SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF STAMFORD/NORWALK
AT G.A. 1 (STAMFORD)

S.C. 20246

STATE OF CONNECTICUT

V.

RICARDO CORREA

BRIEF OF THE STATE OF CONNECTICUT-APPELLEE
WITH ATTACHED APPENDIX

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1. Did the Appellate Court properly determine that a police canine 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?
2. Did the Appellate Court properly conclude that the visual sweep of the defendant's motel room was justified by exigent circumstances?

STATEMENT OF ALTERNATIVE GROUNDS

1. If the police canine sniff of the exterior threshold of the motel room door constitutes a search under article first, § 7, of the Connecticut constitution, should police canine sniffs be deemed constitutional under our state constitution if based on reasonable and articulable suspicion?
2. If the police canine sniff at issue here is deemed unconstitutional, was the evidence admissible under the independent source doctrine?
3. If the police canine sniff at issue here is deemed unconstitutional, was the evidence admissible under the inevitable discovery doctrine?

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NATURE OF THE PROCEEDINGS

On February 5, 2013, Stamford police officers executed a search warrant for the motel room rented by the defendant, Ricardo Correa, and discovered a large amount of marijuana, heroin with an estimated street value of approximately $85,000, and drug paraphernalia. T. 10/19/16: 5-6. Most of the heroin was located inside a dresser. T. 2/29/16: 200. The defendant filed a Motion to Suppress Evidence ("Motion to Suppress"), seeking suppression of all the items seized from his motel room. Defendant's Appendix ("D.App."), A5 (Motion to Suppress Evidence). After an evidentiary hearing on February 29, 2016, the trial court, Blawie, J., issued a Memorandum of Decision, dated June 22, 2016, denying the Motion to Suppress. D.App., A72 (Memorandum of Decision ("Mem.Dec.")).

On October 19, 2016 the defendant pleaded nolo contendere to various drug related offenses and the trial court imposed a total effective sentence of nine years' incarceration and six years' special parole. D.App., A85 (Plea of Nolo Contendere), A91 (Judgment). On March 31, 2017, the trial court specified that its ruling denying the Motion to Suppress was dispositive of the case. D.App., A89 (Transcript of Ruling).

The Appellate Court unanimously affirmed the trial court's denial of the Motion to Suppress. State v. Correa, 185 Conn. App. 308, 340 (2018). Thereafter, this Court granted the defendant's Petition for Certification and certified two issues for review. State v. Correa, 330 Conn. 959 (2019); D.App., A131. On February 1, 2019, the state filed a Statement of Alternative Grounds, identifying three alternative bases upon which to affirm the Appellate Court's decision as to the constitutionality of the canine sniff of the exterior of the motel room door. D.App., A133.

COUNTERSTATEMENT OF THE FACTS

The Appellate Court summarized the trial court's findings of fact, as set forth in its memorandum of decision denying the defendant's motion to suppress, as follows:

> During the early morning hours of February 5, 2013, Sergeant Christopher

Broems[1] of the Stamford Police Department was parked on Home Court, a street immediately behind the America's Best Value Inn motel (motel) on East Main Street in Stamford. Sergeant Broems, a nineteen year veteran of the Stamford Police Department who also spent three years in the New York City Police Department, had made many prior arrests at the motel for narcotics, prostitution, and other criminal activity. From the street, Sergeant Broems was surveilling the motel for evidence of possible illegal activity. He was parked approximately fifty yards away from the motel and had a clear, well illuminated view of the motel, which included two floors of numbered motel room doors that opened onto the back parking lot.

At approximately 1:20 a.m., Sergeant Broems observed a silver colored 2004 GMC Yukon pull into the motel parking lot. Only the passenger in the Yukon, who was later determined to be Eudy Taveras, exited the Yukon, while the operator remained in the vehicle with the headlights on. Taveras approached and entered room 118 of the motel, which was on the first floor, where he remained for less than one minute. Taveras returned to the vehicle, which then left the motel. Given the location, time of night, and duration of the visit, Sergeant Broems believed that he may have witnessed a narcotics transaction out of room 118. Sergeant Broems radioed to a nearby colleague, Officer Vincent Sheperis, that he intended to stop the Yukon, and then drove in the direction of the Yukon.

When the operator of the Yukon, who was later determined to be Charles Brickman, observed Sergeant Broems approaching the Yukon in his marked Stamford Police SUV, he turned off the Yukon's headlights. A short distance from the motel, Sergeant Broems stopped the vehicle. Officer Sheperis joined Sergeant Broems, acting as backup. When Sergeant Broems and Officer Sheperis approached the vehicle, they both smelled a strong odor of marijuana emanating from inside the Yukon. Sergeant Broems and Officer Sheperis removed Taveras from the vehicle, and Taveras admitted to possessing "weed." A search of Taveras revealed two glass jars with yellow tops containing marijuana, along with three other similar, but empty, yellow topped glass jars, as well as a knotted corner of a plastic sandwich bag containing heroin. On the basis of this evidence, Sergeant Broems requested a sweep of the Yukon by a canine officer trained in the detection of narcotics.

A canine officer, Cooper, and his Stamford Police Department handler, Sergeant Seth O'Brien, arrived on the scene shortly after Sergeant Broems' request. Cooper alerted to the center console of the vehicle, but the officers found no additional drugs. Brickman was found to have no drugs on his person. Brickman was issued an infraction ticket for operating a motor vehicle without headlights, and allowed to drive off in the Yukon. The officers detained Taveras.

Taveras informed Sergeant O'Brien that he lived with his grandmother nearby

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[1] On page 2, note 1, of his brief, the defendant represents that Sergeant Broems has been arrested and forced to retire. The citation provided pertains to a May 16, 2019 announcement. This information is not part of the record below and is not properly before this Court. State v. Gilnite, 202 Conn. 369, 378 (1987).

on Charles Street in Stamford. At that point, Sergeant Broems, Officer Sheperis, and Sergeant O'Brien went to the grandmother's home on Charles Street, where they spoke with Taveras' brother. Taveras' grandmother signed a consent form allowing the officers to search Taveras' bedroom. In Taveras' bedroom, the officers found numerous plastic bags with the corners cut off, consistent with narcotics packaging, along with other bags containing an off white powder residue.

The officers then returned to the motel. They spoke with the manager of the motel, who advised them that several days earlier, the defendant had rented room 118 for the week, until February 8, 2013, paying $430 in cash.[2] The manager provided the officers with documentation concerning room 118, including a photocopy of the defendant's driver's license. The guest registration card for room 118 also included the name of a second individual, Victor Taveras. Although the officers were not certain who Victor Taveras was, Sergeant O'Brien testified that they believed that he most likely was Eudy Taveras.

After speaking with the manager, the officers went together to knock on the door of room 118. The officers observed a light on in the room, but no one answered the door. Sergeant O'Brien then retrieved Cooper and conducted a narcotics sweep, which included several passes along the first floor walkway where room 118 is located.[3] On each pass, Cooper consistently alerted to the presence of narcotics at the door to room 118.

It was then approximately 3 a.m. on February 5, 2013, a little over ninety minutes since Sergeant Broems first observed Taveras enter and exit room 118. At this point, on the basis of all that had transpired since observing Taveras enter and exit room 118, Sergeant Broems decided to apply for a warrant to search room 118. The officers decided that Sergeant Broems and Officer Sheperis would return to Stamford Police headquarters to prepare the search warrant and to process Taveras for his drug charges, and Sergeant O'Brien would remain behind on Home Court, in the same area where Sergeant Broems was parked earlier, to surveil room 118 for any possible activity. Very shortly after the officers split up, however, just as Sergeant O'Brien was getting into position to surveil room 118, he observed the defendant on foot near the motel at the corner of Home Court and East Main Street, walking away from the motel. Sergeant O'Brien, who recognized the defendant, immediately radioed for Sergeant Broems and Officer Sheperis to return to the motel to stop the defendant.

While walking on Home Court, the defendant made eye contact with Sergeant O'Brien, who was in a marked police SUV. After the defendant made eye contact with Sergeant O'Brien, the defendant changed his direction and began walking east on East Main Street. About 100 yards from the motel, Sergeant O'Brien approached the

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[2] Footnote 2: "As the result of a prior case, the Stamford police already knew the defendant by name."

[3] Room 118 opens directly onto an open air corridor or breezeway, with a low abutment between the corridor and the parking lot. State's Exhibits ("St.Exs.") 8 & 9 (photographs of door to room 118) and 13-16 (photographs of first floor breezeway).

defendant, stepped out of his police vehicle, and, addressing the defendant as "Ricky," told the defendant that he needed to speak with him. Initially, the defendant was cooperative. Sergeant Broems arrived on the scene, and the defendant was searched. The officers found that the defendant was carrying a large wad of cash, amounting to over $3600, in his pocket, along with a key to a room at the motel. Sergeant O'Brien informed the defendant that Taveras was taken into custody, and that "the jig is up." The defendant responded, "nothing in the room is mine." The defendant agreed to open the door to room 118 for the officers. When the officers and the defendant reached the threshold of room 118, however, the defendant changed his mind and refused to grant them entry. The officers informed the defendant that if he did not consent to a search of the room, they were going to obtain a search warrant.

