Following the June 22, 2016 denial of the defendant's Motion to Suppress Evidence, *Blawie, J*., the defendant entered a conditional plea of nolo contendere in the Superior Court for the Judicial District of Stamford, *Blawie, J.* The defendant was convicted of conspiracy to possess marijuana with intent to sell, in violation of Gen. Stat. §§ 21a-277 (b) and 53a-48, conspiracy to possess narcotics with intent to sell, in violation of Gen. Stat. §§ 21a-278 (a) and 53a-48, and conspiracy to operate a drug factory, in violation of Gen. Stat. § 21a-277 (c) and 53a-48. He was sentenced on each count to nine years to serve followed by six years of special parole, all running concurrently. The trial court made a finding, under Gen. Stat. § 54-94a, that its decision on defendant's motion to suppress was dispositive of the case.

The defendant appealed on December 16, 2016. The parties filed their briefs and the case was argued on April 24, 2018. On October 9, 2018, the Appellate Court, *Alvord, Prescott, and Beach, Js.*, affirmed the defendant's convictions in State v. Ricardo Correa, 185 Conn. App. 308 (2018). The defendant then petitioned this Court to grant certification to review the Appellate Court's decision. On January 11, 2019, this Court granted the defendant's petition for certification as to the following issues:

"1. Did the Appellate Court properly determine that a police canine sniff that took place outside of the defendant's motel room was not a search that violated the defendant's rights under article first, § 7, of the Connecticut constitution?
"2. Did the Appellate Court properly conclude that the visual sweep of the defendant's motel room was justified by exigent circumstances?"

STATEMENT OF THE FACTS

This appeal stems from the denial of the defendant's motion to suppress evidence of drugs and paraphernalia found in the defendant's motel room. The basis of the motion was that members of the Stamford Police Department violated the defendant's rights under the Fourth Amendment of the United States Constitution and article 1, § 7 of the Connecticut Constitution when they conducted a visual sweep of the defendant's motel room prior to obtaining a search warrant. In addition, the defendant raised a second issue for the first time

on appeal of whether the dog sniff search that occurred during the police investigation violated the defendant's state constitutional rights.

The evidence presented and the trial court's findings of fact. On February 5, 2013, at 1:00 AM, Sergeant Christopher Broems of the Stamford Police Department decided to conduct surveillance at America's Best Value motel. (hereinafter ABV). 2/29/16T9; Court's Memorandum of Decision 2 (hereinafter MD). Broems was not focused on a particular person or room. Id., 29, 32. He decided to monitor ABV because he was "bored". Id., 9, 14. He considered ABV a high crime area where he had made many arrests in the past. Id.; MD 2.[1]

Broems set up surveillance on Home Court, a street that runs behind the motel. 2/29/16T9; Exh. A; MD 2. He sat in his police vehicle with his lights off. Id., 13. He could see the well-lit rear motel parking lot and two floors of motel room doors. Id., 9, 18; Exh. 16, 17; MD 2. A walkway ran in front of the doors, edged by a knee wall that ran along it on the other side. The walkway was slightly elevated above the parking lot. Access to the rooms from the lot was impeded by the wall and the elevation. The only access from the lot to the rooms was by a single entrance with a staircase that led to the walkway. Exh. 16, 17.

At 1:20 AM, Broems saw a GMC Yukon SUV pull into the motel lot with its lights on. 2/29/16T15. The passenger, later identified as Eudy Tavares, got out and entered room 118. Id.; MD 2. Room 118 was on the first floor of the two-story motel. Id., 17; Exh. 8. Within one minute, Tavares emerged and re-entered the Yukon, which drove off. 2/29/16T15, 18-19; MD 2. Broems had not seen any activity up to this point. Id., 31.

Broems believed, based on this single event, that Tavares had purchased narcotics in room 118. 2/29/16T18. Broems notified Officer Vincent Sheperis "that he intended to stop the Yukon." MD 2. Broems pulled out from Home Court, leaving room 118 unmonitored.

[1] Broems has been arrested for larceny and conspiracy and was forced to retire when an Internal Affairs investigation discovered "compelling evidence" that he and other officers "repeatedly deviated from proper procedures and manipulated the extra duty assignments to their advantage." https://www.stamfordct.gov/home/news/stamford-announces-results-of-extra-duty-internal-affairs-investigation.

2/29/16T34; MD 2-3. He saw the Yukon emerge from another exit. Id., 19-20. When the driver saw Broems he shut off his headlights. Id., 20, 36; MD 3. When Sheperis arrived to act as backup Broems pulled over the car. Id., 20; MD 3.

The officers approached the vehicle. They smelled a strong odor of marijuana. 2/29/16T23, 51; MD 3. Sheperis removed Tavares from the vehicle and asked him if he had anything illegal or sharp. Id., 51. Tavares stated that he had marijuana in his pocket. Id., MD 3. Sheperis searched Tavares and discovered glass jars with marijuana, a couple of empty glass jars and a plastic baggie with suspected heroin. Id., 52; MD 3. Broems searched the driver, Charles Brickman, who did not have any contraband. Id., 24; MD 3.

The officers called Sergeant Seth O'Brien and his canine Cooper to do a dog sniff of the car in search of more contraband. 2/29/16T23-25; MD 3. O'Brien had been working with Cooper for about 18 months and Cooper was his second canine partner. Id., 105. Cooper had gone through state police training with a different handler from Bridgeport Police Department, but had some differences with the handler; O'Brien then acquired him. Id., 105. At the time O'Brien and Cooper were partnered, Cooper had not received any formal training for narcotics- O'Brien trained Cooper to sense narcotics solely in the field. O'Brien admitted that "[t]ypically, it's a lot more controlled than that…", id., 106, but he believed this was adequate because he was a training officer himself. Id. O'Brien went through some additional unspecified training with Cooper. Id. He did not keep statistics of Cooper's accuracy. Id., 114.

Cooper searched the car and alerted on the center console. However, no contraband was found there or anywhere else in the car. 2/29/16T25, 68-71; MD 3. O'Brien's testified that this alert could have occurred because the residual odors of drugs could linger in the area, even when the drugs were gone. Id., 107. O'Brien conceded that Cooper could "make a hit on…a door, room or a car, days after there were narcotics present…" Id., 115.

The officers issued Brickman a ticket for failure to illuminate headlights and he left. 2/29/1654; MD 3. O'Brien spoke with Tavares who denied being at the motel or having anything to do with the motel. 2/29/16T72. Tavares told them that he lived with his

grandmother. Id., 73; MD 3. He denied having more marijuana at home and said O'Brien could go talk to his grandmother. O'Brien and Broems decided they would do just that. Id.

The officers, having detained Tavares, proceeded to Tavares' nearby home. 2/29/16T74; MD 3. While Tavares remained in the car, id., 121-122, the officers spoke to his brother Danilo and asked to speak to Tavares' grandmother, Pelergrine Cabera. Id., 74; Exh. 19, para 7; MD 3. Despite the fact that it was the middle of the night, the police entered Cabera's home, went upstairs to her bedroom, and woke her up. Id., 74. Police asked Cabera to sign a consent form to allow them to search Tavares' room. Id., 74, MD 3. Cabera did not speak English, so Danilo translated the form and Cabera signed it. Id., 74; Exh. 19. The record does not indicate that they ever obtained Tavares' permission to search his bedroom.

The officers found baggies with the corners cut off and suspected heroin. 2/29/16T76-77; MD 3. The room was sparse, with a mattress on the floor and a few clothes. Danilo told police that Tavares was moving out, leading them to suspect he was moving to ABV. Id., 77.

With Tavares in tow, the officers went back to ABV and spoke with the manager, who told them that the defendant[2] and someone named Victor Tavares had rented room 118 from February 1, 2013 until February 8, 2013 for $430 up front. 2/29/16T78; Exh. 19, para. 8; MD 3-4. The officers suspected that Victor Tavares was actually Eudy Tavares. Id., 79; MD 4.

The officers drove to the rear lot of ABV, where room 118 was located. 2/29/16T134. They discussed their next move. Broems conferred with people from the police station. Id., 79. They knocked on the door to room 118 but there was no answer. Id., 96; MD 4. O'Brien conducted a narcotics sweep with Cooper along the first floor sidewalk. Id., 79; MD 4. O'Brien "started at that far left…hand side of the first floor breezeway and just started …doing…an exterior sweep of the doors, I believe there was four." Id., 79. Cooper alerted at the threshold

[2] Sheperis recognized the defendant's name from a 2010 incident where he was the front passenger in a car that led police on a chase. In the backseat, police found a gun that was used in a shooting later that night. 2/29/16T47-48, 56-57. Sheperis does not explain why the gun was not seized initially. There is no mention of drugs being found during the incident.

of room 118. O'Brien repeated the search a few more times with the same result. Id., 79-80; MD 4. But O'Brien conceded that ABV was known for narcotics and Cooper could have been alerting to narcotics that had been removed from the room days or even weeks ago. Id., 129.