The defendant informed Sergeant Broems that there was no one in the room. To ensure that there was no one else inside the room that might destroy evidence before the officers could obtain a search warrant, however, Sergeant Broems used the defendant's room key to open the door. After opening the door, Sergeant Broems announced "Police!" and looked inside the room for approximately fifteen to thirty seconds.[4] Once he was satisfied that the room contained no occupants, Sergeant Broems closed the door. While the door was open, neither Sergeant Broems, nor any other officer or Cooper, set foot in or otherwise physically entered room 118. When he did not observe anyone in the room, Sergeant Broems "cleared" room 118. Although he did not enter the room, or take any steps to seize any evidence located inside the room, Sergeant Broems did observe a large black digital scale on a table, as well as a plastic sandwich bag lying on the floor nearby. The officers advised the defendant that he was free to leave the motel, and the defendant left.

Following the defendant's departure, other officers of the Stamford Police Department arrived at the motel. Those officers were assigned to watch room 118 while the investigating officers prepared an application for a search warrant, with Sergeant O'Brien and Officer Sheperis acting as affiants. Several hours later, at 9:20 a.m., the court, Hon. Richard F. Comerford, Jr., judge trial referee, signed the search warrant for room 118.

When the police executed the search warrant, they discovered a total of approximately 200 grams of heroin, with a street value of approximately $85,000. The heroin was broken down into dozens of smaller baggies or glassine folds for individual sale. The officers also discovered a large quantity of U.S. currency, a laptop computer, and paper documents pertaining to a street gang, the Latin Kings. The police also discovered over four ounces of marijuana and a quantity of packaging materials, along with a vacuum sealing machine, two sifters, and two digital scales. These items were consistent with the operation of a drug factory by the defendant in the motel room. After the search warrant was executed, the police arrested the defendant at Taveras' grandmother's house on Charles Street. The defendant was charged with a variety of

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[4] Footnote 3: "Sergeant O'Brien characterized the sequence of events as follows: '[Broems] cracked the door, stuck his head in, cleared it, you know, visually and then he relayed that nobody else was in there, he closed the door.'"

felony drug offenses. [footnote omitted].

Correa, 185 Conn. App. at 311-316.

In his Motion to Suppress, the defendant only challenged Broems' use of the room key he found on the defendant to open the door to the defendant's motel room prior to the issuance of the search warrant. D.App., A5; A10; A40. The trial court concluded that suppression was not warranted because the opening of the door fell within the exigent circumstances doctrine based on the potential destruction of evidence; Mem.Dec. at 9-10; and, alternatively, that the seized evidence was admissible under the independent source doctrine. Mem.Dec. at 10-12. For the first time on appeal, the defendant alleged that the evidence should be suppressed because K-9 Cooper's sniff of the threshold of the motel room door was an unreasonable search under our state constitution and that the resolution of this issue is controlled by State v. Kono, 324 Conn. 80 (2016).

ARGUMENT

Both the fourth amendment to the federal constitution and article first, § 7 of the state constitution protect against unreasonable searches or seizures. Under the exclusionary rule, evidence is suppressed if it is found to be the "fruit" of any prior police illegality. State v. Colvin, 241 Conn. 650, 656 (1997). Evidence need not be suppressed, however, if the evidence at issue has been obtained by means sufficiently distinguishable to be purged of the primary taint. Id. at 656-57. The relevant inquiry is whether "the challenged evidence is in some sense the product of illegal government activity." Id. at 657.

As to the defendant's assertion that the evidence should be suppressed because Cooper's sniff of the threshold of the motel room door is an unreasonable search under article first, § 7, the Appellate Court properly rejected his argument that resolution of this issue is controlled by Kono, 324 Conn. 80, and properly concluded that the defendant's claim failed

Golding's third prong.[5] First, contrary to the defendant's assertion; Defendant's Brief ("D.Br.") at 16; a motel room is fundamentally different from a private dwelling and Kono is not controlling. See § II, C. Second, even if the dog sniff here constitutes a search, it did not violate the defendant's state constitutional rights because it was based on reasonable and articulable suspicion. See § II, D. Third, as to the independent source doctrine, if the record is adequate for review, because of the conflicting evidence before the trial court the defendant has failed to bear his burden of providing evidence of a taint warranting suppression. See, § II, E. Fourth, even if the dog sniff is considered an unreasonable search, suppression is not warranted under the inevitable discovery exception to the warrant requirement. See § II, F.

With regard to Broems' opening of the motel room door, the Appellate Court properly affirmed the trial court's conclusion that Broems' conduct fell within the exigent circumstances exception to the warrant requirement. See § III, B. Alternatively, the trial court properly concluded that the seized evidence was admissible under the independent source doctrine because the lawfully obtained evidence in the warrant is sufficient to establish probable cause.[6] See § III, C.

I. RELEVANT LEGAL PRINCIPLES

In determining whether the police conducted an unreasonable search under article first, § 7 of the state constitution, this Court employs the same analytical framework used under the federal constitution. Kono, 324 Conn. at 89. Under this framework, the defendant must establish that he had a reasonable expectation of privacy in the area searched. If he does not, then the police action in question has no constitutional ramifications. Id. at 89-90.

The state bears the burden of establishing the existence of an exception to the warrant requirement and that the evidence is untainted. Colvin, 241 Conn. at 658 n.5; State v.

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[5] State v. Golding, 213 Conn. 233 (1989).

[6] Because the Appellate Court concluded that the search was lawful on the basis of exigent circumstances, it declined to address the defendant's challenge to this alternative basis. State v. Correa, 185 Conn. App. 308, 340 n.23 (2018).

Badgett, 200 Conn. 412, 424, cert. denied, 479 U.S. 940 (1986); Cf. State v. Geisler, 222 Conn. 672, 691 (1992) (exceptions to warrant requirement applicable to state constitution as well as to federal constitution). The defendant, however, bears the burden of producing "specific evidence demonstrating taint." In other words, the defendant was required to produce evidence establishing a causal connection between the alleged illegal search and the discovery of the illegal drugs and drug paraphernalia in room 118. Colvin, 241 Conn. at 658 n. 5.

This Court's standard of review in connection with a trial court's denial of a motion to suppress evidence is well-established. A trial court's factual findings will not be disturbed unless they are clearly erroneous in view of the evidence and pleadings in the whole record. As to its legal conclusions, this Court must determine whether they are legally and logically correct and whether they find support in the facts set out in the memorandum of decision. Colvin, 241 Conn. at 656.

II. THE APPELLATE COURT PROPERLY DETERMINED THAT THE CANINE SNIFF OF THE OUTSIDE OF THE DEFENDANT'S MOTEL ROOM DOOR WAS NOT A SEARCH THAT VIOLATED THE DEFENDANT'S RIGHTS UNDER ARTICLE FIRST, § 7 OF THE STATE CONSTITUTION

The issue before this Court in Kono, 324 Conn. at 82, was "whether article first, § 7 of the Connecticut constitution prohibits the police from conducting a warrantless canine sniff of the front door of a condominium in a multiunit condominium complex, and the common hallway adjacent thereto, for the purpose of detecting marijuana inside the condominium." (Footnote omitted). Here, the Appellate Court correctly concluded that Kono is distinguishable and is not applicable to the facts of this case.

A. Appellate Court's Decision

The Appellate Court concluded that the defendant's claim failed Golding's third prong based on its rejection of his assertion that his claim is indistinguishable from, and controlled by, this Court's decision in Kono. Correa, 185 Conn. App. at 322, 329. After reviewing Kono; Id. at 325-29; the Appellate Court applied the case-by-case analysis utilized in Kono and

concluded that the defendant had failed to show a reasonable expectation of privacy in the outside of the door to his motel room. Id. at 330. The Appellate Court reasoned that

> [t]his case concerns the shared open walkway of a motel.[ ] In *Kono*, the hallway was closed off, and located on the *inside of* the condominium complex structure, which was restricted by a locked door. It was accessible only by keycard access, and the police needed to obtain permission before entering the hallway. The open, shared walkway here, was located on the outside of the structure. It was open to the public, as well as completely illuminated and visible to anyone as far as fifty yards away, even at nighttime. Furthermore, no permission was required to traverse the walkway, evidenced by the ease with which the officers, and eventually Cooper, did so. We conclude that because of the nature of the walkway on which room 118 was located, *Kono* is distinguishable from the present case.

(Emphasis in original; footnote omitted). Id. at 329-30 and n.19 (collecting federal cases addressing similar factual scenario).

The Appellate Court also rejected the defendant's reliance on State v. Benton, 206 Conn. 90, cert. denied, 486 U.S. 1056 (1988), for the proposition that a person who inhabits a motel room has a reasonable expectation of privacy equal to that of an occupant of any residence. Correa, 185 Conn. App. at 329 n.18. The Appellate Court noted that in Benton this Court had acknowledged that "[t]he shared atmosphere and the nearness of one's neighbors in a hotel or motel or apartment in a multiple family dwelling, however, diminish the degree of privacy that one can reasonably expect or that society is prepared to recognized as reasonable." Id. at 329 n.18, quoting Benton, 206 Conn. at 96. The Appellate Court therefore concluded that "this case is one in which the nature of the location to be searched, the outside of a door located on an open, shared walkway, diminished the degree of privacy that the defendant reasonably could expect or that society is prepared to recognize as reasonable."[7] Id.