The officers testified that it was only after Cooper alerted to room 118 that they concluded they had probable cause to apply for a search warrant. 2/29/16T83, 148, 161, 162, 169, 181; MD 4.[3] Even after the dog sniff, the officers were still unsure whether they had enough evidence for probable cause. Broems alerted the officers at the station to this additional information. Id., 148. They decided to apply for the warrant only after this consultation, as Broems wanted to make sure they had enough probable cause to justify waking up a judge at 3:00 AM. Id., 181.[4]

Broems and Sheperis left to write the warrant and process Tavares. O'Brien stayed to monitor the room from Broems' former position on Home Court. O'Brien pulled out of ABV, made a right onto East Main Street and drove toward Home Court. 2/29/16T86-87; Exh. A. But when he reached Home Court, he saw the defendant walking on Home Court toward East Main Street. Id., 84-90; Exh. A; MD 4-5. The two made eye contact and the defendant made a right on East Main Street. Id., 87-88.[5] O'Brien notified Broems and Sheperis. Id., 85; MD 5. Broems returned immediately, and Sheperis returned after he had brought Tavares to headquarters. Id., 92. In the meantime, O'Brien approached the defendant, who was cooperative. Id, 91; MD 5. O'Brien, concerned about his "history" with the defendant, obtained the defendant's consent to a search of his person. Id.[6] Once Broems arrived, O'Brien did the

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[3] In its Appellate Court brief, the state asserted that the police decided to get a search warrant just prior to the dog sniff. St. AC Br. p. 22, 42. As explained in more detail below, it is clear that, as the trial court found, the police did not make their decision until after the sniff.

[4] The officers wrote in the search warrant that they actually made their decision to get the search warrant even later in the process, after the visual sweep.

[5] Both the trial court and the Appellate Court say that the defendant changed direction when he saw O'Brien. Correa, 185 Conn. App. at 336; MD 3. But the record only reflects that the two made eye contact at the corner of Home Court and East Main and the defendant decided to make a right on East Main. The only map in evidence reveals that Home Court does not continue beyond East Main, so the defendant was forced to make a right or left at that point.

[6] O'Brien does not explain whether he is referring to the 2010 incident.

search, finding a large wad of money and the key card to the motel room in the defendant's pocket. Id., 91-92; MD 5. They seized the money, totaling $3680, because of suspicions it was the proceeds of drug sales. The defendant explained that he had papers to prove he earned the money. Id., 98-99. When asked where the papers were, the defendant replied that they were in the room, stating: "ya'll niggers know where I live, that's where they're at." Id., 99; Exh. 19, para 10. O'Brien told the defendant Tavares was arrested and "the [j]ig is up." The defendant responded, "nothing in the room is mine." Id., 93; MD 5.

Broems asked the defendant to open the door of room 118 and initially he agreed. But when they got to the door, he changed his mind and refused to let them in. 2/29/16T94, 141; MD 5. The officers told him they were going to get a search warrant. Id., 95; MD 5.

The defendant told the officers that there was no one in the room. 2/29/16T194-195: MD3. But Broems opened up the door for 15-20 seconds to check. Id., 171, 178; MD 3. He opened the door wide enough to see the whole room. Id., 172. He said, "police, come out" with no response. Id., 174; MD 3. Broems did not enter the room. He saw a scale and one baggie. Id., 178; MD 3. He did not check the bathroom or any closets. Id., 192-193.

The police conducted this search even though they had no indication that there was anyone in the room. 2/29/16T190-191. O'Brien flatly stated: "You're asking me for indicators that -- that somebody was in there? I had none to -- to determine either or." 2/29/16T168. Police acknowledged there was no noise coming from the room, nor did they see anyone through the window. Id., 126. Police were concerned that the driver of the Yukon and Tavares' brother were making phone calls to a possible accomplice. Id., 191. The officers noted that there was another person registered to the room, although police suspected that it was Eudy Tavares, who was in custody. Id., 79, 191. Police were also concerned because no one had been watching the room since Broems had pulled over the Yukon, id., 96-97, and because a light was on in the room. Id., 159-160; MD 9-10.[7]

[7] O'Brien also noted that they found the defendant at Tavares' house when they arrested him, but that did not happen until well after the search. Id., 159-160.

The police released the defendant after the search. 2/29/16T99. They secured other officers to stake out room 118. Id., 98. After they returned to the station, Tavares made a written statement. Id., 155. He explained that his friend "Ricky" rented the motel room and allowed Tavares to leave his marijuana in the room so he would not have to leave it at his grandmother's house. Though he did not have a key to the room, Ricky would let him in whenever he needed marijuana. Earlier that night he had gotten some marijuana from the room and the police stopped him shortly thereafter and found the marijuana. Tavares was not aware of any other drugs in the room. Exh. 19, p. 4 para. 11.

The search warrant application was granted. When they executed the warrant, the police discovered 200 grams of heroin worth about $85,000.00 packaged for sale, four ounces of marijuana, a large amount of money, a computer, paperwork about the Latin Kings, a vacuum sealing machine, two sifters and two digital scales. Correa, 185 Conn. App. at 316. Later that morning they arrested the defendant at Tavares' house. Id., 152-153.

Arguments in the trial court. The state argued that warrantless search was justified by exigent circumstances. Alternatively, the state argued that the evidence was admissible under the independent source doctrine. Id.; 2/29/16T210-217.

The defendant argued that the exigent circumstances doctrine did not apply because both the defendant and Tavares were in custody at the time of the sweep and there was no indication of any imminent threat of destruction of evidence. Defendant's Post- Hearing Memo of Law, p. 10-11. The defendant also argued that the independent source doctrine does not apply because the state did not prove that the decision to apply for the warrant was made prior to the visual sweep, id., 24-27 and because the warrant did not contain probable cause derived from sources independent of the illegal entry. Id., 19-24.

The trial court's decision. The trial court denied the defendant's motion in a written decision. The court held that the exigent circumstances doctrine justified the visual sweep. MD 9. The court found that police correctly acted based on their concerns that Brickman, Cabera, Danilo, guests of ABV, and anyone passing during the stops of the Yukon and the

defendant might be communicating with each other about destroying contraband. Id., 9. The court also found the search was justified by the fact that no one was watching the room while the officers were absent from ABV; the officers' belief there are often others present when crimes occur in motel rooms; that the officers did not know Tavares' true involvement with the room; and that drugs can be destroyed easily. Id., 10.[8]

Alternatively the court found the evidence was admissible under the independent source doctrine. The court found that, under State v. Vivo, 241 Conn. 665, 673 (1997), "the warrant [was] supported by probable cause derived from sources independent of the illegal entry…." The court excised from the warrant the evidence Broems saw in the room and concluded that rest of the warrant contained probable cause. MD 10. The court found that "the decision to seek the warrant [was] not… prompted by information gleaned from the illegal conduct." Vivo, 241 Conn. at 673. The court held that police "had already made the decision to seek a search warrant before Broems ever opened the door to room 118." MD 11.

Arguments in the Appellate Court. In his first issue, the defendant asserted that the dog sniff search of the outside door of the defendant's motel room violated his rights under article first, § 7 of the Connecticut constitution. The defendant argued that this issue is controlled by State v. Kono, 324 Conn. 80 (2016) which held that a dog sniff on the outside of an apartment door in a multiunit building is a search. In his second issue, the defendant asserted that Broems' visual sweep of the defendant's motel room was a search, not supported by exigent circumstances or the independent source doctrine.

The state argued that this case is not controlled by Kono because a motel room is not a "home" and therefore the defendant had a lesser expectation of privacy in room 118 than he would have in an apartment. The state asserted that the defendant did not have a reasonable expectation of privacy in either the walkway outside his motel room; or in the

[8] The trial court noted that Tavares had told police he kept his marijuana in the room; however, this admission did not occur until well after the visual sweep and is not relevant to the exigent circumstances analysis.

contraband in the motel room, which is the only thing the dog can sense. Alternatively, the state argued that the search was justified by the independent source doctrine and the inevitable discovery doctrine. In the second issue, the state argued that the visual sweep was justified by exigent circumstances and the independent source doctrine.