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[7] The Appellate Court further concluded that the defendant was unable to prevail under the plain error doctrine. Correa, 185 Conn. App. at 331-32. In light of its determination that the dog sniff here was lawful, the Appellate Court did not address either the applicability of the independent source doctrine or whether a dog sniff is constitutionally valid under our state constitution if it is supported by a reasonable and articulable suspicion. Id. at 331 nn. 20 & 21.

B. State v. Kono

In Kono, this Court concluded that "a canine sniff directed toward a *home* – whether freestanding or part of a multitenant structure – is a search under article first, § 7, and, as such, requires a warrant issued upon a court's finding of probable cause." (Emphasis added). Kono, 324 Conn. at 122. As part of the fact-specific, case-by-case analysis of whether "a defendant's actual expectation of privacy in a particular place is one that society is prepared to recognize as reasonable;" Id. at 89-90; this Court specified that "chief" among the principles guiding its analysis was "the bedrock principle that '[p]rivacy expectations are . . . highest and are accorded the strongest constitutional protection in the case of a private home and the area immediately surrounding it." (Citations omitted). Id. at 91.

Despite the existence of conflicting federal court decisions, the Kono Court determined that "the better reasoned federal case law concerning the propriety of residential canine sniffs under the fourth amendment" supported this Court's conclusion[8] and was true whether the issue was reviewed under the Katz[9] line of privacy based decisions or under the principles

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[8] The two factually similar federal cases upon which this Court relied are United States v. Thomas, 757 F.2d 1359, 1366, 1367 (2d Cir. 1985), cert. denied sub nom Fisher v. United States, 474 U.S. 819 (1985), and United States v. Whitaker, 820 F.3d 849 (7th Cir. 2016). State v. Kono, 324 Conn. 80, 93 and n.9, 101-02, 113-14 (2016). The Thomas Court concluded that because of a defendant's "heightened expectation of privacy inside his dwelling," a canine sniff outside of his apartment constituted an illegal search because he "had a reasonable expectation of privacy that the contents of his closed apartment would remain private, that they could not be 'sensed' from outside his door." Thomas, 757 F.2d at 1366-1367.

In Kono, this Court observed that Whitaker is similar to Thomas in determining that a dog sniff of a home is distinguishable from sniffs in public places. Kono, 324 at 102. The Whitaker Court further noted that although Whitaker did not have a reasonable expectation of "complete privacy" in his apartment hallway, that did not also mean "that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public." Id. at 102-03.

[9] In Katz v. United States, 389 U.S. 347, 351-52, 353 (1967), the Court clarified that whether a person's fourth amendment rights have been violated is not solely dependent upon the traditional trespassory violation of property but, rather, also focuses on whether an individual has an expectation of privacy that society is prepared to recognize as reasonable. See Florida v. Jardines, 569 U.S. 1, 11 (2013) (the Katz "reasonable-expectations test 'has

of curtilage. Kono, 324 Conn. at 104. Although factually distinguishable, this Court also sought guidance from the decisions in Kyllo v. United States, 533 U.S. 27 (2001),[10] and Florida v. Jardines, 569 U.S. 1 (2013).[11] With regard to United States v. Place, 462 U.S. 696

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been *added to*, not *substituted for*' the traditional property based understanding of the Fourth Amendment." (Emphasis in original)).

[10] With regard to the use of a thermal-imaging device aimed at a private home from a public street, the Court concluded that "[w]here, 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." Kyllo v. United States, 533 U.S. 27, 40 (2001). The Court noted that the home is at "the very core" of the Fourth Amendment and that under the Katz test, the search of the interior of the home necessarily implicates the minimal expectation of privacy that society recognizes as reasonable. Id. at 31, 34. In rejecting the argument that use of the thermal imager was not unconstitutional because it "did not 'detect private activities occurring in private areas,'" the Court reasoned that under fourth amendment jurisprudence "*all* details are intimate details, because the entire area is held safe from prying government eyes." (Emphasis in original). Id. at 37.

[11] In Florida v. Jardines, 569 U.S. at 3, the Court addressed the issue of "whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." The majority resolved the issue on the traditional property basis, noting that the officers gathered their information from within the curtilage of the house and, thus "physically enter[ed] and occup[ied] the area to engage in conduct not explicitly or implicitly permitted by the homeowner." Jardines, 569 U.S. at 5-9. In distinguishing United States v. Place, 462 U.S. 696 (1983), and Illinois v. Caballes, 543 U.S. 405 (2005), the Court specified that "[i]t is not the dog that is the problem, but the behavior that here involved the use of the dog." Id. at 9 n.3, 10-11. The Court stated that it did not need to address whether the investigation was unconstitutional under the Katz test because "[o]ne virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." Id. at 11.

In Kono, 324 Conn. at 99-100, this Court also looked to Justice Kagan's concurring opinion. Justice Kagan wrote separately "to note" that she "could just as happily have decided [the issue] by looking to Jardines' privacy interests." Jardines, 569 U.S. at 13 (Kagan, J., concurring). She suggested that such a privacy-based decision "would have explained that privacy expectations are most heightened in the home and the surrounding area. . . . And it would have determined that police officers invade those shared expectations when they use trained canine assistants to reveal within the confines of a home what they could not otherwise have found there." (Citations and internal quotation marks omitted). Id. Justice Kagan observed that "[i]t is not surprising that in a case involving a search of a home, property concepts and privacy concepts should so align" and further opined that if the Court had decided the case on privacy grounds, it would have realized that Kyllo had already resolved the issue and equated a drug-detecting dog to a thermal imaging device because a dog is

(1983), and Illinois v. Caballes, 543 U.S. 405 (2005),[12] the Kono Court acknowledged that these cases "support[ ] the conclusion that a canine sniff is not a search under the fourth amendment because that investigative technique reveals only the existence of contraband, and one's subjective expectation of privacy in contraband is not objectively reasonable." Id. at 111-12. The Kono Court concluded, however, that Place and Caballes are distinguishable because 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." Id. at 112. The Court further noted that this distinction is consistent with "the established priorities of article first, § 7 of the

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not in general public use and is used to explore details of the home that officers would otherwise have not discovered without entering the premises. Id. at 13-15.

[12] In Place, 462 U.S. at 707, the Court concluded that a sniff, by a trained narcotics detection dog of luggage at an airport, did not constitute a search. A canine sniff does not require luggage to be opened and

> discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.
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> In these respects, the canine sniff is *sui generis*. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.

In Caballes, 543 U.S. at 407, 408, the Court discussed Kyllo; see n.10; within the context of a canine sniff of a motor vehicle and concluded that the use of a well-trained narcotics dog during a lawful traffic stop does not implicate a legitimate expectation of privacy, because "[o]fficial conduct that does not 'compromise any legitimate interest in privacy' is not a search subject to the Fourth Amendment." The Court determined that its decision was "entirely consistent" with Kyllo because the thermal-imaging device at issue in Kyllo was capable of detecting lawful activity and that

> [t]he legitimate expectation that information about perfectly lawful activity will remain private is categorically distinguishable from respondent's hopes or expectations concerning the nondetection of contraband in the trunk of his car. A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

Caballes, 543 U.S. at 409-10.

Connecticut constitution" and concluded that "a resident's legitimate expectation of privacy in a home is capacious enough to preclude certain uses of the common areas immediately adjacent to the home." Id. at 113. With regard to the scope of a canine sniff, this Court determined that "the underlying prohibition against unreasonable intrusions into the sanctity of the home cannot abide the public spectacle of a warrantless canine investigation of the perimeters of any home," because they are "highly visible and readily identifiable," and "hold a resident up to public scrutiny in his own home." Id. at 114. Opining that the "firm and bright line" drawn at the entrance to a single-family dwelling should be applied to dwellings in a multiunit building, the Kono Court concluded that "a canine sniff directed toward a home – whether freestanding or part of a multitenant structure – is a search under article first, § 7, and as such, requires a warrant upon a court's finding of probable cause." Id. at 121, 122.

C. Kono Is Distinguishable Because A Motel Room Is Not A Home And The Canine Sniff Here Was Not An Unreasonable Search Warranting Suppression

Although in Kono this Court stated that it had resolved the issue before it on the basis of the defendant's reasonable expectation of privacy in his condominium unit, as opposed to on the basis of his property rights; Kono, 324 Conn. at 94 n.10; a review of Kono reveals that the analysis necessarily was informed by the fact that the search focused on the defendant's home, where "[p]rivacy expectations are . . . highest and are accorded the strongest constitutional protection," and around which a "bright line" historically has been drawn. Kono, 324 Conn. at 91, 112-13; see Jardines, 569 U.S. at 6-7, 13 (majority and concurrence noted privacy expectations most heightened in home and surrounding area; "home is first among equals"); see also, Katz v. United States, 389 U.S. 347, 361 (Harlan, J., concurring) (reasonableness of privacy expectation "requires reference to a 'place.'"). As noted by Justice Kagan in Jardines, and as is apparent in Kono, the historic property based protection against unreasonable searches, and the recognized expectation of privacy concerns, are necessarily conflated when a search focuses on a private dwelling.