I. THE APPELLATE COURT ERRED IN DETERMINING THAT THE DOG SNIFF THAT TOOK PLACE OUTSIDE THE DEFENDANT'S MOTEL ROOM WAS NOT A SEARCH THAT VIOLATED THE DEFENDANT'S RIGHTS UNDER ARTICLE FIRST, § 7 OF THE CONNECTICUT CONSTITUTION.

This Court must reverse the Appellate Court's decision that the warrantless dog sniff at the threshold of the defendant's motel door did not violate the defendant's state constitutional right to be free of unreasonable searches and seizures. The Appellate Court incorrectly held that Kono, 324 Conn. 80 (2016), where this Court decried the use of a warrantless dog sniff on the threshold of an occupant's apartment door, is not applicable when the exact some dog sniff occurs in a motel. The Appellate Court concluded that the defendant has no reasonable expectation of privacy on the walkway outside the motel door, yet failed to address the defendant's reasonable expectation in maintaining privacy on the inside of his motel room. Had the Court done so, it would have undoubtedly recognized that the defendant's privacy interest in the inside of his motel room is equal to his privacy interest in the inside of his apartment. The search was illegal and, as all the evidence discovered as a result was fruit of the poisonous tree, the defendant's conviction must be reversed.

A. Relevant Facts.

The relevant facts are set forth in the statement of facts above. Additional facts are incorporated into the discussion as needed.

B. Reviewability

The issue of the dog sniff was not preserved, but the Appellate Court properly found the issue reviewable under State v. Golding, 213 Conn. 233 (1989) as modified by In Re Yasiel R., 317 Conn. 773, 120 A.3d 1188 (2015). State v. Correa, 185 Conn. App. 308, 322 (2018). The state has not provided notice under Prac. Bk. § 84-11 that it will rely as an

alternative ground that the issue is not reviewable. Furthermore, the defendant maintains as he did in the Appellate Court that the issue is also reviewable as plain error pursuant to Prac. Bk. § 60-5 and also under the rule of State v. Evans, 165 Conn. 61, 70 (1973): "where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal…" our appellate courts will review issues raised on appeal for the first time.

C. Standard of Review

"[O]ur standard of review of a trial court's findings and conclusions in connection with a motion to suppress is well defined. A finding of fact will not be disturbed unless it is clearly erroneous in view of the evidence and pleadings in the whole record.... [When] the legal conclusions of the court are challenged, [our review is plenary, and] we must determine whether they are legally and logically correct...." (Citation omitted; internal quotation marks omitted.) State v. Saturno, 322 Conn. 80 at 87–88 (2016).

Whether the trial court properly found that the facts submitted [in a search warrant application] were enough to support a finding of probable cause is a question of law... subject to plenary review on appeal.'" State v. Pappas, 256 Conn. 854, 864 (2001). In reviewing the sufficiency of the application, this Court looks to see whether the affidavit '"presented a substantial factual basis for the magistrate's conclusion that probable cause existed..."' State v. Duntz, 223 Conn. 207, 215- 16 (1992). The court on appeal has "an independent responsibility to ascertain whether a search warrant passes constitutional muster." State v. Walczyk, 76 Conn.App. 169, 176-177 (2003).

D. The Appellate Court's Decision.

The Appellate Court held that this claim fails under the third prong of Golding. Correa, 185 Conn. App. at 322. The Court determined that the defendant's reliance on Kono, 324 Conn. 80 (2016) is misplaced and Kono does not control this case.[9] Correa, 324 Conn. App. at 329. Noting that findings as to the reasonable expectation of privacy standard are made

[9] This Court's decision in Kono was issued on December 22, 2016, six months after the trial court in the present case denied the defendant's motion to suppress.

on a case-by-case basis, the Court distinguished Kono because the hallway in that case was locked and closed to the public. Id., 330. By contrast, the Court noted that the walkway in the present case was outdoors, well-lit, visible from the road and accessible to the public. Id. The Court concluded that "the defendant has not shown a reasonable expectation of privacy on the outside of the door to his motel room" and that the dog sniff was not a search. Id.

E. Legal Principles

General principles. Article first, § 7 of the Connecticut constitution provides: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches or seizure; and no warrant to search any place, or to seize any persons or things, shall issue without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." Warrantless searches "are per se unreasonable under the Fourth Amendment- subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967); State v. Dukes, 209 Conn. 98, 121 (1988). The government bears the burden of establishing that a warrantless search or seizure was justified by an exception to the warrant requirement. Mincey v. Arizona, 437 U.S. 385, 390-391 (1978); State v. Clark, 255 Conn. 268, 291 (2001). Under article first, § 7, Connecticut has embraced "a strong policy in favor of warrants." State v. Miller, 227 Conn. 363, 382 (1993).

"…[T]he exclusionary rule bars the government from introducing at trial evidence obtained in violation of the fourth amendment to the United States constitution." (Internal quotation marks omitted.) The rule does not "apply only to evidence obtained as a direct result of the unlawful activity. "Rather, the rule extends to evidence that is merely derivative of the unlawful conduct, or what is known as the fruit of the poisonous tree." State v. Brunetti, 279 Conn. 39, 72 (2006)(citing Nardone v. United States, 308 U.S. 338 (1939)).

Of course, a citizen's rights under article first, § 7 are violated only if a "search" has occurred. Kono, 324 Conn. at 89. To decide this question the court must "employ the same analytical framework that would be used under the federal constitution….[W]e ask whether

the defendant has established that he had a reasonable expectation of privacy in the area or thing searched." (citation omitted) State v. Davis, 283 Conn. 280, 310 (2007). The standard applied is: "first, whether the individual has exhibited an actual subjective expectation of privacy, and, second, whether that expectation is one society recognizes as reasonable. (citation omitted) State v. Mooney, 218 Conn. 85, 94 (1991). This determination "involves a fact-specific inquiry into all the relevant circumstances." Id. Property rights are highest and most strongly protected in the home. State v. Mann, 271 Conn. 300, 314 (2004).

A person who inhabits a motel room has a reasonable expectation of privacy that is equal to the reasonable expectation of privacy possessed by occupants of any residence. State v. Benton, 206 Conn. 90, 95 (1987). "No less than a tenant of a house, or the occupant of a room in a boarding house…a guest in a motel room is entitled to constitutional protection against unreasonable searches and seizures." (Citations omitted) Stoner v. California, 376 U.S. 483, 490 (1964); *see also* State v. Benton, 206 Conn. at 95. The Court in Benton specifically equated motels and motels with apartments, noting that "[p]ersons…residing in an apartment, or persons staying in a motel or motel have the same fourth amendment rights to protection from *unreasonable* searches and seizures and the same *reasonable* expectation of privacy as do the residents of any dwelling." (Emphasis in original)(Citations omitted) Benton, 206 Conn. at 96.

Dog sniff searches of the home. Under both the state and federal constitutions, dog sniffs in which a police canine, while standing on the curtilage of a free-standing, single family home, detects contraband located inside the home that would not have been detectable otherwise, are searches that require probable cause and a warrant. Florida v. Jardines, 569 U.S. 1 (2013). Recently, this Court held that a dog sniff of the outside door of an apartment that occurs in a common area of the building is a search under article first, § 7 of the Connecticut constitution. Kono, 324 Conn. 80.

In Kono, police received an anonymous tip that the defendant had bragged about growing marijuana in his condominium unit. Police conducted a canine sniff of the common

hallway on the second floor of the condominium complex where the defendant lived. The dog sniffed at the bottom of the door of each unit. The dog alerted on the defendant's unit. The police then obtained a search warrant. They entered the apartment and found marijuana plants and other contraband. Kono, 324 Conn. at 83-84.

This Court explained that the United States Supreme Court has analyzed privacy rights under both a "privacy interest" standard and a "trespass" standard: "the fourth amendment protects against government infringement of an individual's reasonable expectation of privacy and also against the government's nonconsensual physical intrusion into a person's private property." Kono, 324 Conn. at 90 fn. 7. The Court decided the case under the "privacy interest" standard. Id., fn. 7, 10. It reasoned that, though the common area of an apartment building is accessible to the public, a canine sniff of the outside of a person's home "impermissibly invades reasonable expectations of privacy in the home." Id., 109.

F. The police conducted the canine sniff without a warrant, which violated the defendant's rights under article first, § 7 of the Connecticut constitution.