By contrast, although a motel guest has a reasonable expectation of privacy in his motel room, it is a "diminished" expectation of privacy and differs from that of a permanent residence. This is so not merely because of the "shared atmosphere and the nearness of one's neighbors" or the existence of a common hallway, but because motels and hotels are "truly transitory places" and, unlike an apartment or even a boarding house, such rooms are not ordinarily where one lives and keeps personal effects. United States v. Mankani, 738 F.2d 538, 544 (2d Cir. 1984); United States v. Agapito, 620 F.2d 324, 331 (2d Cir. 1980), cert. denied, 449 U.S. 834 (1980); Benton, 206 Conn. at 95-96. Because the property based and privacy based concepts do not share the same alignment for motel rooms as they do for a private dwelling, the Appellate Court properly concluded that Kono is distinguishable and does not govern the outcome of this case.

The defendant asserts that the Appellate Court failed to address his reasonable expectation of maintaining privacy on the inside of his motel room; D.Br. at 9; and argues that the Appellate Court erred for three reasons: (1) it improperly focused on the accessibility of the hallway and thus "improperly limit[ed] Kono's reach to those apartment dwellers who have a hallway that is more difficult to access;" D.Br. at 14; (2) it failed to recognize that Kono applies with equal force to a lawfully rented motel room; D.Br. at 16-20; and, (3) it incorrectly concluded that the police were not on the defendant's curtilage when they performed the sniff. D.Br. at 20-21. All three of the defendant's arguments are based on the premise that motel rooms in general, and room 118 in particular, are the equivalent of a home. The defendant's arguments fail to undermine the propriety of the Appellate Court's decision.

First, the location of the officers is a relevant component in the "fact-specific inquiry into all the relevant circumstances." Kono, 324 Conn. at 90; see Jardines, 569 U.S. at 9 n.3. Therefore, the nature of the walkway here is relevant to assessing whether the defendant had a reasonable expectation of privacy and was one factor distinguishing this case from Kono.

Second, as this Court set forth in Benton, "[t]he shared atmosphere and the nearness of one's neighbors in a hotel or motel . . . diminish the degree of privacy that one can reasonably expect or that society is prepared to recognize as reasonable." Benton, 206 Conn. at 93-94, 96 (statements overheard by officer, without the use of any aural enhancement device, while stationed in an adjacent apartment did not warrant suppression). Moreover, it is the transitory nature of a motel that diminishes a person's justifiable expectation of privacy in a hotel or motel. Mankani, 738 F.2d at 544. "Unlike an apartment or a room in a boarding house, hotels and motels are not ordinarily considered places where one lives and keeps personal effects. In addition, service personnel in hotels and motels have keys to enter and make-up the rooms, remove dishes, check air-conditioning, heating and the like. Former occupants may even have retained a key to a hotel room." Id. Therefore, as observed in Mankani, because of the transitory nature of a motel room, its contents are akin to private possessions in a public sphere which are accorded a lesser expectation of privacy. Id.

The defendant now claims that the motel room in fact was his "home." D.Br. at 16, 18. Before the trial court, however, the defendant never argued that the motel was his home; rather, he sought only to establish that he had standing to contest the search based in part on Benton. See D.App., A21-A22, A45-A46; see generally, T. 2/29/16: 217-21. Before this Court the defendant therefore relies on one sentence in the search warrant affidavit,[13] and Sergeant O'Brien's similar testimony, to support his assertion that room 118 was his home.[14] D.Br. at 6. Based on the evidence presented, however, the trial court found that the defendant had rented the room for a period of one week. Mem. Dec. at 4. In addition, the Uniform Arrest Report and original information identify 206 Cove Road, Stamford, as the defendant's

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[13] A copy of the search warrant affidavit is located in the defendant's appendix at A135.

[14] Sergeant O'Brien testified that the defendant said "he had papers to prove that - - that he had earned it. [¶] You know, I asked him where. He blurts out in the room. And I go, where? And he's like - - you know, he said something to the effect of ya'll niggers know where I live, that's where they're at." T. 2/29/16: 99.

address.[15] D.App., A1 (Original Information).

Because the defendant did not raise this claim before the trial court, the record is inadequate for review under Goldings's first prong. Moreover, because the state "bears no responsibility for the evidentiary lacunae, . . . it would be manifestly unfair to the state for this court to reach the merits of the defendant's claim upon a mere *assumption*." (Emphasis in original) State v. Brunetti, 279 Conn. 39, 59 (2006), cert. denied, 549 U.S. 1212 (2007); see State v. Torres, 230 Conn. 372, 380 (1994) (unpreserved challenge to canine sniff reviewable because necessary facts undisputed). If this Court deems the record adequate for review, however, because the ambiguity in the record is attributable to the defendant's failure to raise the issue below, the ambiguity favors the state and the defendant will have failed to bear his burden of showing that room 118 was more than a transitory place of abode and that it should be treated as his "home" in assessing the reasonableness of the canine sniff. See Colvin, 241 Conn. at 658 and n.5 (lack of evidence to support conclusion discovery of cocaine was product of allegedly unlawful arrest and absence of trial court finding favors state; defendant had burden to produce specific evidence of taint).

Similarly, the defendant's argument that the exterior threshold of the door should be considered "curtilage" also fails. Jardines, 569 U.S. at 6-7 (curtilage an area "intimately linked to the home, both physically and psychologically and is where privacy expectations are most heightened." (internal quotation marks omitted)). Additionally, because the defendant has failed to establish that the motel was his home, contrary to his assertion; D.Br. at 15; this case does not implicate the valid concern that privacy protections should not be based on income, race or ethnicity.

The defendant also seeks to undermine the Appellate Court's decision by challenging

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[15] This Court can take judicial notice of the Uniform Arrest Report which is contained in the trial court's file. State v. Fagan, 280 Conn. 69, 101 (2006), cert. denied, 549 U.S. 1269 (2007).

the reliability of dog sniffs as well as Cooper's training and the accuracy of his alert. D.Br. at 3, 5, 18-19. At the time of the sniff here, O'Brien had been handling Cooper for two years, after Cooper had been with the Bridgeport Police Department. Tr. 2/29/16, p. 69. The defendant overlooks the testimony that although Cooper had received training with his original placement, he then went through additional training with O'Brien, including narcotics training, and received "the necessary certifications." Tr. 2/29/16, pp. 70, 106. Before the trial court the defendant did not seek to further undermine Cooper's qualifications and this evidence sufficiently establishes Cooper's reliability. The fact that Cooper may have been informally trained by a K-9 training officer does not render the sniff here unreliable, or constitutionally unreasonable, because both certification or a training program can provide a sufficient basis to establish the reliability of a dog's alert. Florida v. Harris, 568 U.S. 237, 246-47 (2013) (evidence of dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert). Moreover, the fact that a canine alerts to a residual odor does not cast doubt on the dog's reliability because a "detection dog recognizes an odor, not a drug, and should alert whenever the scent is present, even if the substance is gone." Harris, 568 U.S. at 246 n.2.

That the defendant did not have an expectation of privacy that society recognizes as reasonable, in his motel room or its threshold, is evident from federal and state court decisions. Except for the fairly recent case of People v. Lindsey, 118 N.E.3d 723 (Ill. App. Ct 3d 2018), appeal allowed, 116 N.E.3d 907 (Table) (Jan. 31, 2019), cited by the defendant, federal and state courts that have addressed the issue all have concluded that a dog sniff of a motel or hotel room door does not constitute an unreasonable search.

The cases concluding that the sniff of a motel or hotel room door does not infringe on a reasonable expectation of privacy based on the Katz test, reasoned that no reasonable expectation of privacy was infringed upon because a narcotics dog detects only the presence of illegal narcotics. United States v. Legall, 585 Fed. Appx. 4, 6 (4th Cir. 2014), cert. denied,

135 S. Ct. 1471 (2015); State v. Foncette, 238 Ariz. 42, 46 (Az. App. 2015); Sanders v. Commonwealth, 64 Va. App. 734, 753-55 (Va. App. 2015); Wilson v. State, 98 S.W.3d 265, 272 (Tx. App. 2002), discretionary review refused June 4, 2002.

The cases concluding that the sniff of a motel or hotel room door does not infringe on a reasonable expectation of privacy based on a property analysis have focused on the walkway or hallway outside of the room as not being a constitutionally protected location. Legall, 585 Fed. Appx. at 5; United States v. Roby, 122 F.3d 1120, 1124-25 (8th Cir. 1997), rehearing denied (Nov. 4, 1997); United States v. Lewis, No. 1:15-CR-10-TLS, 2017 WL 2928199, *7-*8 (N.D. Ind. Jul 10, 2017) State's Appendix ("St.App."), A-4; United States v. Marlar, 828 F.Supp. 415, 418-19 (N.D. Miss. 1993), dismissed, 68 F.3d 464 (5th Cir. 1995); Sanders, 64 Va. App. at 748, 751-53; Foncette, 238 Ariz. at 45-46; Nelson v. State, 867 So.2d 534, 536-37 (Fla. App. 2004), review denied, 115 So.3d 1001 (2013); Wilson, 98 S.W.3d at 272.

In support of his argument, the defendant relies on the dissenting opinion in United States v. Roby, 122 F.3d at 1125-1127, and on People v. Lindsey, 118 N.E.3d 723. D.Br. at 17-18, 19-20. These decisions are not sufficient to overcome the weight of authority.

The Roby dissent relied on United States v. Thomas; see n.8; which the Second Circuit itself has limited to the sanctity of a home or dwelling place which has been afforded a "heightened privacy interest." United States v. Hayes, 551 F.3d 138, 144 (2d Cir. 2008); see also State v. Waz, 240 Conn. 365, 380-81 and n.21 (1997) (Thomas based on heightened privacy interests that pertain to one's house). The issue in Hayes was whether a canine's sniff and alert in the front yard of a home was a warrantless search. Hayes, 551 F.3d at 141, 142. The Hayes Court determined that Thomas was "clearly distinguishable" because the defendant "had no legitimate expectation of privacy in the front yard of his home insofar as the presence of the scent of narcotics in the air was capable of being sniffed by the police canine. . . . the front yard where the dog sniff occurred was clearly within plain view

of the public road and adjoining properties" and the "sanctuary of the home simply does not extend to the front yard" of the property where the initial sniff occurred. Id. at 145.

With regard to Lindsey, 118 N.E.3d at 729, the Illinois Appellate Court relied on the Seventh Circuit's decision in United States v. Whitaker; see n.8. In United States v. Lewis, 2017 WL 2928199 at *8, the Northern District of Indiana, a lower court within the Seventh Circuit, concluded that a canine sniff of a motel door from an open air walkway - which it characterized as an unenclosed, common area readily accessible to the public at all hours and fully visible to anyone who might walk by, including from the adjacent parking lot - was distinguishable from both Jardines and Whitaker. St.App., A-4. The Lewis Court observed that although Whitaker used what it termed a "*Kyllo*-based approach," that decision "was nonetheless restrained by the location of the dog sniff and its implication for the Fourth Amendment's core concern of protecting the privacy of the home," and that "[r]ead in its entirety, and in conjunction with binding Supreme Court precedent,[16] *Whitaker* appears to adopt a hybrid approach for dog sniff cases in the Seventh Circuit." Id. at *7, *8. The Lewis Court concluded that the facts before it did not align with the facts in Jardines and Whitaker with respect to the location where the police led the dog to perform a sniff and that, therefore, resolution of the issue turned on Caballes. Id. at *8. The Court determined that the "correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment," and that consistent with Caballes, the defendant's "expectations about perfectly lawful activity – which would have been legitimate and protected – were not implicated." Id.

Lastly, for the reasons set forth further, below, § II, D and E, the defendant incorrectly asserts that the evidence obtained as a result of the search warrant was the fruit of the poisonous tree and thus should have been suppressed. D.Br. at 21-22; see Colvin, 241 Conn.

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[16] The cases to which the Court was referring are Caballes, 543 U.S. at 409-10, and United States v. Jacobson, 466 U.S. 109, 122 (1984).

at 656-57 (evidence is "fruit of the poisonous tree" and should be suppressed only when the evidence has been obtained by exploitation of the alleged illegality) *quoting* Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). Second, there is no merit to the defendant's assertion that O'Brien should have realized that the sniff of the outside of the motel room door would raise fundamental constitutional questions. In light of the federal and state case law set forth above, O'Brien would have had every reason to view the sniff as constitutionally reasonable.

In sum, the Appellate Court correctly concluded that this case is factually and legally distinguishable from Kono. First, a motel room is not a private residence, but a transitory location with a lesser expectation of privacy than a private dwelling. Second, because room 118 is a motel room, the Kono Court's concern, that a canine sniff results in a defendant being held up to public scrutiny "in his own home," does not exist. See Kono, 324 Conn. at 114. Third, the rationale of Hayes is more applicable here than that of Thomas, because the open-air walkway was publicly accessible and in plain view of a public parking lot, road and adjoining properties. Therefore, under the Second Circuit's own rationale limiting the scope of Thomas, the defendant did not have a legitimate expectation of privacy in the open-air walkway outside of his motel room. See Hayes, 551 F.3d at 145. Fourth, in contrast to the legal landscape in Kono, here the overwhelming weight of authority establishes that a dog sniff of a motel room door does not invade a reasonable expectation of privacy. Therefore, the canine sniff here is constitutional because the defendant cannot bear his burden of establishing that he had a reasonable expectation of privacy.

D. Alternatively, If The Canine Sniff Of The Threshold Of A Motel Room Door Constitutes A Search, It Is Reasonable If Based On Reasonable And Articulable Suspicion

In State v. Torres, 230 Conn. at 380-84, this Court assumed, without deciding, that a canine sniff of the exterior of a stopped car constituted a search under the state constitution, and further concluded that the sniff was not unconstitutional because it was conducted based

on reasonable and articulable suspicion. Similarly, in State v. Waz, 240 Conn. at 371, 383-84, this Court assumed, without deciding, that a canine sniff of a parcel in the possession of the United States Postal Service was a search, and further concluded that under the state constitution police need no more than reasonable and articulable suspicion to justify the sniff. In arriving at this conclusion, the Waz Court was guided by United States v. Place, 462 U.S. 696 (1983),[17] and the decisions of sister states. See Waz, 240 Conn. at 375-79. The Waz Court specified that "the unintrusive nature of the canine sniff, coupled with the state's legitimate law enforcement objectives, leads us inexorably to the conclusion that any reasonable expectation of privacy that the defendant may have in the area to be examined, namely, the air surrounding his parcel, is satisfied by a showing of reasonable and articulable suspicion." Id. at 384 n.25.

In Kono, this Court recognized that at least three states have concluded, under their respective state constitutions, that a canine sniff of an apartment door in a multiunit building is a lawful search if based on reasonable and articulable suspicion rather than probable cause. Kono, 324 Conn. at 116-17, *citing* State v. Davis, 732 N.W.2d 173, 181-82 (Minn. 2007); State v. Ortiz, 257 Neb. 784, 787, 796-97 (1999); and People v. Dunn, 77 N.Y.2d 19, 25-26 (1990), cert. denied, 501 U.S. 1219 (1991); see also, Hoop v. State, 909 N.E.2d 463, 464, 465, 470 (Ind. App. 2009) (dog sniff from front porch of private residence; in order to restrict arbitrary selection of persons to be searched, reasonable suspicion needed to justify sniff of a private residence), and n.6 (collecting cases), rehearing denied (Oct. 6, 2009), transfer denied, 929 N.E.2d 782 (2010). Based on the defendant's lesser expectation of privacy in his motel room, in combination with the less intrusive nature of a canine sniff and the state's interest in using narcotics-detection dogs in combating drug crimes, if this Court concludes that the sniff of the exterior of a motel door constitutes a search under the state

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[17] See p. 11, n.12.

constitution, such a sniff is lawful if based upon reasonable and articulable suspicion.[18]

As this Court similarly observed in Torres and Waz, the Nebraska Supreme Court in Ortiz noted that in a variety of settings, e.g., sniffs of luggage, packages and public warehouses, the majority of courts have approved the admission of the evidence seized as a result of the sniff if the evidence was obtained based on reasonable and articulable suspicion and quoted, at length, the Pennsylvania Supreme Court's decision in Commonwealth v. Johnson, 515 Pa. 454 (1987). Ortiz, 257 Neb. at 794-96. In Johnson, the Court concluded that under the Pennsylvania constitution, a canine sniff from the common corridor outside of a storage locker was a search but that the sniff did not "implicate the usual warrant requirements characteristic of police searches of private areas." Johnson, 515 Pa. at 458, 464. The Johnson Court was concerned both that "much of the law enforcement utility of such dogs would be lost if full blown warrant procedures were required before a canine sniff could be used" and that dogs might be used at random and without reason. Id. at 465. The Johnson Court therefore held that

> [A] narcotics detection dog may be deployed to test for the presence of narcotics. . . where:
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> 1. the police are able to articulate reasonable grounds for believing that drugs may be present in the place they seek to test; and
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> 2. the police are lawfully present in the place where the canine sniff is conducted.

Id. at 465-66. The Johnson Court reasoned that "a canine sniff-search is inherently less

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[18] Reasonable 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. State v. Waz, 240 Conn. 365, 373 n. 14 (1997). It is an objective standard that does not focus on the actual state of mind of the officer but focuses on whether a reasonable person, having the information available to and known by him, would have had that level of suspicion. State v. Torres, 230 Conn. 372, 379 (1994). What constitutes reasonable and articulable suspicion under the fourth amendment and article first, § 7, are the same in this respect. State v. Donahue, 251 Conn. 636, 644 (1999), cert. denied, 531 U.S. 924 (2000).

intrusive upon an individual's privacy than other searches such as wiretapping or rummaging through one's luggage; it is unlikely to intrude except marginally upon innocent persons; and an individual's interest in being free from police harassment, annoyance, inconvenience and humiliation is reasonably certain of protection if the police must have a reason before they may . . . utilize a narcotics detection dog." Id. at 466.

The defendant argues that because a motel room is a home, a dog sniff on a motel room door "must" be performed only if the police have probable cause and a warrant. D.Br. at 28. As discussed previously, there exists a diminished expectation of privacy in a motel, and a canine sniff is limited in its scope to revealing illegal substances to which no reasonable expectation of privacy attaches, is limited in its overall duration and intrusiveness, and is an important investigatory tool. Therefore, if this Court concludes that the sniff was a search under the state constitution, it should further conclude that the sniff at issue here was lawful because it was based on reasonable and articulable suspicion that illegal drugs were present in room 118.