The Appellate Court erred in three ways. First, the Court focused upon the defendant's privacy interest in the walkway outside his motel door. Correa, 185 Conn. App. at 329-330. The Court did not discuss the defendant's privacy interests in the inside of his motel room. Second, the Court did not acknowledge the heightened privacy interest in a lawfully rented motel room that is equal to the property interest in an apartment or single family home. Distinguishing motel rooms from apartments is problematic because it affords less protection and privacy rights to people whose motel room is their only home. Third, the Court wrongly held that the defendant has no reasonable expectation of privacy in the curtilage of his motel room because it was accessible to the public. The Court failed to recognize that the corridor in Kono, though locked, was also accessible to the public and that the defendant has the right to expect certain norms of behavior in the walkway outside his door.

1. The Appellate Court improperly focused on the accessibility of the hallway in Kono and the walkway in the present case and failed to recognize the defendant's privacy interest on the inside of his motel room.

The Appellate Court declared that "this case concerns the shared open walkway of a motel." Correa, 185 Conn. App. at 329. The Court erred in its constrained reading of Kono to require a locked, less accessible hallway to establish a reasonable expectation of privacy. These characteristics were not critical to the decision in Kono; in fact, they were barely mentioned. This Court explicitly based its decision upon privacy interests inside the home. Kono, 324 Conn. at 90, fn. 7, 10. In doing so, the Court recognized that people who live in apartments have the same search and seizure protections as those who live in freestanding homes, affirming the rights of all people who live in multitenant structures. Id., 121. The Appellate Court improperly limits Kono's reach to those apartment dwellers who have a hallway that is more difficult to access.

This Court's emphasis on privacy interests on the inside of the home stems from U.S. Supreme Court precedent. This Court examined Kyllo v. United States, 533 U.S. 27 (2001), which held that the police's use of a thermal imaging device to scan the outside of the defendant's unit located in a three-family home violated the defendant's fourth amendment rights. Id., 29-30. Kyllo prohibited the use of "a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion" without a warrant. Id., 40. Kyllo emphasized that the fourth amendment's protections at the entrance to the home are paramount. Id. Furthermore, Kyllo rejected the argument that if the information discovered is not private, there is no fourth amendment violation: "The fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained." Id., 37. This Court adopted these principles as crucial to its analysis in Kono.

This Court was also influenced by Florida v. Jardines, 569 U.S. 1 (2013), particularly Justice Kagan's concurrence. In Jardines, police conducted a dog sniff on the front porch of Jardines' freestanding, single family home, and alerted to contraband inside the home. The

Court determined that the police violated the defendant's fourth amendment rights because they improperly trespassed on the home's curtilage. Id., 11-12.

This Court was primarily interested in the reasoning of the concurrence in Jardines, where Justice Kagan applied the "firm and "bright" rule of Kyllo to conclude that Jardines would also prevail under the "privacy interest" standard: "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." (citation omitted) Id., 14. She concluded that a police canine is such a device, and the dog sniff violated Jardines' reasonable expectation of privacy. Id., 14-15.

This Court was persuaded by Justice Kagan's application of the Kyllo rule to a dog sniff of a freestanding home. This Court determined that the Kyllo rule also applied to apartments in multiunit buildings, holding that "a canine sniff directed toward a home-whether freestanding or part of a multitenant structure- is a search for purposes of article first, § 7 of the Connecticut constitution and, therefore, requires a warrant issuing upon a court's finding of probable cause." Id., 122. The holding, as expressed by this Court, is not limited to locked hallways and does not exclude multitenant structures with unlocked hallways.

Furthermore, the Appellate Court's decision here is at odds with this Court's concern that it not allocate "[constitutional] protections on grounds that correlate with income, race, and ethnicity.'" Kono, 324 Conn. at 121 citing United States v. Whitaker, 820 F.3d 849, 854 (2016).The Court provided protection to residents of multiunit buildings equal to residents of freestanding homes. Recognizing that privacy interests in common areas of apartment buildings is reduced, the Court preserved the inviolability of the home by protecting citizens' rights on the inside of their apartments. Kono, 324 Conn. at 91, 100-101, 112, 113, 114, 115.

2. The Appellate Court did not recognize that the rule in Kono applies with equal force to a lawfully rented motel room.

The Appellate Court did not recognize that citizens have an expectation of privacy in a motel room equal to that of an apartment in a multitenant building with locked hallways or a stand-alone home. As recognized by the U.S. Supreme Court: "[n]o less than a tenant of a house, or the occupant of a room in a boarding house…a guest in a motel room is entitled to constitutional protection against unreasonable searches and seizures." (Citations omitted) Stoner v. California, 376 U.S. 483, 490 (1964). People do all the things in a motel room that they would do in the privacy of their own homes. Citizens keep personal effects in motel rooms, such as clothes, jewelry, computers, phones, medication, toiletries, purses, wallets, credit cards, and identification, just to name a few. They sleep, eat, shower, get dressed, relax, read, and watch television in their motel rooms. A citizen rents his motel room with every expectation of obtaining the privacy he needs to engage in his most intimate activities.

In Kono, this Court distinguished between canine sniffs that occur in public places, such as luggage in an airport or a car on a public road, and canine sniffs of the home, reaffirming that privacy interests are paramount in the home. Kono, 324 Conn. at 101-103. This difference applies with equal force to a motel room. As noted above, people rent motel rooms to find privacy for all their most personal activities. The expectation of privacy therefore is correspondingly greater in a motel than in those other areas.

Furthermore, the defendant, as he stated, lived in the motel room. The defendant's living situation was therefore like many others who must live in a motel when they have no place to stay. Individuals, such as the defendant, and families struggling to keep a roof over their heads should not be stripped of constitutional protections simply because they must live in a motel. Affording search and seizure protections to occupiers of free standing homes and apartments but not occupants of motels "'would apportion [constitutional] protections on grounds that correlate with income, race, and ethnicity.'" Kono, 324 Conn. at 121 citing

Whitaker, 820 F.3d at 854. This Court must not countenance such a division.[10]

If the defendant's motel room is not subject to constitutional protections, the police and drug detection dogs will be able to trawl the halls of ABV with impunity whenever they are "bored." Broems was very clear that he decided to surveil ABV because he was "bored." He stopped the Yukon simply because he had seen Tavares go into room 118 and then come out a minute or so later. Such actions will disproportionately occur in motels such as ABV which are considered "high crime" and where poor people sometimes are forced to live. Thus, this Court must recognize the rights of people to privacy in their motel rooms. State v. Kono, 324 Conn. at 115 (without constitutional protection, warrantless dog sniffs of people's apartments may occur indiscriminately or "based on whim or fancy….").

The federal motel dog sniff cases the Appellate Court relied on are contrary to Kono's treatment of a dog sniff as a sense enhancing device that detects otherwise undetectable information about the inside of a home. Correa, 185 Conn. App. at 330-331, fn. 19. United States v. Marlar, 828 F. Supp. 415 (1993) holds that a dog sniff of the outside of a motel door is not a search because the dog is lawfully present in the common corridor of the motel and is smelling an odor that travelled into the corridor from the room. Id., 419. United States v. Roby, 122 F.3d 1120 (8th Cir. 1997) similarly held that the dog's detection of the odor of drugs was "plain smell" similar to the "plain view" doctrine and was no different than if the officer detected it himself when walking past the motel room. Id., 1124-1125. Kono rejected this "travelling molecule" theory. Kono, 324 Conn. at 128.

More consistent with Kono is the dissent in Roby, which recognized an individual's heightened expectation of privacy in his motel room. Roby, 122 F.3d at 1126 (Healey, J, dissenting). While noting that "a hotel is less private than an apartment or a home….", id., the dissent recognized that there is a greater expectation of privacy in a hotel room than in a "public… airport or a commercial bus." Id. The dissent relied upon United States v. Thomas,

[10] The Appellate Court's decision also draws into question Kono's application to apartments or other homes in multitenant structures where the building or hallways are not locked.

757 F.2d 1359 (2d Cir. 1985), cert. denied sub nom. Fisher v. United States, 474 U.S. 819 (1985), Wheelings v. United States, 474 U.S. 819 (1985), and Rice v. United States, 479 U.S. 818 (1986), a case also relied upon in Kono, where a dog sniff of an apartment door violated the fourth amendment. The dissent adopted the reasoning in Thomas and applied it to motel room doors, holding that "guests of a hotel have a legitimate expectation that the contents of their closed hotel room will remain private" and could not be identified by a sense enhancing dog sniff. Id., 1127.

The Appellate Court's reliance upon United States v. Lewis, No. 1:15-CR-10-TLS, 2017 WL 2928199 (N. D. Ind. Jul 10, 2017), another motel sniff case, is also inconsistent with Kono. Lewis reasoned that the canine officer did not trespass in the common area of the motel and that there is no reasonable expectation of privacy in contraband, which is the only thing that a dog can detect inside the home. Id. Kono acknowledged that the U.S. Supreme Court in United States v. Place 462 U.S. 696 (1983)(dog sniff of luggage at public airport not a search) and Illinois v. Caballes, 543 U.S. 405 (2005)(dog sniff of car during lawful traffic stop not a search) adopted this reasoning. Nonetheless, this Court rejected it, refusing to interpret Place and Caballes as holding that dog sniffs always get a free pass. Id., 115-116. Affirming that "the sanctity of the home is at the 'very core' of the fourth amendment", id., 112, this Court stated: "the sanctity of the home is not measured by the presence or absence of contraband, or even by the relative "intimacies" of the facts that may be discovered there….Rather, it is measured by the "firm" and "bright" line at the entrance to the house." (citation omitted; internal quotation marks omitted). Id., 115. This "firm" and "bright" line at the entrance to the house applies with equal force to the motel room that was the defendant's home. For this purpose, there is no distinction between the expectation of privacy in a motel room and an apartment or free-standing house.

Moreover, the rationale that the canine is only able to detect contraband assumes that a drug detection dog always accurately detects drugs. Because dogs are imperfect their mistakes can and do lead to private areas being opened and explored. Illinois v. Caballes,

543 U.S. at 412-413 (Souter, J, dissenting). In order to prevent such invasions from occurring in the intimate space of a motel room, the Court must require police to have probable cause and a warrant before conducting a dog sniff outside a motel room.

In the present case, the evidence revealed that dog sniffs can be inaccurate and Cooper in particular was problematic. Cooper was never trained in a controlled training setting. He frequently made hits on areas where there were no drugs. Early on Cooper falsely alerted to the center console in the Yukon, leading to this private space, being opened and searched. O'Brien testified that false alerts could happen because the residual odors of drugs could linger in the area for days or weeks, even when the drugs were gone. Given this astounding level of inaccuracy, Cooper may well have alerted to a room that had previously contained drugs. This would in turn lead to a search of a person's private, intimate space, which is contrary to article 1, § 7 of the Connecticut constitution.

People v. Lindsey, 118 N.E.3d 723 (Ill. App. Ct. 2018), appeal allowed, 116 N.E.3d 907 (Ill. 2019), released just a few weeks after the decision in the present case, recognized that a dog sniff of a motel room requires probable cause and a warrant. In Lindsey, police brought a police dog to Lindsey's motel and "performed a free air sniff on the exterior of Lindsey's motel room door." Id., 726. The dog signaled that there were drugs in the room. The police obtained a search warrant and found the drugs. Id. The Court determined that Lindsey's fourth amendment rights were violated. Id., 731. It first noted that "a motel occupant's reasonable expectation of privacy is *reduced* with regard to the area immediately adjoining the room…." (emphasis in original) Id., 728, because a motel room occupant must share the common areas of the motel with others. Id. But then the Court, citing to Florida v. Jardines, 569 U.S. 1 and Whitaker, 820 F.3d 849, went on to affirm the right of a motel resident to exclude others from using "a sophisticated sensing device not available to the general public…to explore the details previously unknown in Lindsey's motel room…." Id., 730. The Court concluded that a dog sniff of a motel door from a public hallway is a search.

The Lindsey Court's well-reasoned decision is very similar to Kono. Just as Kono

recognized in the context of an apartment search, the Court in Lindsey recognized that the question of whether a police dog is lawfully present in the outside of the motel room is separate from whether the sniff invades the occupant's reasonable expectation of privacy on the inside of the room. And just as Kono focused upon the reasonable expectation of privacy on the inside of the apartment, Lindsey focused upon privacy rights on the inside of the motel room to hold that such an invasion is unlawful. This Court must recognize the defendant's heightened privacy interest in his motel room and adopt the reasoning of Lindsey.

3. The Appellate Court was also incorrect in its conclusion that the police were not on the defendant's curtilage when they performed the dog sniff.

The Appellate Court misconstrued Kono by giving dispositive weight to the differences between the hallway in Kono and the walkway in this case. Correa, 185 Conn. App. at 329-330. The Appellate Court distinguished this case from Kono on the basis that in Kono, the hallway outside the suspect's condominium was closed off, located inside the building and "restricted by a locked door." Correa, 185 Conn. App. at 329-330. On the other hand, the walkway at ABV was on the outside, open to the public, fully lit and fully accessible. Id. The Appellate Court did not recognize this Court's holding that the hallway in Kono was an area in which the occupant could not control or limit access. Even though the defendant could not stop people from walking through, he still had a "right to expect certain norms of behavior in his apartment hallway." (citation omitted) Kono, 324 Conn. 80, 113 (2016). Likewise, societal norms granted the defendant a reasonable expectation that police are not entitled to use a canine, highly trained to locate contraband, to sniff the threshold of his motel room door.

Furthermore, Cooper alerted at the threshold of the defendant's motel room. If any area of the motel is curtilage it is the threshold of the door. The dog was as close as he could possibly be to the room without actually being in the room. In Kono this Court explained: "…the fact that a police officer might lawfully walk by and hear loud voices from inside an apartment does not mean [that] he could put a stethoscope to the door to listen to all that is happening inside." (citation omitted; internal quotation marks omitted) Kono, 324 Conn. at

114. This reasoning applies with equal force to the defendant's motel room.

Finally, there are obstacles to the walkway at ABV which signal that the occupants want privacy. The walkway is not completely open. It is elevated from the parking lot. There is a partial wall along the edge which blocks people from walking directly onto the walkway from the parking lot. The only access to the walkway is by a staircase built into the motel between the parking lot and the walkway. These barriers discourage the public from approaching. No one would seriously contend that any member of the public, without being an occupant or guest, would be welcome to assemble on the walkway, which is private property. Thus, the defendant had a reasonable expectation of privacy in the walkway.

4. The drugs and contraband obtained when the search warrant was executed was the fruit of the poisonous tree.

"[N]ot all evidence "is fruit of the poisonous tree simply because it would not have come to light but for the illegal actions of the police…[E]vidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint...." (citations omitted; internal quotation marks omitted) Brunetti, 279 Conn. at 73. In determining whether or not the taint has been dissipated courts must look to "…the temporal proximity of the illegal police action and the discovery of the evidence, 'the presence of intervening circumstances,' and 'the purpose and flagrancy of the official misconduct.'" (citations omitted; internal quotation marks omitted) State v. Cates, 202 Conn. 615, 621 (1987).

Applying these factors reveals that the evidence was the fruit of the dog sniff. The execution of the search warrant was in temporal proximity to the dog sniff and there were no intervening circumstances. All the events occurred in rapid succession after the dog sniff- the officers ran into the defendant, they did the visual sweep, they obtained a statement from Tavares and they wrote and executed the warrant. Furthermore, the misconduct here was flagrant. O'Brien is a K-9 officer who actually trains other K-9 units. He would be well aware that warrantless dog sniffs in free standing homes are illegal. He should have realized that a

dog sniff of a motel room would raise fundamental constitutional questions yet he conducted the sniff anyway. For these reasons, collection of the drug and contraband evidence is not sufficiently attenuated from the illegal dog sniff search.

G. The search is not justified by the independent source doctrine.

The state raised the independent source doctrine as an alternative ground for affirmance and in its brief to the Appellate Court. The Appellate Cour did not reach it. Correa, 185 Conn. App. at 331, fn. 20. Should this Court address the doctrine, it will find that it is not applicable in this case because the decision to seek the warrant was directly prompted by the dog sniff. Moreover, all of the evidence collected after the dog sniff was discovered as a result of the dog sniff. Without this evidence, the warrant did not contain probable cause.

The independent source doctrine prohibits excluding evidence that initially is tainted by the unlawful actions of law enforcement, but is later obtained by an entirely separate, uncorrupted method. Murray v. United States, 487 U.S. 533, 539 (1988); State v. Vivo, 241 Conn. 665, 672-673 (1997). Evidence seized is admissible under the independent source doctrine when "(1) the warrant [is] supported by probable cause derived from sources independent of the illegal entry; and (2) the decision to seek the warrant [was not] prompted by information gleaned from the illegal conduct." Vivo, 241 Conn. at 673, *quoting* United States v. Johnson, 994 F.2d 980, 987 (2d Cir. 1993). As to the first prong, in the case of a search conducted pursuant to a warrant, the Court must determine "whether the affidavit, with the illegal information excised, is sufficient to support the finding of probable cause necessary for the warrant." State v. Arpin, 188 Conn. 183, 193 (1982).