The record here reveals that when Cooper was run in the open-air walkway outside room 118 the police had, at the very least, reasonable and articulable suspicion to believe that the room contained marijuana. Prior to Cooper's sniff of the exterior of the motel room door, Broems had observed what he believed to be a narcotics transaction in relation to room 118 of the motel (a location known for illegal narcotics activity); the officers had stopped the SUV and detected the odor of marijuana; Taveras admitted possessing marijuana and the pat-down search uncovered similar looking glass jars, two of which contained marijuana, and a substance that appeared to be heroin; contrary to Broems' observations and Brickman's statement that his "friend is staying in the hotel," Taveras told O'Brien that he had nothing to do with the motel and had not been there. D.App., A136 (Search Warrant Affidavit, ¶ 6); T. 2/29/16: 72; Taveras told the police that he resided with his grandmother and a search of his bedroom at his grandmother's house revealed items consistent with narcotics packaging;

because Taveras' room did not look lived in and the police therefore thought that "maybe he was staying in the hotel room;" T. 2/29/16: 77; and because Taveras' brother stated that Eudy was in the process of moving out of the house; Id.; the police returned to the motel and discovered that the registration card for room 118 included the name of a person the police believed to be Taveras and that the defendant had rented the room for the week, paying $430 in cash. See Correa, 185 Conn. App. at 311-13. The foregoing information, establishing a direct link between Taveras, illegal drugs and room 118, reveals that the police had specific and identifiable facts which, taken together with rational inferences from those facts, provided a particularized and objective basis for suspecting that room 118 contained illegal drugs.

E. Alternatively, If The Record Is Adequate For Review, The Evidence Was Admissible Under The Independent Source Doctrine

Should this Court conclude that the dog sniff is unconstitutional, the state continues to maintain that the record is inadequate for review. If the record is adequate for review, even absent the single sentence in ¶ 8 referring to Cooper's sniff, the warrant affidavit contains probable cause independent of the sniff and the seized evidence is admissible. D.App., A137 (Search Warrant Affidavit, ¶ 8).

Under the independent source doctrine, if a search has been conducted pursuant to a warrant, the evidence is admissible if: (1) the warrant is supported by probable cause derived from sources independent of the illegal search; and, (2) the decision to seek the warrant was not prompted by the information gleaned from the illegal conduct. State v. Joyce, 243 Conn. 282, 290 (1997), cert. denied, 523 U.S. 1077 (1998). This Court therefore considers whether the lawfully obtained evidence in the warrant is sufficient to establish probable cause.[19] Id. at 290-91; State v. Arpin, 188 Conn. 183, 192-93 (1982). Whether the

[19] Probable cause to search exists if: (1) there is probable cause to believe that the particular items sought to be seized are connected with criminal activity or will assist in a particular apprehension or conviction; and, (2) there is probable cause to believe that the items sought to be seized will be found in the place searched. State v. Holley, 324 Conn.

affidavit, with the illegal information excised, is sufficient to support a finding of probable cause, is an objective test. Arpin, 188 Conn. at 192-93. On appeal, this Court views the information in the affidavit in the light most favorable to upholding the trial court's determination of probable cause. In a doubtful or marginal case, this Court defers to the trial court's determination. Joyce, 243 Conn. at 292.

1. The Record Is Inadequate For Review

In his opening brief before the Appellate Court, the defendant argued that the state would not be able to establish that the evidence was admissible under the independent source doctrine. The state responded, as set forth further, below, that under Golding's first prong the record is inadequate for review for the reasons set forth in Brunetti, 279 Conn. at 57-59 and n.31, 61 n.34. The Appellate Court determined that it "need not decide the adequacy of the record with respect to this issue." Correa, 185 Conn. App. at 322 n.9.

When "an illegal search comes to light," the defendant bears the burden of providing "specific evidence demonstrating" that the evidence was tainted by the illegality. Colvin, 241 Conn. at 658 n.5. The defendant relies on the trial court's determination that Broems decided to apply for a search warrant after Cooper's alert as a basis for demonstrating taint. D.Br. at 22-23; Mem.Dec. at 4. The evidence, however, does not clearly establish that the decision to apply for a search warrant was only made after the alert or that probable cause did not exist prior to the alert.

344, 351 (2016). Probable cause is a fluid concept, requires less than proof by a preponderance of the evidence, and turns on an assessment of probabilities under the totality of the circumstances. Id. at 351-52. It is a practical, non-technical determination of whether there is a "fair probability," or a "substantial chance," that contraband or evidence of a crime will be found in a particular place. Id. at 352, 354. This standard does not demand that a belief be correct, more likely true than false, or that there be an actual showing of criminal activity. Id. at 354; State v. Hedge, 59 Conn. App. 272, 278-79 (2000). Under article first, § 7, a determination of whether probable cause exists for a warrantless search and seizure is based on consideration of all of the legally obtained facts available to a police officer, and all of the reasonable inferences that might be drawn therefrom in light of the officer's training and experience. State v. Trine, 236 Conn. 216, 230-31 (2006).

Sergeant Broems testified that the dog sniff was "building on probable cause," which they were developing in order to obtain a search warrant, and that he had been in contact with the shift-lieutenant the entire night keeping him apprised of the situation, including their decision to apply for a warrant. T. 2/29/16: 180-83; St.App., A-24.

Similarly, Sergeant O'Brien testified that:

1. the sniff "helped confirm" the specific room; T. 2/29/16: 102; St.App., A-23;

2. they had decided to apply for a search warrant after leaving the apartment on Charles Street and prior to seeing the defendant's name on the motel registration card; T. 2/29/16: 101-02;

3. they had probable cause to obtain a search warrant based on Broems' seeing Taveras go in and quickly out of room 118, Taveras' possession of marijuana and heroin as discovered during the motor vehicle stop, seeing drug related items in Taveras' room on Charles Street, and the discovery that the registration card contained what he considered to be Taveras' name. T. 2/29/16: 101-02.

Moreover, O'Brien testified that he is the one who decided to run Cooper while Broems was conferring with the shift commander and Broems appears to have been unaware of the alert until O'Brien relayed it to him. T. 2/29/16: 96, 127, 133. Therefore, that O'Brien and Broems also testified that they decided to "head back to headquarters and start typing the search warrant application" after Cooper's alert; T. 2/29/16: 83, 133, 147-48, 161-62, 169; does not preclude their also having made this decision prior to the dog sniff, and that their decision was reinforced after the dog sniff, especially when the evidence also reveals that the officers decided to apply for a warrant at least one other time, after Broems opened the door.

Because the defendant did not challenge the constitutionality of the dog sniff before the trial court, the state was not on notice that it was required to develop the officers' testimony about the timing of the decision to apply for the warrant in relation to the dog sniff and, therefore, it is improper to infer that the trial court's conclusion as to when the decision was made is the conclusion it would have made if confronted with a different issue and potentially different evidence. Brunetti, 279 Conn. at 58 n. 31, 61-62. Therefore, as in

Brunetti, 279 Conn. at 59, it would be manifestly unfair to the state for this Court to reach the merits of the defendant's claim that the police had decided to apply for a search warrant only after the dog sniff.

2. Alternatively, The Warrant Contained Sufficient Probable Cause Derived From Independent Sources

If the record is adequate for review, it is still, nevertheless, ambiguous as to whether the officers first decided to apply for the warrant prior to the dog sniff. This ambiguity favors the state because the defendant will not have borne his burden of producing evidence establishing that the seized evidence was tainted by the illegality. Colvin, 241 Conn. at 658 and n.5.

Moreover, even absent the single sentence in ¶ 8 referring to Cooper's sniff, the affidavit establishes probable cause independent of the dog sniff. Specifically, the officers' observations and investigation beginning from Broems' surveillance up to and including the information obtained from the registration card, as set forth in ¶¶ 2-8 of the search warrant affidavit, established a fair probability that marijuana would be found in room 118 and that the marijuana in the room would be associated with Taveras' illegal activities. Moreover, the officers were investigating locations associated with Taveras and his possession of marijuana, first by going to his grandmother's house and observing items consistent with narcotics packaging and, then, as set forth in ¶ 7 and testified to by O'Brien, because the bedroom appeared abandoned, the police therefore returned to the motel because Taveras "maybe . . . was staying in the hotel room." T. 2/29/16: 77. This investigation directly led to Taveras' statement to the police admitting that marijuana was in the room and providing further information as to the defendant and his association with the room.[20]

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[20] After O'Brien had approached the defendant and left the motel, he returned to the police station where he gave Taveras his *Miranda* warnings and thereafter Taveras gave a hand-written statement. T. 2/29/16: 155, 165. Taveras stated that the marijuana found during the pat-down and in room 118 belonged to him, and that he kept his marijuana in the motel

The defendant argues that the decision to seek the warrant was "directly prompted by the dog sniff" and that "all of the evidence obtained after the dog sniff search was derived from the dog sniff search." D.Br. at 22, 24. The chronology of events belies the defendant's argument. Because the evidence shows that the police were investigating Taveras and locations associated with him, their actions, which ultimately resulted in Taveras' giving a statement, were derivative of what had occurred prior to the sniff. See State v. Vivo, 241 Conn. 665, 673-74 (1997).