This Court need only examine the second prong of the independent source test to conclude that it does not apply. The officers' decision to request a search warrant right after the dog sniff was entirely "prompted by information gleaned from the illegal conduct." Throughout the hearing Broems and O'Brien asserted that they made the decision to obtain a warrant "after the K-9…search." 2/29/16T161; see also 148, 162, 169, 181. The trial court specifically found that after the dog sniff, at about 3:00 AM, a little over 90 minutes since the

investigation began, “Broems decided to apply for a search warrant for room 118.” MD 4.

If the officers had believed they had probable cause once they saw the registration, one of them would have gone to obtain it right then. Instead, as O’Brien explained, “[w]e continued to discuss it, we went back to the rear lot.” Id., 79. Once there, they knocked on the door. Broems conferred with other officers. Id. These actions show that they did not believe they had probable cause yet but were still trying to gather it.

By contrast, once the officers did decide to apply for a warrant, they moved quickly. Broems again conferred with a lieutenant to get corroboration of the decision, concluded the evidence amounted to probable cause, and headed back to the station to write the warrant. These actions show that they had decided they had probable cause.

The state had every incentive to establish at the hearing that the decision occurred as early as possible in order to refute the defendant’s claim that the police decided to pursue the search warrant only after the visual sweep. The timing of the decision was a critical question. The chronology of events set forth in the search warrant indicates that the police decided to apply for the warrant *after* the visual sweep. State’s Exhibit 19, para 10. The defendant cross examined the officers at length about the timing of the decision, and the officers repeatedly insisted they decided to apply for a search warrant after the dog sniff, but before they ran into the defendant. 2/29/16T147-149, 161-165. Had the officers decided to apply for a search warrant at any point before the dog sniff, they would have explained that they made this crucial decision well before the visual inspection. Because, as the officers themselves testified under oath, the decision to apply for a warrant was made after the dog sniff, the independent source doctrine does not apply.

Moreover, the first prong of the independent source test is not met. All the evidence police included in the warrant that they found after the dog sniff was obtained as a direct consequence of the dog sniff. This evidence included the primary evidence of Cooper’s signal that there were drugs in the room. Exh. 19, para 8. It also included the secondary evidence obtained: 1) the money and the key card police found on the defendant, id., para 9; 2) the

defendant's statement, "nothing in the room is mine," id; 3) the officers' viewing of the scale and baggie in the motel room, id; defendant's assertion that he was living in room 118, id., para 10; and 4) Tavares' statement that he kept his marijuana in the defendant's motel room and the defendant had let him in earlier to pick some up. Id., para 11. Once the evidence is excised from the warrant, the warrant no longer contains probable cause.

O'Brien's encounter with the defendant, searching him, and getting him to make an admission was part and parcel of the dog sniff. O'Brien's surveillance was obviously meant to secure the room while Broems obtained the warrant. The dog sniff was therefore the reason for the surveillance, and consequently O'Brien's meeting with the defendant.

Broems' viewing of the scale and baggie during the visual sweep was a direct result of the dog sniff. Cooper had detected drugs in the motel room. Police testified that the search was motivated by the fear that someone would destroy those drugs. Therefore, they decided to do the visual search. *See* State v. Boll, 651 N.W.2d 710, 719 (S.D. 2002)("illegal search [of defendant's chicken coop] remained at least a part of the reason for" officers' second visit and search of coop).

Finally, Tavares' statement that he kept his marijuana in the motel room was not independent of the dog sniff search. O'Brien testified that when he interviewed Tavares his intention was to learn Tavares' "association with the room and…if [he was] willing to put that association on paper…." O'Brien was seeking information viewed from the lens of his earlier dog sniff search in order to tie Tavares to the room. Furthermore, Tavares at first denied any connection to the motel; however, he was being held in the back of a cruiser when the dog sniff occurred. This may have prompted him to feel that the "jig" was truly "up" and that he had better make a statement distancing himself from the room. Thus, this interrogation and the evidence it elicited was the fruit of the illegal dog sniff. *Cf.* United States v. Leake, 95 F.3d 409 (6th Cir. 1996) (evidence provided by coconspirators whose identities were uncovered by illegal search of defendant's house was not derived from independent source).

Even if the viewing of the scale and baggie, as well as Tavares' statement, were not

the product of the illegal dog sniff, if this Court determines that, as argued in Issue II, the visual sweep was illegal, the scale, baggie, and statement cannot remain in the warrant to justify the admission of the drugs and paraphernalia under the independent source doctrine. The independent source doctrine exists to "put[] the police in the same, not a *worse*, position [than] they would have been in if no police error or misconduct had occurred…." (emphasis in original) State v. Rogers, 18 Conn. App. 104, 111 (1988), *citing* Nix v. Williams, 467 U.S. 431 (1984). Allowing illegally obtained evidence from another search to justify admitting the contraband under the independent source doctrine would not put the police in the same position; it would put them in a better position. As explained in United States v. Johnson, 380 F.3d 1013, 1016 (7th Cir. 2004): "if police conduct an illegal search that does no harm because the same evidence would have been obtained lawfully, there is no need to punish them; but this assumes that the evidence would indeed have been obtained *lawfully,* for only then is there no harmful illegality."(emphasis in original).

Once all this information is excised from the warrant, the only facts left are: 1) a car pulled up to ABV, a "high crime" area. Id., exh. 19, para 3; 2) Eudy Tavares exited the car entered room 118 and then left within one minute. Id.; 3) after pulling the car over, police smelled marijuana in it; Id., para 4; 4) police found marijuana, a packet of heroin and some empty glass jars on Tavares' person. Id., para 5; 5) the driver of the car told the officers "my friend is staying in the motel and I don't know what he was getting." Id., para 6; 6) police found a few plastic baggies with some residue inside them in Tavares' bedroom at a separate location. Id., para 7; 7) police learned that the defendant and Victor Tavares rented room 118 for the week, paying $430 in cash. Id., para 8; 8) a light was on in the room but no one answered their knock. Id.

These facts fail to establish a nexus between drug activity and the motel room. The police themselves did not believe they had probable cause at this time because they continued to investigate rather than apply for a warrant. Broems' suspicion that Tavares was involved in a drug transaction because he briefly entered the motel room is nothing more

than speculation. Broems did not observe any furtive activity or suspicious hand-to-hand transactions. While the officers discovered marijuana on Tavares, they did not obtain any information that the contraband was connected to the motel room, either from Tavares or from the driver of the car. It was every bit as likely Tavares already had the marijuana before going into the motel room. And the drug paraphernalia found in Tavares' room added nothing to the probable cause calculation because there was no connection to the motel room. Thus, when all the tainted information is excised from the warrant, there is no probable cause to show that there was contraband in room 118.

H. The evidence would not have been inevitably discovered even if the illegal search did not occur.

The state raised the inevitable discovery exception in its brief to the Appellate Court and in its alternative grounds for affirmance. The Appellate Court did not reach this issue. Should this Court address the issue, it will find that the doctrine does not apply.

"Under the inevitable discovery rule, evidence illegally secured…need not be suppressed if the state demonstrates by a preponderance of the evidence that the evidence would have been ultimately discovered by lawful means…. [T]he state must demonstrate that the lawful means…were possessed by the police and were being actively pursued prior to the occurrence of the constitutional violation." (Citations omitted; internal quotation marks omitted) State v. Badgett, 200 Conn. 412, 433 (1986). The doctrine requires courts to avoid speculation in favor of "demonstrated historical facts capable of ready verification or impeachment…." (citations omitted; internal quotation marks omitted) State v. Brown, 331 Conn. 258, 287 (2019). Courts must "determine, viewing affairs as they existed at the instant before the unlawful search occurred, what would have happened had the unlawful search never occurred.... The court must find, "with a high level of confidence, that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor." (Citations omitted; internal quotation marks omitted.) Id.

At the instant before the unlawful search occurred, the officers did not have probable

cause to obtain a search warrant.[11] And this Court can have no confidence that the rest of the evidence would not have been inevitably discovered if not for the visual sweep. O'Brien's encounter with the defendant happened because he was securing the room in lieu of the decision to get a warrant. If the dog sniff had not happened, the police would not have had probable cause and O'Brien would not have taken this same action. And even if he had, it is unlikely it would have been at the precise moment that the defendant was walking near Home Court. Moreover, it was the dog sniff that prompted Broems to do a visual sweep of the room. The positive dog sniff result alerted him to the danger of the drugs being destroyed. This Court cannot confidently conclude that this evidence would have been inevitably discovered.

Finally, the police would not have obtained Tavares' confession if not for the dog sniff. Tavares was present when O'Brien conducted the dog sniff and knew that the officers knew about the drugs. His confession surely stemmed from this knowledge; thus he had the motivation to minimize his association with the room. Furthermore, there is no certainty that police would have obtained the same statement without the illegality. "[A] statement not yet made is, by its very nature, evanescent and ephemeral. Should the conditions under which it was made change, even but a little, there could be no assurance the statement would be the same." United States v. Vasquez De Reyes, 149 F.3d 192, 196 (1998).

As argued in the independent source section above, if this Court finds that Broems' visual sweep was illegal, and any of the evidence in the warrant would have inevitably been discovered by that illegal sweep, that evidence should be excised from the warrant. This Court must avoid putting the police in a better position than they would have been had they only done one illegal search. See Johnson, 380 F.3d at 1016.

[11] The defendant relies on his discussion about the lack of probable cause prior to the sniff in the independent source section just above this one.

I. The police should not be able to perform a dog sniff on a motel room door based only upon a reasonable and articulable suspicion.

As an alternative grounds for affirmance, the state proffers that if the dog sniff is a search, it should be based upon reasonable and articulable suspicion. The Appellate Court did not reach this issue. Correa, 185 Conn. App. at 331, fn. 21. Should this Court reach the issue it must hold that police must have probable cause and a warrant to do the dog sniff.

The Court in Kono has recognized that "a canine sniff of a residence is entitled to significantly more protection than a canine sniff of an automobile or a piece of luggage at a public airport." Kono, 324 Conn. at 112. Kono reinforced the central principle that a citizen's greatest expectation of privacy is in his or her home. Id. As argued above, a motel room is a home. A citizen retreats to his motel room to engage in his most intimate activities, whether the room is the sole roof over his head, or he has another, more permanent home far away.

Even if there is a lesser expectation of privacy in a motel room, such an expectation is certainly greater than in a suitcase in an airport, an automobile on the road, or mail at the post office. As the state noted in it Appellate Court brief, Connecticut courts apply the reasonable and articulable suspicion standard to dog sniff of lawfully stopped cars, State v. Torres, 230 Conn. 372, 380-384 (1994) and packages at the post office. State v. Waz, 240 Conn. 365, 371 (1997). These moveable objects, found in public areas, do not command the same level of protection as a motel room.

Even if the Court determines that a reasonable and articulable suspicion is the proper standard, at the time of the dog sniff the police did not have a reasonable and articulable suspicion that there were drugs in the room. "[R]easonable and articulable suspicion requires that the investigating officer 'be able to point to specific and [identifiable] facts which, taken together with rational inferences from those facts,' provide 'a particularized and objective basis' for suspecting that criminal activity is afoot. (Citations omitted; internal quotation marks omitted.) Waz, 240 Conn. at 373. The fact that Tavares entered and quickly exited the room reveals nothing. He could have gone in to grab keys or a coat. Without further proof of a

connection to room 118, Tavares' marijuana could have come from anywhere. The baggies found in his grandmother's house are more indicative of the presence of drugs in the grandmother's house rather than in room 118. The fact that Victor Tavares had registered for the motel room also does not contribute to reasonable suspicion because even if Tavares was Victor, renting a motel room is not a suspicious activity by itself. And Tavares' denial of being at the motel does not connect to the drugs. Thus, the state's claim is without merit.

II. THE APPELLATE COURT ERRED IN DETERMINING THAT THE POLICE'S VISUAL SWEEP OF THE DEFENDANT'S MOTEL ROOM WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES.

The Appellate Court's acceptance of the officers' justifications for the visual sweep opens the door to police justifying warrantless entries into homes based upon speculation. The Court recognized that the police never saw or heard anything in room 118 that would suggest that the destruction of evidence was imminent. Moreover, the Court did not consider that both people who police believed had rented room 118 were not in the room. Rather, the Court relied on unfounded concerns that others who police had spoken to "might" be making phone calls to someone in the room. Indeed, if there were truly an exigency, the police would have conducted the search right after the dog sniff, when they decided to get a warrant and when they did not know the whereabouts of the defendant. The officers did not have exigent circumstances and the Appellate Court's decision must be reversed.

A. Relevant Facts

The relevant facts are set forth in the statement of facts above.

B. Standard of review and legal principles related to this claim.

The standard of review and legal principles related to this claim that are set forth in Issue I, Sections C and D are incorporated herein.

C. The Appellate Court decision.

The Appellate Court held that the police officer's visual sweep of the motel room was permissible pursuant to the exigent circumstances doctrine. Correa, 324 Conn. App. at 332.

The Court held that at the time of the visual sweep the officers had probable cause that a crime had occurred in the motel room based on: Tavares' brief visit to room 118 at that location and time of night; the discovery of drugs on Tavares; the items consistent with narcotics packaging found in Tavares' bedroom; the registration bearing the names of the defendant and Victor Tavares; defendant making eye contact with O'Brien and changing direction; the wad of cash and the key card found on the defendant; and the defendant's statement "nothing in the room is mine." Id.

The Appellate Court then determined that the visual sweep was justified by exigent circumstances. The Court emphasized the police's contact with four people who were not taken into custody prior to the visual sweep. Correa, 324 Conn. App. at 337. The Court found it reasonable that the police would be concerned that unknown passersby might have observed the investigation. Id. The Court credited the police officer's concern that phone calls may have occurred between any of those people and "possible confederates, prompting the destruction of evidence inside of the room." Id.

D. There were no exigent circumstances justifying the visual sweep.

The term exigent circumstances refers to "those situations in which law enforcement agents will be unable or unlikely to effectuate an arrest, search or seizure, for which probable cause exists, unless they act swiftly and, without seeking prior judicial authorization." (Citations omitted; internal quotation marks omitted) State v. Guertin, 190 Conn. 440, 446 (1983); State v. Aviles, 277 Conn. 281 (2006). "The test is whether, under the totality of the circumstances, the police had reasonable grounds to believe that if an immediate arrest [or entry] were not made, the accused would be able to destroy evidence, flee, or otherwise avoid capture, or might, during the time necessary to procure a warrant, endanger the safety or property of others." State v. Kendrick, 314 Conn. 212, 227–28 (2014). The test is an objective one. Id. The burden is on the government to demonstrate that exigent circumstances existed at the time of the warrantless entry. Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984); Chimel v. California, 395 U.S. 752, 762 (1969).

The Appellate Court failed to consider that Tavares and the defendant, the two people most likely to destroy contraband, were outside the room. The Court credited the officers' concerns that the driver of the Yukon and Tavares' brother were making calls to tell some unknown person to destroy the drugs in the room. But the officers did not have even a glimmer of evidence that such calls might occur or to whom they would go. Even worse, the Court expressed concerns about people who might have passed the police when they pulled over the Yukon or when they seized the defendant, even though there is no evidence in the record of any such people. There could always be some unknown person or co-conspirator in any area that police want to search. The exigent circumstances exception requires much more definitive proof. *See* State v. Harris, 10 Conn. App. 217, 229 (1987)("no compelling necessity for immediate action" when defendant had left the premises); State v. Aviles, 277 Conn. 281, 295 (2006)(defendant inside bedroom valid exigent circumstance).

Furthermore, as the Court conceded, the officers did not hear any noise coming from the room, nor did they see anyone through the window. The only fact they gave in support of the search was that a light was on in the room. But a single light is not enough to create exigent circumstances. The police must see activity or hear noises which convey the message that evidence is being destroyed or someone is in danger. *Compare* United States v. Leveringston, 397 F.3d 1112, 1116 (8th Cir. 2005)(police could conclude evidence being destroyed when "occupant … reacted to police knocking by… expressing surprise, and then immediately shutting the curtains….followed by sounds of pots and pans slamming, dishes breaking, water flowing, and a garbage disposal running). *with* United States v. Ramirez, 676 F.3d 755, 763 (8th Cir. 2012)(no exigency when "at the time these officers sought to gain entry by swiping the key card, they had no indication whatsoever that there was any activity at all in the motel room, let alone any activity that might lead them to believe that the occupants inside might imminently destroy evidence") *and* United States v. Collins, 510 F.3d 697, 701 (7th Cir. 2007)("if police hear [destruction of evidence] being committed within a house… then they can enter immediately, without knocking; if they do not hear [evidence

being destroyed] they have to get a warrant"). The Court did not acknowledge that exigent circumstances requires definitive evidence like noise or movement.