The defendant further argues that O'Brien's encounter with him, and what transpired thereafter, was derivative of the dog sniff. D.Br. at 23. The record reveals, however, that O'Brien stopped the defendant because it was the defendant who had rented room 118. Broems' conduct similarly was based on the defendant having rented the room, which led him to open the door to allay concerns based on observations made prior to the dog sniff. Therefore, even if the dog sniff itself does not fall within the independent source doctrine, such a conclusion is independent of, and not fatal to, the conclusion that despite Broems' conduct in opening the door the seized evidence was admissible under the independent source doctrine. See, § III, § C.

In addition, and independent of both the sniff and Broems' opening the door, it is the officers' discovery of the defendant's name and driver's license on the registration card that provided the basis for approaching him when he unexpectedly appeared. Once O'Brien happened upon the defendant, he conducted a pat-down and thereby discovered the room key and large amount of cash. The room key further verified the defendant's association with

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room instead of at his grandmother's house. Id. at 156-57, 158. He specified that his friend "Ricky" had rented the room and that "Ricky" would let Taveras into the room whenever he needed some marijuana because Taveras did not have a key. Id. at 166, 180. Taveras gave his statement prior to the submission of the search warrant application and the application is based, in part, on Taveras' statement. See D.App. at A138 (Search Warrant Affidavit, ¶ 11). The charges specified in the search warrant application were possession of marijuana and possession of marijuana with intent to sell. D.App. at A135.

the room and the large amount of cash was indicative of drug dealing. See State v. Garcia, 108 Conn. App. 533, 538, 539, cert. denied, 289 Conn. 916 (2008); State v. Uribe, 14 Conn. App. 388, 390, 393-94 (1988).

Therefore, even after the single sentence pertaining to the canine sniff is excised from ¶ 8 of the warrant affidavit, an independent basis for probable cause existed based on what transpired before the sniff, the defendant's possession of the room key and a large amount of cash, and Taveras' statement, all of which were derived from the police investigation of Taveras and were not prompted by the dog sniff.

F. Alternatively, The Evidence Would Inevitably Have Been Discovered

Even if Cooper's sniff of the exterior threshold of the motel room door constituted an illegal warrantless search, suppression is not warranted under the inevitable discovery rule.[21] Under this rule, evidence illegally obtained 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. Badgett, 200 Conn. at 433. The state must demonstrate that the lawful means which made discovery inevitable were possessed by the police and being actively pursued prior to the occurrence of the constitutional violation. Id. The "[c]ircumstances justifying application of the inevitable discovery rule *are most likely to be present* if the[ ] investigative procedures were already in progress prior to the discovery via

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[21] The inevitable discovery rule and the independent source rule are closely related. State v. Vivo, 241 Conn. 665, 672 (1997). Both rules rest on the assumption that if the police had eschewed the illegal activity, they nevertheless would have procured the evidence at issue. Id. at 673 n. 5. They differ in terms of the exclusionary rule in that the independent source rule applies only upon proof that "in actual fact," the police did not obtain the challenged evidence as a result of the primary illegality. In contrast, the inevitable discovery exception assumes that the evidence was in fact obtained as a consequence of the primary illegality but is invoked by proof that, hypothetically, if the police had not engaged in the primary illegality, they would nevertheless, although in a different manner, have obtained the challenged evidence. Id. Both exceptions are premised on the concept of fairness, specifically that fairness can be assured by placing the state and the defendant in the same positions they would have been in had the impermissible conduct not taken place. Id. at 672.

illegal means . . . or where the circumstances are such that, pursuant to some standardized procedures or established routine a certain evidence-revealing event would definitely have occurred later." (Emphasis in original). State v. Cobb, 251 Conn. 285, 339 (1999), cert. denied, 531 U.S. 841 (2000). "The purpose of the inevitable discovery rule is to block setting aside convictions that would have been obtained without police misconduct." Nix v. Williams, 467 U.S. 431, 443 n.4 (1984).

Whether the inevitable discovery doctrine applies ordinarily is a question of fact for the trial court. Here, however, the undisputed historical facts established by the record reveal that no other rational conclusion could be drawn and, therefore, this Court can decide this issue for the first time on appeal. Cobb, 251 Conn. at 339. Contrary to the defendant's assertion, the police had probable cause prior to the dog sniff. D.Br. at 26-27. The undisputed facts reveal that based on their observations and investigation of Taveras, the police were actively pursuing their investigation of room 118 prior to Cooper's sniff of the threshold because they were actively investigating locations associated with Taveras. Therefore, the police had the lawful means that made the discovery inevitable, namely, the information gathered prior to the canine sniff, in their possession and were actively pursuing their investigation of Taveras and room 118 prior to the occurrence of the alleged constitutional violation.

Moreover, the information obtained from the sniff was not the deciding factor in applying for a search warrant. Rather, the testimony of Broems and O'Brien, as set forth previously, § II, E, 1, p. 25, reveals that the police had acquired probable cause to apply for a search warrant and that they were getting ready to do so prior to the sniff.

As to Taveras himself, no evidence was elicited as to when Taveras was placed under arrest. T. 2/29/16: 138-39. The evidence clearly established, however, that the police had probable cause to arrest Taveras for possession of narcotics as a result of the surveillance and his possession of marijuana at the time of the motor vehicle stop. See e.g., State v. Austin, 74 Conn. App. 802, 808 (probable cause to arrest; during surveillance of known high

crime area, police observed defendant engage in drug transaction), cert. denied, 263 Conn. 910 (2003); State v. Hedge, 59 Conn. App. 272, 279 (2000) (same). The evidence also established that Taveras was arrested prior to O'Brien and Broems encountering the defendant and prior to the search warrant being executed and that when he was brought to the police station, he gave a statement confirming his possession of marijuana and that there was marijuana in room 118. See p. 26, n.20. Taveras' arrest was based upon the evidence the officers had obtained prior to the dog sniff and, consequently, and contrary to the defendant's assertion; D.Br. p. 27; Taveras' statement in conjunction with the investigation of room 118 itself was inevitable, which thus led to the lawful means that made the discovery of the illegal drugs inevitable.

III. THE APPELLATE COURT PROPERLY CONCLUDED THAT THE VISUAL SWEEP OF THE DEFENDANT'S MOTEL ROOM WAS JUSTIFIED BY EXIGENT CIRCUMSTANCES

With regard to Sergeant Broems' opening of the door to room 118, the Appellate Court properly affirmed the trial court's conclusion that the evidence was admissible under the exigent circumstances doctrine. Correa, 185 Conn. App. at 332-40.

A. Trial Court's Memorandum Of Decision And Appellate Court's Opinion

The trial court's factual findings; Mem.Dec. at 5-6; are summarized in two paragraphs on pages 315-16 of the Appellate Court's decision. See pp. 3-4.

As to its legal conclusions, the trial court acknowledged that under the fourth amendment persons staying in a motel are protected from unreasonable searches and seizures; Mem.Dec. at 7; and thereafter concluded "that when all the facts of this case as known by the police at the time of the warrantless entry by Broems are viewed objectively, the case meets the criteria for finding exigent circumstances." Id. at 9. In support of its determination, the trial court noted O'Brien's prior experience as a police officer and his "concern that a number of people already knew of the Stamford police's investigation into the activity in room 118, and that phone calls informing potential confederates of that basic fact

may have already been made, prompting the destruction of any evidence inside." Id. The trial court identified the "knowledgeable persons" to include the operator of the Yukon (Brickman); Taveras' brother and grandmother; Taveras' neighbors; other guests or visitors at the motel; as well as anyone else passing by the motel or the site of the motor vehicle stop of the Yukon or the sidewalk stop of the defendant. Id.

In affirming the trial court's conclusion, the Appellate Court first determined that at the time of Broems' visual sweep, probable cause existed to search room 118 and set forth the evidence that supported its conclusion. Correa, 185 Conn. App. at 336-37. The Appellate Court then expressly agreed with the trial court's conclusion that the case meets the criteria for a finding of exigent circumstances. Id. at 337. The Appellate Court further determined that its decision in State v. Reagan, 18 Conn. App. 32, cert. denied, 211 Conn. 805 (1989), provided factually persuasive authority in support of the trial court's ruling. Id. at 338-39. The Appellate Court thereafter set forth the evidence in support of its conclusion that exigent circumstances existed and that it was "reasonable for the police to believe that the delay necessary to obtain a search warrant may have resulted in the destruction of incriminatory evidence." Id. at 339-40.

B. Sergeant Broems' Visual Sweep Was Justified Under The Exigent Circumstances Exception

The defendant asserts that the Appellate Court erred in concluding that Broems' opening of the motel room door falls within the exigent circumstances exception to the exclusionary rule because the officer's justification for opening the door was based on speculation. D.Br. at 29. In support of his assertion, the defendant argues that only he and Taveras were "most likely" to have destroyed the contraband in the room, the police did not hear any noise in the room, and they did not see anyone through the window. D.Br. at 31. Under the totality of the circumstances, these arguments are insufficient to undermine the Appellate Court's affirmance of the trial court's conclusion.