The Appellate Court did not recognize that the officers did not conduct the visual sweep immediately after the dog sniff when they had no idea of the defendant's whereabouts. O'Brien actually left the property to stake out room 118. A truly exigent circumstance is an imminent threat to the destruction of evidence. The officers' failure to conduct the search earlier reveals that they did not believe there was a serious threat, even when the defendant was unaccounted for. Any exigency was dissipated, not created, when police located the defendant and knew her could not access the room.

State v. Kendrick, 314 Conn. 212 (2014) is instructive. In Kendrick, New Jersey police were investigating a murder. They obtained a cell phone number they believed belonged to the murder suspect, Malik Singer. They tracked the location of the cell phone to an address in Stamford, CT. A Stamford officer went to the address and learned from the landlord that the daughter of one of the tenants was spending time with an African-American man who "fit Singer's general description." Id., 216-217. Shortly thereafter, other officers arrived with the arrest warrant for Singer. They knocked on the door and the tenant allowed them in. The tenant told them that her daughter was in a bedroom a few feet away with two African-American men. Id. 219-220. The officers knocked on the bedroom door and entered, discovering the defendant, the daughter and another man. The defendant lunged towards a backpack. The police restrained the defendant, and found a gun in the backpack. Id., 221.

In Kendrick, the police knew that they were searching for a dangerous criminal who was likely armed. They had reason to believe he was in the apartment, based upon the cell phone tracking, the information about a stranger fitting the murderer's general description spending time there, the fact that there were two African American men in the room and an unrecovered murder weapon. Kendrick, 314 Conn. at 237-238. Police were searching for someone they knew existed in a place he was likely to be. In contrast, in the present case, the police had no indication that there was a single person in the room. They relied upon a

very general concern that it was possible that an unknown associate *might* be in the room who learned of the police investigation from someone who *might* have called them to alert them to the police presence. This is simply not enough for exigent circumstances.

The Appellate Court's reliance on State v. Reagan, 18 Conn. App. 32 (1989) is misplaced. In Reagan, the police were surveilling the defendant's home. They saw what looked like a drug deal between Reagan and another man. The man left and stopped at a gas station very close to the defendant's home where he spoke to someone. The police arrested and searched him right in front of several people at the gas station, as well as a woman at the corner of the defendant's street who they thought may have also made a brief visit to the defendant's home. Id., 34-35. Fearing that someone else connected with the defendant had seen the arrest and search, and would alert the defendant, the police properly entered the defendant's home and secured it until a warrant could be obtained Id., 39. In Reagan, the defendant was still in his home while the police were getting a warrant. By contrast, in the present case, the defendant was with the police officers outside the motel room and there was no indication whatsoever that there was some unknown person inside the room. For these reasons, the exigent circumstances doctrine does not apply here.

Moreover, the police could have posted an officer right outside the door to watch and listen for activity in the room that would signal tampering. *See* United States v. Adams, 621 F.2d 41 (1st Cir. 1980)(police could have staked out apartment while obtaining warrant). Thus there was not "such compelling necessity" to avoid delay. Guertin, 190 Conn. at 451.

The Appellate Court also erred in concluding that the police had probable cause at the time of the visual sweep. For the reasons more fully explicated in section E below, the police did not have probable cause at this time. However, if this Court finds that there was probable cause, but it was obtained illegally by the dog sniff search, the Court should not include it in the probable cause analysis. As argued in Issue I, section H. above, using evidence from one illegal search to justify another illegal search puts police in a better position than they would have been in had the second illegal search never happened. Thus, all the evidence

from both illegal searches should be discounted. Johnson, 380 F.3d at 1016.

E. The independent source doctrine does not apply because once the tainted evidence is excised from the warrant, the remaining facts do not support probable cause.

The Appellate Court did not reach the state's claim that the independent source doctrine justified the warrantless visual sweep. Correa, 185 Conn. App. at 340, fn. 23. However, the state has raised the doctrine as an alternative grounds for affirmance. The independent source doctrine does not justify the visual sweep.

Tavares' statement was the fruit of the officers' unlawful visual search.[12] By the time the officers spoke to Tavares, they knew that K-9 Cooper had alerted for drugs at room 118. They also had opened the door and seen a scale and a baggie, equipment that is ubiquitous in drug dealing. O'Brien testified that he interviewed Tavares at headquarters. His intention was to learn Tavares' "association with the room and…if [he was] willing to put that association on paper…." 2/29/16T166. O'Brien suspected Tavares of being associated with any drugs in the room and was trying to tie him to the room. According to the warrant, Tavares did exactly that, making a statement in which he explained that the defendant let him leave the marijuana in his motel room. Thus, this interrogation and the evidence it elicited was derivative of the illegal visual search of the room.

If this Court finds that the dog sniff is also illegal, this Court should excise all the evidence found as to that search when determining whether the warrant has probable cause. As argued more fully in Issue I, section H, this Court must not reward the police for conducting two illegal searches. The Court must avoid putting the police in a better position than they would have been had they only done one illegal search. See Johnson, 380 F.3d at 1016.

Once all this information is excised from the warrant, it does not contain probable

[12] It is not inconsistent to argue that Tavares's statement is derivative of both the illegal dog sniff search and the illegal visual search. The chain of events that occurred from the dog sniff up through Tavares's statement are all connected with each other. Each occurrence is derivative of the earlier occurrences.

cause. Once the tainted information is removed are the only facts left are: 1) Broems saw a Yukon pull up to ABV; 2) Broems saw the passenger get out of the Yukon, enter room 118 and then leave within one minute; 3) Broems pulled the Yukon over; 3) Police approached the car, smelled marijuana and found marijuana, a packet of heroin and empty glass jars on Tavares; 5) the driver of the car told the officers "my friend is staying in the motel and I don't know what he was getting;" 6) plastic baggies with some residue inside them that were found in Tavares' room; 7) the dog sniff evidence; 8) the money and the key card found when police patted down the defendant, and 9) the defendant's statement, "nothing in the room is mine."

Even construing these remaining facts as broadly as possible, there is no probable cause to search the motel room. As argued in the Issue I, the first six facts fail to establish a nexus between drug activity and the motel room. The remainder of the evidence, the dog sniff, the money and key card, and the defendant's statement "nothing in the room is mine" likewise did not rise to the level of probable cause. During the hearing O'Brien testified that Cooper's alerts often did not result in drugs being found because the residual odors of drugs could linger in the area for days or weeks after the drugs were gone. Given that the police had made arrests for drugs at ABV in the past, police could not determine whether Cooper alerted to drugs in room 118 at that time or drugs had been there days or weeks ago. The money may have aroused the officers' suspicion that the defendant was selling drugs, but certainly did not establish a connection to drugs that would amount to probable cause. The defendant's statement "nothing in the room is mine" is extremely vague and makes no allusion to any sort of drug activity taking place in the room. For all these reasons, once the evidence found by the illegal search of the bedroom, as well as the statement from Tavares that was derivative of the illegal search is excised from the warrant, the search warrant is not supported by probable cause. The drugs and paraphernalia that were seized as the result of the illegal search must be suppressed as the fruit of the poisonous tree.

CONCLUSION

The defendant requests that the Court overturn his convictions and order a new trial.

Respectfully Submitted,
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S.C. 20246

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RICARDO CORREA | JUNE 12, 2019

CERTIFICATION

Pursuant to Conn. Prac. Bk. §§ 62-7 and 67-2 the undersigned certifies that the attached brief and appendix are true copies of the electronically submitted brief and appendix, and that true copies were mailed first class postage prepaid this 12th day of June 2019, to: Michele C. Lukban, Senior Assistant State's Attorney, Juris No. 409700, Office of the Chief State's Attorney, 300 Corporate Place, Rocky Hill, CT 06067, Tel. (860)-258-5807, Fax (860)-258-5828, DCJ.OCSA.Appellate@ct.gov.

It also is certified that true copies were delivered via first class mail to Ricardo Correa.

It also is certified that the brief and appendix comply with all the provisions of Conn. Prac. Bk. § 67-2 including electronic delivery to all counsel of record.

The undersigned attorney hereby certifies that this brief and appendix does not contain any name or other identifying information that is prohibited from disclosure by rule, statute, court order or case law; and that the brief complies with all provisions of this rule pursuant to Conn. Prac. Bk. § 67-2.

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