1. The Exigent Circumstances Doctrine

The exigent circumstances doctrine is an exception to the warrant requirement triggered by the need for swift action by the police and must be supported by a reasonable belief that immediate action was necessary. State v. Kendrick, 314 Conn. 212, 225 (2014); State v. Guertin, 190 Conn. 440, 447 (1983). This exception is limited to instances in which the police initially have probable cause to search and is justified to prevent the destruction of evidence. Kendrick, 314 Conn. at 226-28. In evaluating the reasonableness of the officer's belief that immediate action was necessary, the relevant analysis is objective and focuses on the totality of the circumstances; "no single factor such as a strong or reasonable belief that the suspect is present on the premises, will be determinative in evaluating the reasonableness of a police offer's belief that a warrantless entry . . . was necessary." Kendrick, 314 Conn. at 229; State v. Aviles, 277 Conn. 281, 293, cert. denied, 549 U.S. 840 (2006). This exception is analyzed the same under both the federal and state constitutions. Aviles, 277 Conn. at 286 n.3.

The "preeminent criterion is what a *reasonable*, well-trained police officer would believe," not what the officer acting on the exigency "actually did believe." (Emphasis in original). Guertin, 190 Conn. App. at 453, 454. The reasonableness of a police officer's determination that an exigency exists is evaluated on the basis of the facts known at the time of the search and the circumstances confronting him, including the need "for a prompt assessment of sometimes ambiguous information." State v. DeMarco, 311 Conn. 510, 536-37 (2014); see Kendrick, 314 Conn. at 234, 237 (calculus of reasonableness must allow for fact that officers often forced to make split-second judgments – in tense, uncertain and rapidly evolving circumstances). Direct evidence of an emergency situation is not required. DeMarco, 311 Conn. at 536.

2. The Police Reasonably Believed That The Immediate Opening Of The Door Was Necessary To Prevent Destruction Of Evidence

Based on all that had transpired prior to Broems' opening the door, the Appellate Court correctly concluded that at the time of the visual sweep the police had probable cause to search room 118 and that the totality of the circumstances would have led a reasonable person to conclude that there was a fair probability that contraband, or evidence of that crime, would be found.

Contrary to the defendant's assertion; D.Br. at 31; the lack of response to the officers' knock on the door and the light being on in room 118 do not undermine the existence of an exigent circumstance. Before the trial court, Sergeant O'Brien testified that the light was on in room 118 which possibly indicated that someone was inside the room. T. 2/29/16: 159-60. He further opined that even if the light had been off, someone could have been inside. Id. at 168. The officers then knocked on the motel room door and did not receive an answer. Id. at 96, 125-26. He further testified that he could not tell if anyone was in the room and that they had "no reason not to believe that" someone else was in the room. Id. at 126, 150, 168. As he explained, "Just because somebody doesn't answer the door when there's a narcotics investigation going, doesn't mean that there isn't potentially somebody still there. . . . very few people open the door for police when they're involved in illegal activities." Id. at 150.

When asked why he believed it possible that there was someone in the room, O'Brien referred to his years of observation, training and experience and responded that it was common for there to be additional people in a motel room, even if there are just one or two registered parties, "[e]specially when it comes to prostitution or narcotics." T. 2/29/16: 149-50. He further explained that they were concerned about the destruction of evidence because the driver of the car or Taveras' brother could have made calls and "if there was somebody in there" they could have been warned about the police interest in Taveras and the motel. Id. at 96. O'Brien characterized such a scenario as "typical" "out on the street." Id. That the

defendant was later arrested at 46 Charles Street, where Taveras lived with his grandmother and brother, illustrates the validity of O'Brien's concern that there could have been communication and knowledge about the officers' interest in room 118. Id. at 152-53. In fact, the police knew that the defendant was at Charles Street based on a phone call from jail between Taveras and another person. Id. at 154.

At the time Broems opened the door, not only had the police observed and investigated Taveras; see § II, E, 2, p. 26; the police also knew that the room had not been under surveillance while they were engaging in the motor vehicle stop and searching Taveras' room on Charles Street. As to the extent of Taveras' involvement, O'Brien testified that the police did not know whether he was "purchasing or retrieving drugs." T. 2/29/16: 97. It is reasonable to infer that if Taveras had been purchasing drugs, a seller would have been inside the room at the time Broems initially saw Taveras and that the seller could still have been in the room at the time Broems opened the door. It is further reasonable to assume that anyone inside of the room would have been aware of the police cars in the parking lot, have heard the officer's knock on the door, and have been aware of the presence of Cooper being run past the door. See Id. at 124-25. Thus, in light of the nature of narcotics activity, it was objectively reasonable for the police to believe that someone might have been inside the room who could have destroyed the evidence before the police could return with a search warrant. Moreover, the Appellate Court properly relied on its decision in Reagan where, as here, it was publicly evident that the police were interested in, and pursuing an investigation of, a particular location in relation to drug dealing. Contrary to the defendant's assertion; D.Br. at 33; the precise location of the defendant is not the dispositive factor, rather, under the totality of the circumstances what is relevant is that people other than the defendant had knowledge of the investigation and potentially were in the room and capable of destroying evidence.

That the police were unable to definitively discern whether someone was inside of the room is not fatal to upholding the Appellate Court's decision. In Kendrick, this Court

concluded that direct evidence is not required to justify a warrantless entry, that that "level of certainty [is] not required by the law," and reiterated that no single factor viewed in isolation is determinative in evaluating reasonableness. Rather, the focus is upon all the relevant circumstances. Kendrick, 314 Conn. at 216, 229, 238. Because whether or not a room is illuminated or a knock on the door goes unanswered are ambiguous indicators of a person's presence, "it is of no moment that it turns out there was in fact no emergency." (Internal quotation marks omitted). DeMarco, 311 Conn. at 536. In addition, the defendant's argument that the police could have posted an officer outside of the door to watch and listen for activity is unavailing because it is highly speculative whether anyone outside could have heard or seen the potentially surreptitious destruction of evidence inside of the room. See D.Br. at 33.

C. Alternatively, The Evidence Was Admissible Under The Independent Source Doctrine

In the alternative, the trial court properly concluded that the evidence was admissible under the independent source doctrine. Mem.Dec. at 11-12.

1. Relevant Legal Principles And Standard Of Review

See Issue II, § E, pp. 23-24.

2. The Warrant Contained Sufficient Probable Cause Derived From Independent Sources

The trial court properly concluded that, even absent the two sentences in ¶ 9 of the search warrant affidavit referencing Sergeant Broems' observation of a scale and plastic bag, the police had derived probable cause from sources independent of his observations and that opening the door did not prompt the officers' decision to apply for a search warrant.

As previously discussed, the police observed and were investigating Taveras in relation to drug activity. See § II, D, p. 22; § II, E, 2, p. 26. Even though the police had probable cause to believe that marijuana would be found in room 118 and that the marijuana in the room would be associated with Taveras' illegal activities, Cooper's alert to the presence of illegal drugs in room 118 provided verification of the reasonableness of that belief. See

Harris, 568 U.S. at 246-47 (dog's alert provides probable cause to search). Based on the foregoing, the trial court, in resolving the issue before it, concluded that it was at this point that Broems decided to apply for a search warrant for room 118. Mem.Dec. at 4.

In addition, and independent of both the sniff and Broems' opening the door, as discussed previously, § II, E, 2, p. 27, it was the defendant's name and driver's license on the registration card that led to O'Brien's stopping him and the events thereafter.

Because the foregoing all occurred prior to Broems' opening the door, it necessarily was independent of his alleged illegal conduct. Moreover, contrary to the defendant's assertion, Taveras' statement to the police was not derived from Broems' opening the door. D.Br. at 34. The defendant bases his assertion on O'Brien's testimony that when he interviewed Taveras at the police station he wanted to learn Taveras' "association with the room." D.Br. at 34. As discussed previously, § II, E, 2, p. 26, the sequence of events evinces that the police were investigating Taveras and the locations associated with him. In addition, Taveras was being transported to the police department to be processed in conjunction with his arrest; Mem.Dec. at 4; and the officers' decision to apply for a warrant, both occurred prior to O'Brien seeing the defendant. Because the police were investigating locations associated with Taveras, regardless of their having located the defendant, Taveras' statement to the police was a result of their ongoing interest in Taveras and not because Broems opened the door. Similarly, their decision to apply for the warrant was prompted by their interest in, and investigation of, Taveras and not because Broems opened the door.

Moreover, based on the police investigation of Taveras, which led to the identification of the defendant as the person who had rented room 118, and based on the police encounter with the defendant, the police had probable cause to search 118 even absent Cooper's positive alert and Broems' observation of a scale and plastic bag inside room 118.

CONCLUSION

For the foregoing reasons, the State of Connecticut respectfully requests that this Court affirm the Appellate Court's determination that suppression of the evidence was not warranted.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix and the filed paper brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record and to any trial judge who rendered a decision that is the subject matter of the appeal, in compliance with Section 62-7; and

(4) the brief and appendix being filed with the appellate clerk are true copies of the brief and appendix that were submitted electronically; and

(5) the brief complies with all provisions of this rule.

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